



# Terms and Conditions

## PLATFORM TERMS AND CONDITIONS

**Last Updated: March 2017**

**IMPORTANT – READ CAREFULLY:**

These General Terms and Conditions (“General Terms”) describe the terms and conditions under which Total Merchant Services, Inc. (“TMS” or “we”) grants the user (“you”) the right to access and use the Platform, defined below in Section 1.2, that is made available by TMS. Please read these General Terms carefully before accessing or using the Platform. By accessing or using the Platform, you agree to be bound by these General Terms and you acknowledge that such agreement constitutes a binding agreement between you and TMS. By accessing or using the Platform, you also represent that you (i) have the authority to bind the party accessing or using the Platform, and (ii) have read, understand, and agree to these General Terms. If you do not agree to these General Terms, TMS does not grant you any rights to the Platform and you should not access it or use it.

Access to or installation or use of certain Products also may require you to be bound to Product-specific terms of use in addition to these General Terms. In the event of any conflict between these General Terms and any such Product-specific terms of use, the Product-specific terms of use will control

We may update these General Terms from time to time, which will be indicated by a new date at the top or bottom of this document. Your continued access to and use of the Platform constitutes your acceptance of the current version of these General Terms. If you do not agree with any modifications to these General Terms, your only recourse is to discontinue your use of the Platform.

1. **Definitions.** As used in these General Terms, the following definitions shall apply:

- 1.1. “**Confidential Information**” may include, but is not limited to, nonpublic information regarding TMS, its affiliates, the Platform or TMS applications, products, services, data, ideas, inventions, features, software, techniques, technology, trade secrets, and business and financial information, or any other information relating to TMS or its affiliates that becomes known to you through disclosure, observation or otherwise, and that either is designated as confidential by TMS or its affiliates, by its nature would be generally deemed to be confidential information, or that is not generally known or readily ascertainable to the public.
- 1.2. “**Platform**” means the Products and any related or associated websites, portals, apps, or other online properties. TMS may change the Platform at any time.
- 1.3. “**Products**” means the part of the Platform comprised of payment processing products and services listed at <http://developer.groovv.com/product-list/>.
- 1.4. “**Registration Data**” means limited information about you collected by TMS during the online registration process.

- 1.5. **“TMS Brands”** means all trademarks, service marks, trade dress, logos, taglines, slogans, product names, any other similar intellectual property, registered or unregistered, directly or indirectly owned by or licensed to TMS anywhere in the world, including but not limited to Groovv and the Groovv Logo.
2. **Online Registration.** In order to access or use the Platform, you must (i) complete the online registration process and (ii) electronically sign these General Terms.
  - 2.1. **Registration Data.** You represent and warrant that all Registration Data provided by you is current, complete and accurate, and you are solely responsible for updating your Registration Data as necessary. TMS reserves the right to terminate your license to use the Platform immediately if your Registration Data is found to be inaccurate, incomplete, or not current at any time.
  - 2.2. **Account Password/Security.** If you have an account to access the Platform, you are responsible for maintaining the confidentiality of your password and account and for all activities that occur under your account. You agree to notify TMS immediately of any unauthorized use of your account or any other breach of security. TMS is not liable for any loss that you may incur as a result of a third party using your password or account, either with or without your knowledge.
  - 2.3. **Privacy.** TMS’s use of any information provided by you, including without limitation, Registration Data, will be consistent with the Privacy Policy posted on the Platform which is incorporated by reference into these General Terms. We may update this Privacy Policy from time to time, which will be indicated by a new date at the top or bottom of that document. Your continued access to and use of the Platform constitutes your acceptance of the current version of this Privacy Policy. If you do not agree with any modifications to this Privacy Policy, your only recourse is to discontinue your use of the Platform.
3. **Licenses and Restrictions.**
  - 3.1. **Platform License.** Subject to these General Terms, TMS grants you a limited, revocable, non-exclusive, non-sublicensable, non-transferable license to access and use the Platform (i) for payment processing solutions using the Products, (ii) to develop, test and support applications, products or services of yours, and (iii) to enable end users of any of your applications, products or services to connect to and communicate with the Platform. Your applications, products or services are not permitted to facilitate or enable end users to access or use the Platform in a manner inconsistent with these General Terms.
  - 3.2. **Brand License and Trademarks.** Subject to these General Terms, TMS grants you a limited, revocable, non-exclusive, non-sublicensable, non-transferable license to display the applicable TMS Brands solely as necessary to (i) show compatibility with the Platform or (ii) enable end users of your applications, products or services to connect to and communicate with the Platform in furtherance of the license granted in Section 3.1. You are not permitted to use, register, or attempt to register any trademarks or domain names that are derived from or confusingly similar to those of the TMS Brands.
  - 3.3. **Use of the Products.**
    - 3.3.1. **Support.** TMS and its affiliates may provide Merchant with support services related to the Products. TMS and its affiliates may also, in their discretion, issue updates, corrections, and new releases (a “Change”) to the Products. TMS and its affiliates are not responsible for any damages suffered as a result of such support services or Changes. If TMS chooses to issue a Change, then these General Terms shall apply to such Change, and such Change shall be treated as incorporated into the Products for purposes of this Section. Changes may require that Merchant agree to additional or revised terms and conditions as a condition of continued use of the Products. Except as otherwise set forth in this Section, TMS and its affiliates have no obligation to provide Changes, maintenance or support to Merchant or any person having access to the Products.
    - 3.3.2. **Access/Transmissions.** TMS will use reasonable efforts to ensure that the Products are accessible on a 24/7 basis. However, there may be occasions when the Products will be interrupted (i) for maintenance, repairs and Changes, or (ii) because of the failure of

telecommunications or of Merchant's devices or systems, each of which is beyond control of TMS and its affiliates. TMS and its affiliates will not be liable to Merchant for any suspension or interruption of the Products for any reason. Due to the open nature of Internet communications, no data transmission over the Internet can be guaranteed to be secure, and thus TMS and its affiliates cannot guarantee that communications between a Merchant, on the one hand, and TMS or its affiliates, on the other, will be free from unauthorized access by third parties.

3.3.3. **Fees and Taxes.** TMS may charge a fee for use of one or more of the Products or other parts of the Platform. If any such fees are charged, they will be explained in the Merchant Credit Card Processing Agreement or by separate notice, and are subject to change. Merchant is responsible for all applicable sales and use taxes assessed with respect to any Products, beginning the month the such Product is downloaded or installed by Merchant and continuing until use of the Product is terminated or cancelled.

3.3.4. **Export Controls.** Merchant will not ship, transfer or export the Products, or any of their components, data, information, code or technology, into any country or use the Products in any manner prohibited by the United States Export Administration Act or any other export laws, restrictions, or regulations (hereinafter, collectively, "Export Laws"). In addition, if any of the Products is identified as export-controlled under the Export Laws, Merchant represents and warrants that it is not a citizen of, or otherwise located within an embargoed nation or a nation that has been designated by the U.S. government as a "terrorist supporting" country, and that Merchant is not otherwise prohibited under the Export Laws from receiving that Product.

3.4. **Data.** TMS shall retain full ownership of all data and information submitted to or passed through the Platform by you (or your affiliates or clients). TMS will in no event be liable to you or any third party for the accuracy or correctness of the data or information submitted to or passed through the Platform. TMS is not responsible for compiling or retaining any data and information submitted to or passed through the Platform. Upon the termination of your (or your affiliates' or clients') use of the Platform, TMS will have no obligation to store, retain, report or otherwise provide any copies of or access to any such data or information.

3.5. **Restrictions.** By using the Platform, you agree not to (i) modify, prepare derivative works of, or reverse engineer, our Platform in whole or in part; (ii) knowingly or negligently use our the Platform in a way that abuses or disrupts our networks, security systems, user accounts, or the Platform in whole or in part, including but not limited to introducing any virus or other code, files, or programs intended to disrupt, damage, or limit the functioning of the Platform; (iii) access or use the Platform for illegal, fraudulent, threatening, abusive, defamatory, libelous, deceptive, or tortious purpose, or for any purpose that may be harmful to TMS or the Platform; (iv) market, sell, or resell access or use of the Platform to any third party; (v) use the Platform in violation of our policies, applicable laws, or regulations, including but not limited to those identified in Section 12.6; (vi) use the Platform in any application, product or service that competes with any application, product or service offered by TMS; (vii) use the Platform for the purpose of gaining competitive intelligence for yourself or others, or to otherwise divert TMS customers or potential customers from TMS or our Platform; (viii) harvest, collect, or gather user data without appropriate consent; (ix) transmit through the Platform any material that may infringe the intellectual property or other rights of third parties, or (x) remove any proprietary rights notices on any aspect of the Platform, the TMS Brands, and any other materials you receive related to the Platform; (xi) make any representations with respect to TMS, the Platform, or these General Terms, or display the TMS Brands in a manner that could reasonably imply an endorsement, relationship or affiliation with or sponsorship between you or a third party and TMS, (xii) access or use the Platform in a manner that exceeds a reasonable request volume or constitutes excessive or abusive usage.

4. **Proprietary Rights and TMS Marks.** You acknowledge that we (together with our licensors) retain all proprietary right, title and interest in the Platform (including portions contributed by licensors to TMS) and the TMS Brands, and any related intellectual property rights, including, without limitation,

all modifications, enhancements, derivative works, and upgrades thereto. You agree that you will not use or register any trademark, service mark, business name, domain name or social media account name or handle which incorporates in whole or in part the TMS Marks or is similar to any of these.

5. **Termination.** TMS reserves the right, in its sole discretion, and at any time with or without prior notice, to change, suspend or discontinue any aspect of the Platform or suspend or terminate your rights to access or use the Platform or display the TMS Brands. You may stop use of the Platform and terminate this agreement at any time upon notice to TMS and closing any associated accounts you have, and ceasing all access to and use of the Platform and TMS Brands. Upon termination of these General Terms, you are no longer permitted to access or use the Platform or to display or otherwise use the TMS Brands. Neither party shall be liable for any damages resulting from a termination of these General Terms in accordance with this Section; provided, however, the termination of these General Terms shall not affect any claim regarding conduct prior to such termination or conduct subsequent to termination regarding a breach of surviving sections (e.g., Section 7 - Confidentiality). The following shall survive expiration or any termination of this Agreement: Sections 4 through 12 and any other provisions that by their nature would reasonably be expected to survive expiration or termination.
6. **Independent Development.** You understand and acknowledge that TMS may from time to time independently create applications, products or services that are similar to or competitive with your applications, products or services, and nothing in these General Terms will be construed as restricting or preventing TMS from creating and fully exploiting such applications, products or services, without any obligation to you.
7. **Confidentiality.** Unless expressly authorized in writing by TMS, you shall not disclose to any third party any Confidential Information, nor use such Confidential Information in any manner other than to perform your obligations under these General Terms. The foregoing restrictions do not apply to any information that (i) is publicly disclosed through no fault of your own, (ii) is already lawfully in your possession and not subject to a confidentiality obligation to TMS, (iii) becomes known to you from a third party having a bona fide right to disclose the information, or (iv) is Confidential Information that you are obligated to produce pursuant to an order of a court of competent jurisdiction or a valid administrative subpoena, provided you supply TMS with timely notice of such court order or subpoena. Furthermore, you will keep in confidence all passwords and/or other access information related to the Platform.
8. **Warranties.** You hereby warrant to TMS that you have all necessary authority to enter into and perform your obligations under these General Terms without the consent of any third party or breach of any contract or agreement with any third party, and that the use by others of your applications, products or services shall not violate the rights of any third party (e.g., copyright, patent, trademark or other proprietary rights) or any applicable law or regulation. You hereby acknowledge and agree that the Platform is provided by TMS on an "AS IS" and "AS AVAILABLE" basis. TMS EXPRESSLY DISCLAIMS ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THOSE OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, COMPLIANCE WITH REQUIREMENTS ESTABLISHED BY THE PAYMENT CARD INDUSTRY SECURITY STANDARDS COUNCIL, EMV COMPLIANCE, AND NON-INFRINGEMENT. TMS MAKES NO WARRANTY THAT ANY OF THE PLATFORM SERVICES WILL MEET YOUR REQUIREMENTS OR THAT YOUR USE OF THE PLATFORM SERVICES WILL BE UNINTERRUPTED, TIMELY, VIRUS-FREE, OR ERROR-FREE; NOR DOES TMS MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE PLATFORM SERVICES OR THAT ANY DEFECTS IN THE PLATFORM SERVICES WILL BE CORRECTED. NO INFORMATION OR ADVICE, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM TMS OR THROUGH THE PLATFORM SERVICES SHALL CREATE ANY WARRANTY NOT EXPRESSLY MADE HEREIN.
9. **Limitation on Liability.** IN NO EVENT SHALL TMS BE LIABLE FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL OR INCIDENTAL LOSS, EXEMPLARY OR OTHER DAMAGES RELATED TO THIS AGREEMENT, WHETHER DIRECT OR INDIRECT, INCLUDING BUT NOT LIMITED TO: (i) LOSS OF DATA, (ii) LOSS OF INCOME, (iii) LOSS OF OPPORTUNITY, (iv) LOST PROFITS,

AND/OR (v) COSTS OF RECOVERY OR ANY OTHER DAMAGES, HOWEVER CAUSED AND BASED ON ANY THEORY OF LIABILITY, AND INCLUDING, BUT NOT LIMITED TO, BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STATUTE, OR OTHERWISE, AND WHETHER OR NOT TMS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. TMS's LIABILITY HEREUNDER IS LIMITED TO \$50.00. Any cause of action that you have arising out of or relating to the Platform must commence within one (1) year after the cause of action arose; otherwise, such cause of action is permanently waived and barred. You acknowledge and agree that any software, data, or information downloaded or otherwise obtained in connection with your access to or use of the Platform is downloaded at your own risk and that you will be solely responsible for any damage to property or loss of data or information that results from such download. You acknowledge and agree that TMS is not be responsible or liable for unauthorized access of facilities or to your data, information, or programs due to accident, illegal, or fraudulent means or devices.

10. **Indemnification.** You agree to defend, indemnify, and hold harmless TMS and its affiliates, and their respective directors, officers, employees, partners, suppliers, licensors, and agents from and against any and all third party claims arising from or in any way related to your access to or use of the Platform, any violation by you of these General Terms, any violation by you of any Product-specific terms of use, any installation of a Product, or any other actions related to your access to or use of the Platform, including any liability or expense arising from claims, losses, damages (actual or consequential), suits, judgments, litigation costs and reasonable attorneys' fees, of every kind and nature.
11. **Choice of Law and Location for Resolving Disputes.** This Agreement is governed by laws of the State of California, without regard to any choice of law rules. In the event of a dispute arising out of or related to these General Terms, the Parties shall use reasonable efforts to resolve such dispute among themselves, and failing to achieve any resolution within sixty (60) days of the initiation of the dispute resolution process, the Parties shall submit the dispute to mediation under the Commercial Mediation Rules of the American Arbitration Association at its Los Angeles, California offices. The mediator shall be selected by mutual agreement of the Parties provided, however, that if the Parties are unable to select a mediator by mutual agreement, each Party shall select its own mediator and such mediators shall mutually appoint a third mediator who shall preside over the dispute. Each Party will bear its own costs of mediation, provided however that the fees and costs of the mediator will be borne equally by the Parties. The Parties hereby irrevocably consent to exclusive jurisdiction and venue in the state and federal courts and administrative tribunals located in Los Angeles, California for adjudication of any dispute related to this Agreement which is not settled by such mediation.
12. **Additional Provisions.**
  - 12.1. **Relationship of the Parties.** You and TMS are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties.
  - 12.2. **Assignment.** You may not assign your rights or delegate your duties under these General Terms either in whole or in part, by operation of law or otherwise and any such attempted assignment or delegation shall be void.
  - 12.3. **Force Majeure.** Neither party will be responsible for any delay, interruption or other failure to perform under these General Terms due to acts beyond its reasonable control, but only for so long as such conditions persist. Force majeure events include, but are not limited to: natural disasters (e.g., lightning, earthquakes, hurricanes, floods); wars, riots, terrorist activities, and civil commotions; activities of local exchange carriers, telephone carriers, wireless carriers, Internet service providers, and other third parties; explosions and fires; embargoes, strikes, and labor disputes; governmental decrees; and any other cause beyond the reasonable control of a party.
  - 12.4. **Notice.** TMS may provide you with notice via email, regular mail, postings on the Platform, and/or notices in your statements from TMS or its affiliates. You may provide TMS with notice via email at [compliance@merchantserviceshq.com](mailto:compliance@merchantserviceshq.com).

- 12.5. **Compliance with Applicable Laws and Rules.** You agree to comply with all applicable local, state, national and foreign laws, rules, and regulations, including, but not limited to, the Telephone Consumer Protection Act, Telemarketing Sales Rule/Do Not Call Registry, Fair Credit Reporting Act, and the FTC Act in connection with your access to and/or use of the Platform. You further agree to comply with all applicable requirements established by the Payment Card Industry Security Standards Council, payments networks (including but not limited to Visa, MasterCard, Discover, American Express, PIN-debit networks, and NACHA) and TMS.
- 12.6. **No Waiver.** The failure of either party in any one or more instance(s) to insist upon strict performance of any of these General Terms will not be construed as a waiver or relinquishment of the right to assert or rely upon any such term(s) on any future occasion(s).
- 12.7. **No Third Party Beneficiaries.** No person or entity not a party to these General Terms will be deemed to be a third party beneficiary of these General Terms or any provision hereof.
- 12.8. **Remedies.** You acknowledge that your breach of these General Terms may cause irreparable harm to TMS, the extent of which would be difficult to ascertain. Accordingly, you agree that, in addition to any other remedies to which TMS may be legally entitled, TMS shall have the right to immediately seek injunctive relief without the posting of any bond in the event of a breach of these General Terms by you or by any of your officers, employees, consultants or other agents.
- 12.9. **eSign Disclosure and Consent: Electronic Signatures and Documents.** By using the Platform, you are consenting to: (a) using electronic means to sign all documents regarding your access to and use of the Platform, including but not limited to these General Terms, and (b) receiving electronically all documents regarding your access to and use of the Platform, including but not limited to these General Terms and any disclosures and notices. TMS is not a document storage facility, and we recommend that you download and maintain physical or electronic copies of these documents. We reserve the right, in our sole discretion, to send you any of the documents referenced above ("Documents") in paper form instead of, or in addition to, electronic form.
- a) **How to Receive Paper Copies.** After you provide your consent, you may receive, without charge, a paper copy of any Documents that have been provided to you electronically by submitting a written request to [compliance@merchantserviceshq.com](mailto:compliance@merchantserviceshq.com). TMS reserves the right to charge you a fee of up to \$10 per document for sending you each such paper copy. You may also print copies of the Documents from your computer if you have a printer that is connected to your computer.
- b) **Your Right to Withdraw Your Consent.** You have the right to withdraw your consent at any time. If you withdraw your consent, TMS reserves the right in its sole discretion to prohibit your further access to and use of the Platform. If TMS permits your further access to and use of the Platform, any Documents provided to you after the effective date of the withdrawal will be provided in paper form, although TMS reserves the right to charge you a fee of up to \$10 per document for sending each to you in paper form. You can withdraw your consent by submitting a written request to [compliance@merchantserviceshq.com](mailto:compliance@merchantserviceshq.com).
- c) **Change of Your Contact Email Address.** TMS may contact you via email, so you must keep current the email address you provide TMS. If you change your designated e-mail address, you must notify us by submitting a written notice to [compliance@merchantserviceshq.com](mailto:compliance@merchantserviceshq.com).
- d) **IP Address Storage.** For verification and fraud prevention purposes, your IP address will be recorded and stored as a part of your electronic signature.
- e) **Hardware and Software Requirements.** The hardware and software requirements to access and retain electronic records are as follows: (i) a computer and modem, or other device capable of accessing the Internet, and the ability to receive HTML files; (ii) an active "Internet Service Provider"; (iii) an active email account; (iv) a Web Browser that supports 128 bit SSL encryption; (v) the ability to download (to your hard disk drive or a floppy diskette) or print agreements and disclosures; and (vi) Adobe Acrobat Reader software.
- 12.10. **Entire Agreement.** These General Terms set forth the entire agreement and understanding of the parties relating to the subject matter hereof and supersedes all prior and

contemporaneous oral and written agreements and understandings with respect to the same. No waiver or amendment of any term or condition of these General Terms shall be valid or binding on either party unless agreed to in writing by both parties. If any provision of these General Terms is declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable, such provision shall be severed from these General Terms and the other provisions shall remain in full force and effect and the parties agree to comply with the remaining provisions of these General Terms in a manner consistent with the original intent of the agreement. In the event of any conflict between the content of this document and the documents incorporated by reference, this document shall control with respect to your use of the Platform.

***Last Updated: March 2017***