

MercurySend LLC Terms and Conditions

As of 6/2/2019



1. AGREEMENT

You agree this agreement is with you and MercurySend and you agree to use MercurySend with all applicable guidelines, and state and federal law. You also agree that you have read and understood the terms set herein. If you do not agree with the Terms and Conditions do not use MercurySend.

2. TERM

This agreement will start when you are notified by MercurySend that it has accepted your application to use the Service. It will continue until terminated by either party in accordance with this agreement.

3. Our SERVICE

3.1 MercurySend will use its best efforts to provide you with a reliable and robust Service.

3.2 The provision of the Service may be affected by a range of factors that are out of the control of MercurySend including unforeseen technical, software, carrier problems and telecommunications network coverage, Force Majeure, and availability which relies on third party services. Also, Messages may not be received where the recipient's mobile phone memory is full, not of merchantable quality, location, has no credit, damaged, battery has not been charged, or type of phone plan does not allow. MercurySend takes no responsibility for any loss if the recipient never reads the message whether by intention, omission, or inability to do so. MercurySend does not guarantee delivery of Messages either in a timely manner or at all.

3.3 MercurySend does not make any warranties in respect of services provided by third parties.

4. FEES

MercurySend will charge you the fees set out in the registration form and may vary the fees on the website at any time, which become effective at that time of posting, and in its sole discretion giving you notice via email. It is Your responsibility to also check the fees schedule from time to time to ensure You are complying with the most current version of this agreement by MercurySend.

5. DIRECT DEBIT AUTHORITY

5.1 MercurySend may vary the pricing from time to time and You must regularly check the website pricing plans to review the latest pricing.

MercurySend will arrange payment of your MercurySend account by debiting your credit card where you have given us your credit card details and authorized us to do so in your registration form.

5.2 If you select the Monthly Account option, your credit card account will be debited monthly for the amount you owe on your MercurySend account; and

5.3 If you select the Prepaid option, your credit card account will be debited on registration and at other times as set out in clause 6.2

5.4 You may also be charged fees on direct debits that are dishonored. You should contact MercurySend if you have any issues or complaints about your direct debit arrangement or to cancel it. You can phone MercurySend on +1 347-791-6542 or contact accounts@mercurysend.com and we will answer you within 24 hours.

5.5 Each time You send a Message or block of Messages at the applicable Message cost as set out in the Prepaid Message Pricing Plans You will be charged against the Prepaid fees for sending those Messages at the applicable Message cost.

5.6 Each Message will be charged against the Monthly or Prepaid Fees as soon as it is sent through the MercurySend system and regardless of whether or not the Message(s) are received by the intended end user.

5.7 MercurySend will debit your credit card where you have given us permission to do so with your registration form

6. PAYMENT

MercurySend provides two payment options: (Please note One SMS Text Message equals One Credit)

6.1 Monthly Account (Auto Renewal)

- a. MercurySend reserves the right to refuse you credit and you may be required to use Prepaid.
- b. MercurySend will invoice you as PAID each calendar month for the monthly fee selected and any other fees for use of the Service in that calendar month.
- c. you must pay within 30 days of the date of the invoice provided to you.
- d. We do not credit you with your unused text messages for the next month and all unused message credits expire at the end of that month.
- e. Please review our pricing page for updates on pricing as they may change from time to time. Each Monthly account provides a limited number of free replies
- f. When your allocated texts have all been used you will be charged for your extra texts sent and/or received at the rate you selected on your monthly account known as overage texts.
- g. To avoid paying for your next month no further texts may be sent or received and you must cancel **within 48 hours** of your billing cycle in writing to accounts@mercurysend.com.
- h. Cancellation after this 48 hour period with any texts sent or received will incur the cost of your next monthly cycle.

6.2 Prepaid Accounts

- a. We will credit your account for an initial amount and charge you accordingly on registration; when your MercurySend account runs out of credit; on each anniversary of the date your MercurySend account was last credited; and as requested (for the amount requested);
- b. MercurySend will deduct fees for use of the Service from the credit on your MercurySend account;
- c. MercurySend may notify you when your MercurySend account is running low; and
- d. You will forfeit any unused credit on your MercurySend account on each anniversary of the date your MercurySend account was last credited.
- e. Any unused prepaid messages are only valid for 12 months from date of purchase under this plan.
- f. On all prepaid accounts only, One text message is deducted from your remaining account when sent and when received.
- g. It is up to you to ensure you have enough pre-paid credit on your account to use the service, MercurySend will not auto refill a prepaid account at any time.

7. USE OF THE SERVICE

You agree that you or anyone who uses The Service will only send messages to recipients whom have an established relationship with your business and that compliment an existing transaction with your business. That you will never send messages that are of a marketing or sales nature and never send messages that have no relationship to the service you provide. You agree that you will never use the MercurySend service to send anonymous messages to persons unrelated to your business or impose or send messages as or for another business.

You further agree that YOU WILL NOT send or create template messages on behalf of another similar external business entity or charity or for another business name or any 3rd party that did not originally sign up to the service. In the event MercurySend believes there is misuse of your account MercurySend may suspend your account and may pursue civil charges and/or back payments for the duration of misuse.

Do not use our service to send messages that:

- 7.1 defamatory, offensive, abusive, indecent, sexually explicit, menacing, symbols of hate, or harassing or cause damage or injury to any person or property or otherwise objectionable
- 7.2 Does not violate any law, observes applicable codes of practice and all rules of a regulatory body. Or, falls outside of the standard G, PG 13 viewer ratings. NC-17 R and XXX content is strictly prohibited and MercurySend expressly accepts no liability for this type of content;
- 7.3 result in a misuse of a third party's confidential information;
- 7.4 constitute a violation or an infringement of any duty or obligation in contract, tort or otherwise to a third party;
- 7.5 infringe any intellectual property rights owned or licensed by a third party; or in breach of any intellectual property (including copyright), or otherwise unlawful.
- 7.6 represent (by act or omission, unless accurate) that MercurySend, its network suppliers or any other person created, endorses, has reviewed, or is in any way involved in the production of the Content;
- 7.7 do not have prior opt-in and consent and a way for the recipient to Opt-out. It is deemed by using our service you have already gained permission by the recipient and if they opt out you will remove them from your contacts immediately. MercurySend will not be responsible for messages that continue to be sent to persons whom have requested you to stop sending messages.
- 7.8 do not have a **clear indication of the source** or originating entity of the Message to enable the recipient to determine who sent the Message; are unsolicited or unauthorized;
- 7.9 malicious sending or receiving any instructions which, if implemented, might cause damage or injury to any person or property;
- 7.10 expose either party to the risk of any legal or administrative action including prosecution under any law;
- 7.11 affects the normal operation of a telecommunications network or equipment;
- 7.12 Sending text messages that contain "virus", "worm", "spam" or trojan" or similar program;
- 7.13 are for any illegal purpose or contravene any law, code, standard or regulation, or are in contempt of court; or
- 7.14 that are misleading or deceptive as to your (or the sender's) identity.
- 7.15 Promote another text messaging service, or any other commercial venture, that is competitive with the Services of MercurySend.
- 7.16 MercurySend reserves the right at all times to terminate your account, and delete any and all content at, in whole or in part, for any reason including, but not limited to, violations of these Terms of Service. If you do violate these Terms of Service, MercurySend reserves the right to share any information with any third law enforcement party. In addition, MercurySend reserves the right at all times to disclose any User Content as necessary to satisfy any law, regulation, governmental request or partner request, in its sole discretion.
- 7.17 You agree to abide and adhere to all local, state, federal and international laws or regulations and are solely responsible for all acts or omissions that occur under your account and become familiar with the legalities of any messages, broadcasts or campaigns transmitted through MercurySend by viewing the following websites:
 - . Federal Trade Commission, www.ftc.gov
 - . Federal Communications Commission, www.fcc.gov

If you are unclear or unfamiliar on the legalities of any message you send, you must consult with your attorney prior to your use of the MercurySend web site or Service. There is zero tolerance for any fraudulent, abusive, or otherwise illegal activity. At the discretion of MercurySend you may be reported to the appropriate law enforcement agency.

8. SECURITY

Your security and use of the Service is very important to us and we take every reasonable step to ensure this. Keep your login and passwords in a safe place and make immediate changes when or if users no longer have access to your account or no longer work for you. Contact MercurySend immediately if you become aware of any access to your Security Identification by unauthorized persons or any unauthorized access to information intended for you. Support@mercurysend.com

9. INTELLECTUAL PROPERTY RIGHTS

MercurySend LLC owns (or is the licensee of) all Intellectual Property, trademarks, trade names Rights In:

9.1 The MercurySend website and user interface, the MercurySend Logo, The four distinct pointed stripes on the left side of the letter M and/or word MercurySend and associated company slogan “Text Message for Business” and accompanying colors of letters within the word MercurySend and MercurySend systems including all pre existing Intellectual Property Rights; and

9.2 all documentation, know how, methodologies, equipment and other materials supplied or made available to You under or in connection with this agreement and **nothing** in this agreement transfers or assigns to the customer any of those rights.

9.3 All content, design and layout of the website is copyright 2010-2018 MercurySend.com All rights reserved

9.4 You shall indemnify MercurySend LLC fully against all liabilities of any nature whatsoever, including (without limitation) all costs and expenses which MercurySend may incur as a result of your infringement of any patent or other proprietary right of any third party.

10. GENERAL WARRANTY

Each party warrants to the other that it is duly authorized to enter into and perform this agreement.

11. INDEMNIFICATION

You agree to indemnify, hold harmless, and keep MercurySend, and its subsidiaries and other affiliated companies, its officers and employees, directors, contractors, agents, licensors and suppliers indemnified against all liability for or in respect of any losses, expenses, damages and costs including, but not limited to, all consequential, indirect or special losses or damages of any kind (including, without limitation, loss of profit or indirect costs) incurred by MercurySend, its officers and employees, contractors, agents, licensors and suppliers as a result of persons making any claim whatsoever against MercurySend arising out of the provision of the Service to you, in so far as they are attributable to:

12.1 any breach of this agreement by you, or

12.2 your negligent or unlawful action in the course of complying with your obligations under this agreement.

You further represent to MercurySend that you shall at all times comply with all applicable laws and regulations including without limitation the Telephone Consumer Protection Act, the Telemarketing Sales Rule, the CAN-SPAM Act (controlling the assault of Non-Solicited Pornography and Marketing Act) of 2003, and all other laws concerning privacy, telemarketing and internet marketing.

12.3 You will be liable for any costs and Attorney’s fees to MercurySend that it incurs to successfully establish or enforce its right to indemnification under this section.

12. LIABILITY OF MERCURYSEND

12.1 No liability for delay or failure or cost to recipient.

MercurySend will not be liable for any delay or failure to provide the Service if the delay is due to an Event of Delay. MercurySend does not undertake, warrant, or guarantee that the services (including access to the Web Tools or other MercurySend Systems) will be uninterrupted or error free. You acknowledge and agree that use of the Service is dependent on, and affected by, a number of environmental and other factors outside of the reasonable control of MercurySend, including the infrastructure and services provided by Network Operators (External Factors). BE AWARE MercurySend will have no liability to the extent permitted by law whatsoever relating to any delay or failure of, or interruption in the performance of, the Services resulting from any External Factors. You also agree that the intended recipient(s) may not receive the message(s) sent due to their phone plan, phone plan credit, battery life, or location, and, or, the recipient may be charged an additional fee when receiving the Message(s) as a result of their phone plan or location and that this is out of the control of MercurySend. MercurySend has no control on how the message is received, if at all. MercurySend cannot control how the Network Operators (external factors) deliver the message to their customer’s handset. MercurySend will do all it can to ensure your message is sent through the MercurySend system as fast possible to the applicable Networks. But be aware we cannot guarantee the speed or specific maximum time in which the Networks will deliver your message to the recipient. Networks operate and assign text messages with a default lifetime and any message that cannot be delivered within that life time will be discarded by that mobile network operator and without notice to MercurySend. MercurySend is not liable for any loss incurred by the failure of non-delivery and any loss cannot be claimed by MercurySend.

12.2 Limitation of liability

To the extent permitted by law, MercurySend is not under any liability to you or any third party in respect of any consequential, indirect or special losses or damages of any kind (including, without limitation, loss of profit or indirect costs) however caused, which may be suffered or incurred or which may arise directly or indirectly in respect of the supply of the Service under this agreement or the failure or omission on the part of MercurySend to comply with its obligations under this agreement.

12.3 Exclusion of warranties

Except as expressly provided to the contrary in this agreement, all warranties whether express, implied, statutory or otherwise, relating in any way to the subject matter of this agreement or to this agreement generally, are excluded.

12.4 Limitation of warranties that may not be excluded at law

Where any Act of Law implies in this agreement any term, and that Act avoids or prohibits provisions in a contract excluding or modifying the application of, or exercise of, or liability under, such term, such term will be deemed to be included in this agreement. However, the liability of MercurySend for any breach of such term will be, if permitted by that Act, limited, at the option of MercurySend:

12.4.1 to the supplying of the Service again; or

12.4.2 to the payment of the cost of having the Service supplied again.

12.5 Limitation of indemnities

Regardless of any other provision of this **agreement**, MercurySend's total liability to you under any indemnities that MercurySend has given to you under this agreement must not exceed the Contract Price.

12.6 MercurySend is not intended to support or carry Emergency Texts or to any Emergency Services or to act as or indirectly as an emergency broadcast services product. Neither MercurySend nor its representatives will be liable under any legal or equitable theory of for any claim, damage, loss, injury, or wrongful death. You will hold MercurySend harmless against any and all such claims arising from or relating to the inability to use the MercurySend Services to contact Emergency Services or to be used as an emergency services broadcast.

12.7 Location Services – May or may not be accurate or at all. You assume all responsibility and risk when using this service and exempt MercurySend LLC and it's agents for all and any liability when using the location service.

12.9 Feedback Services – It is up to you the customer or user how Feedback Services are defaulted and redirected. You exempt MercurySend LLC and its agents from any and all liability for any loss caused directly or indirectly from using the MercurySend Feedback Features. There is no guarantee that Feedback will work in a timely manner or at all.

13. FORCE MAJEURE

13.1 Neither party shall be liable to the other for any breach of its obligations hereunder resulting from any cause beyond its reasonable control including but not limited to fire, strikes, delays in transportation, inability to obtain supplies, hostilities, regulations of any civil or military authority. The party whose performance is affected by force majeure shall use all reasonable efforts to avoid or overcome the causes affecting performance as soon as it becomes practical to do so.

14. TERMINATION AND SUSPENSION

14.1 Termination by either party

Either party may terminate this agreement at any time by notifying the other party. MercurySend will deal with a request for termination as soon as reasonably practicable. MercurySend shall have no liability to you or any third party because of such termination or action. Termination must be in writing.

14.2 Termination and suspension by MercurySend

MercurySend may terminate this agreement or suspend the Service immediately by giving you written notice:

15.2.1 when you have selected the Monthly Account option and you fail to pay your account on time;

15.2.2 when you have selected the Pay As You Go option and a debit to your credit card is not accepted;

15.2.3 when you breach any of these terms and conditions or suffer an Insolvency Event; or

15.2.4 when MercurySend can no longer provide the Service.

14.3 Consequences of termination

If this agreement is terminated for any reason:

15.3.1 you will no longer be able to use the Service;

15.3.2 you will forfeit any included messages or unused credits; and

15.3.3 if you have selected a Monthly Account, you will be liable for any accrued or unpaid fees and must fulfill those payment obligations up til the time of termination. MercurySend may forward your debt to a collections agency with or without notice.

15. STAMP DUTY AND OTHER TAXES

15.1 All fees including Monthly Accounts and Prepaid Fees and any other fees and charges payable by You under this agreement are exclusive of all taxes, duties, and charges imposed or levied in the United States or Overseas in connection with this agreement or the Services.

15.2 Any stamp duty, duties, taxes, including state, local or county taxes or of a similar nature (including fines, penalties and interest) in connection with this agreement or any transaction contemplated by this Agreement must be paid by You. You agree that you are liable for any new taxes, duties, or charges imposed subsequent to the Commencement Date in respect of this agreement.

15.3 Withholding Tax

If a law, or regulation pursuant to a Law, requires You to deduct or withhold an amount on account of any tax or sales tax from any payment to MercurySend under or in connection with this Agreement;

15.3.1 You must make the withholding or deduction; and

15.3.2 the amount of the payment to MercurySend must be increased by such additional amount as is necessary to ensure that the amount received and retained by MercurySend (after taking into account All deductions and withholdings on account of tax) is equal to the amount that MercurySend would have received had the payment in question not been subject to any deductions or withholdings.

16. MISCELLANEOUS

16.1 This agreement may only be varied or replaced by an agreement duly executed by the parties.

16.2 This agreement contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this document and have no effect.

16.3 A single or partial exercise or waiver of a right relating to this document does not prevent any other exercise of that right or the exercise of any other right.

16.4 No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

16.5 You cannot assign, novate or transfer any of its rights and/or obligations under this agreement without MercurySend's written consent.

16.6 Each indemnity in this document is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this document.

16.7 It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this document.

16.8 Any suggestions by a customer or other, on new ideas, changes, improvements on functionality or intellectual property that help to modify or improve the MercurySend system software will at all times remain the property of MercurySend. No claim either financial gain or reward or intellectual property claim whatsoever can made against MercurySend and any of its officers for any such idea, suggestion, system change, or improvement whether it be verbal, written, or implied to MercurySend. All and any improvements to the MercurySend software remain the property of MercurySend LLC at all times.

17. NOTICES All notices must be in English, and signed by a person duly authorized by the sender in writing and may be delivered in person or sent by mail, email or facsimile to the current business address of the party. All notices are deemed served 48 hours after the date of posting or if delivered personally, on the actual date of receipt or if sent by facsimile or email, in the normal course of transmission.

18. REFUNDS. MercurySend will not provide refunds or prorate partial un-used texts on monthly or prepaid accounts (see rules in section 6.1). You can cancel your account at any time in writing to support@mercurysend.com.

18.1 ABUSE, MISUSE, AND WRONGFUL USE. MercurySend will not be responsible for any abuse, misuse, or wrongful use of your account. It is up to you at all times to ensure that all passwords are protected and only authorized persons can access your account to send text messages. MercurySend will charge you for all messages sent or received on your account so we encourage you to monitor usage and your access as often as possible to avoid or limit any potential or actual abuse, misuse, and wrongful use. MercurySend will not provide refunds for any abuse, misuse, or wrongful use on your account. It is important you change your passwords, monitor daily limits, delete users who should no longer have access, or contact MercurySend immediately if you notice any abuse, misuse or wrongful use. support@mercurysend.com

19. Modification of Terms. MercurySend is constantly improving the service and these changes may often require changes and or an update to these Terms. We reserve the right to change or discontinue an aspect or feature of the service and or update or modify these terms. It is your responsibility to review these terms from time to time and to make regular enquiries as to any changes.

20. Opt In Guarantee – All users of the MercurySend Service guarantee that by using the service all the cell phone numbers used or uploaded in their account will not send bulk or mass marketing or sales related messages or any message unrelated to a transaction and each recipient will be able to recognize the sender in all communications. In the event MercurySend believes or suspects recipients of the client or user have not opted in or given permission to receive communications it may ask for an explanation from the client and or suspend the account. **MercurySend believes that to provide an optimal and responsible service all your recipients must provide you (the sender) with prior written consent and permission and or your messages must be related to a transaction that strictly and specifically benefits the intended service or internal communications you are providing. The FCC regulates unsolicited text messages and marketing messages strictly and we encourage you to consult your Attorney on the laws affecting your text messages.**

21. INTERPRETATION and JURISDICTION

21.1 This agreement is governed by and is to be construed in accordance with the laws of Delaware. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Delaware and waives any right to object to proceedings being brought in those courts. This Agreement will not be governed by the United Nations Convention on Contracts for the International Sale of Goods.

21.2 If a party consists of more than one person, this document binds them jointly and each of them severally.

21.3 In this document:

21.3.1 a reference to this or other document includes the document as varied or replaced regardless of any change in the identity of the parties;

21.3.2 headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this document; and

21.3.3 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning.

21.4 If a provision in this document is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.

21.5 If it is not possible to read down a provision as required in this clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this document.

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