

# Template for agreement between ESP and ASP

The Association between ESP and ASP for availing eSign Online Digital Signature Service may be in the form of "an Undertaking provided by ASP to ESP" or "An agreement between ASP and ESP"

All requirements for availing e-KYC service will be dealt by ESP independent of eSign Service mentioned in this document. The e-KYC service that can be used for eSign is Aadhaar e-KYC service

This document provides a draft Structure of the Agreement to be entered into between Application Service Provider (ASP) and eSign Service Provider (ESP). The actual clauses can be decided based on mutual agreement between ASP & ESP, however the scope, obligation and representation in respect of ASP and ESP are mandatory.

## **Agreement for eSign Online Electronic Signature Services**

**BETWEEN**

**Application Service Provider (ASP)**

**and**

**eSign Service Provider(ESP)**

**(To be executed on non-judicial stamp paper of appropriate value as per Stamp Act relevant to place of execution and bought in the name of one of the executing parties)**

This Agreement (the 'Agreement') is entered at \_\_\_\_\_ on \_\_\_\_ day of \_\_\_\_\_, 201x

**BY AND BETWEEN**

The President of India/Governor of State of \_\_\_\_/ xyz, acting through the \_\_\_\_\_, having its office located at \_\_\_\_\_ (herein after referred to as "Application Service Provider" or "ASP", which expression shall unless excluded by or repugnant to the context deemed to include its successor/s in office or assign) of the First Part

**AND**

\_\_\_\_\_, a [private limited company], registered under the [Companies Act, 1956], having its registered office at \_\_\_\_\_ (hereinafter referred to as "eSign Service Provider" or "ESP" which expression shall unless repugnant to the context or meaning thereof mean and be deemed to include its authorized representatives, agents and permitted assigns) of the Second Part

**WHEREAS**

- A. ASP is a \_\_\_\_\_ [details about ASP entity];
- B. ESP is a \_\_\_\_\_[details about ESP entity];
- C. ASP wishes to obtain eSign electronic Online Signature services from ESP;
- D. ESP is willing to provide such services in accordance with the terms and conditions of this Agreement;

**NOW THEREFORE**, IN CONSIDERATION OF THE FOREGOING AND MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN AND OTHER GOOD AND VALUABLE CONSIDERATIONS, THE RECEIPT AND ADEQUACY OF WHICH IS HEREBY ACKNOWLEDGED, THE PARTIES HEREBY COVENANT AND AGREE AND THIS AGREEMENT WITNESSETH AS FOLLOWS:

**1. Definitions and Interpretations**

- (a) '**e-KYC Number**' shall mean the unique identification number maintained by e-KYC provider;
- (b) '**Agreement**' shall mean this agreement executed between the Parties, along with its schedules, annexures and exhibits, if any, and all instruments supplemental to or amending, modifying or confirming this agreement in accordance with the provisions of this agreement, if any, in each case as they may be supplemented or amended from time to time;
- (c) '**Business Day**' shall mean any day other than a Saturday, Sunday or official public holiday in India;

- (d) **‘Controller of Certifying Authorities (CCA)’** shall have the same meaning as such term is defined in Information Technology Act, 2000 and rules and regulations made thereunder as amended from time to time.
- (e) **‘Digital Signature Certificate (DSC)’** shall have the same meaning as defined under the Information Technology Act, 2000 and rules and regulations made thereunder as amended from time to time;
- (f) **"e-KYC"** mean the transfer of digitally signed demographic data such as Name, Address, Date of Birth, Gender, Mobile number, Email address, photograph etc of an individual. collected and verified by e-KYC provider on successful authentication of same individual
- (g) e-KYC provider means any e-KYC provider listed in e-Authentication Guidelines**
- (h) **"eSign" or “eSign Service”** is an online Electronic Signature Service in which the key pair generation, certification of the public key by the CA and digital signature creation for electronic document are facilitated by the eSign online Electronic Signature Service provider instantaneously within a single online service based on successful authentication of individual using e-KYC services
- (i) **"eSign User"** is an Individual requesting for eSign online Electronic Signature Service of eSign Service provider
- (j) **"response code"** is the identification number maintained by e-KYC provider to identify the authentication
- (k) **‘Laws’** shall mean all applicable laws, by-laws, rules, regulations, orders, ordinances, protocols, codes, guidelines, policies, notices, directions, judgments, decrees or other requirements or official directive of any governmental authority or person acting under the authority of any governmental authority, whether in effect or which may come into effect in the future;
- (l) **‘OTP’** shall mean one time password sent to the eSign User’s cell phone for the purpose of authentication;
- (m) **‘Party’** refers individually to ASP and the ESP;
- (n) **‘Parties’** refer collectively to ASP and ESP;
- (o) **‘Services’** shall mean the services to be provided by ESP to ASP as agreed in this Agreement;
- (a) **‘Successful Transaction’** means the event of receipt of a DSC by ASP from ESP for a particular Document in the case of ASP and the event of dispatch of a DSC to ASP by ESP for a particular Document ;
- (p) **‘Third Party’** shall mean any party who is not ASP or ESP.

## 1.2 Interpretations

- a) In this Agreement, unless the context requires otherwise:

- (i) reference to singular includes a reference to the plural and vice versa;
  - (ii) reference to any gender includes a reference to all other genders;
  - (iii) reference to an individual shall include his legal representative, successor, legal heir, executor and administrator;
  - (iv) reference to statutory provisions shall be construed as meaning and including references also to any amendment or re-enactment (whether before or after the date of this Agreement) for the time being in force and to all statutory instruments or orders made pursuant to statutory provisions;
  - (v) references to any statute or regulation made using a commonly used abbreviation shall be construed as a reference to the title of the statute or regulation;
  - (vi) references to any Article, Clause, Section, Schedule or Annexure, if any, shall be deemed to be a reference to an Article, Clause, Section, Schedule or Annexure of or to this Agreement.
- b) Clause headings in this Agreement are inserted for convenience only and shall not be used in its interpretation.
  - c) When any number of days is prescribed in this Agreement, the same shall be reckoned exclusively of the first and inclusively of the last day unless the last day does not fall on a Business Day, in which case the last day shall be the next succeeding day which is a Business Day.
  - d) If any provision in this Agreement is a substantive provision conferring rights or imposing obligations on anyone, effect shall be given to it as if it were a substantive provision in the body of this Agreement.
  - e) Any word or phrase defined in the body of this Agreement shall have the meaning assigned to it in such definition throughout this Agreement unless the contrary is expressly stated or the contrary clearly appears from the context.
  - f) The rule of construction, if any, that a contract shall be interpreted against the party responsible for the drafting and preparation thereof shall not apply.
  - g) Reference to days, months or years in this Agreement shall be a reference to calendar days, months or years, as the case may be, unless the contrary is expressly stated or clearly appears from the context.
  - h) Reference to any agreement, deed, document, instrument, rule, regulation, notification, statute or the like shall mean a reference to the same, as may have been duly amended, modified or replaced. For the avoidance of doubt, a document shall be construed as amended, modified or replaced only if such amendment, modification or replacement is executed in compliance with the provisions of such document(s).

## **2. Agreement**

2.1 ASP agrees to avail Services from ESP and ESP agrees to provide Services to ASP, in accordance with the terms and conditions of this Agreement.

2.2 ESP hereby appoints ASP as an entity authorized to access eSign services through ESP.

### **3. Representations**

#### **3.1 Representations of ESP:** ESP represents to ASP that-

- (i) the ESP is an entity legally constituted and validly existing under the laws of India;
- (ii) ESP has all requisite powers and authority and has taken all actions necessary to execute, deliver, and perform its obligations under this Agreement;
- (iii) this Agreement has been validly executed by ESP and constitutes a valid agreement binding on ESP and enforceable in accordance with the laws of India;
- (iv) ESP has obtained and shall maintain all valid licenses, permissions, approvals etc. from requisite Government authorities, departments etc. to perform Services and other obligations under this Agreement;

ESP agrees that these representations are present and continuing representation.

#### **3.2 Representations of ASP:** ASP represents to ESP that-

- (i) ASP is an entity legally constituted and validly existing under the laws of India;
- (ii) ASP has all requisite powers and authority and has taken all actions necessary to execute, deliver, and perform its obligations under this Agreement;
- (iii) this Agreement has been validly executed by ASP and constitutes a valid agreement binding on ASP and enforceable in accordance with the laws of India.

### **4. Scope of Services**

4.1 The ESP shall provide services (‘Services’) as per this Agreement.

### **5. Obligations of ESP**

5.1 The ESP shall, during the Term of this Agreement, maintain necessary licences with CCA or Certifying Authority (as the case may be) as required for issuance of DSC;

5.2 The ESP shall, during the Term of this Agreement, maintain its empanelment with CCA

### **6. Obligations of ASP**

6.1 ASP, who is seeking to use eSign to enable a specific service/business functions, is solely responsible for the choice of authentication type(s). The choice of the Authentication type shall be the sole decision of the ASP, and no other entity, ESP or eSign user shall have any role in this decision of ASP.

6.2 ASP assumes complete responsibility with regard to its network connectivity with ESP.

6.3 ASP shall establish and maintain necessary eSign related operations, including systems, processes, infrastructure, technology, security, etc., in compliance with standards and specifications, issued by CCA from time to time.

- 6.4 ASP shall, at all times, comply with the provisions contained in the Information Technology Act, 2000 and the statutory rules framed there under, from time to time, in so far as the same has application to its operations in accordance with this Agreement, and also with all other Laws, rules and regulations, whether already in force or which may be enacted anytime in the future, pertaining to data security and management, data storage, sharing and data protection, as also with the National Identification Authority of India Bill, as and when the same is enacted into a law and comes into force, and shall ensure the same level of compliance .
- 6.5 ASP shall maintain logs of all eSign related transactions processed by it, capturing the complete details of the eSign requirements. The ASP understands and agrees that the logs maintained by it shall not be shared with any individual or entity, and that the storage of the logs maintained by it shall comply with all the relevant laws, rules and regulations, including, but not limited to, the Information Technology Act, 2000 and the Evidence Act, 1872.
- 6.6 In case of any investigations around signature related fraud(s) or dispute (s), the ASP shall extend full cooperation to ESP/CCA and/or any agency appointed/authorized by it and/or any other authorized investigation agency, including, but not limited to, providing access to their premises, records, personnel and any other relevant resource / information, etc. of or pertaining to its eSign,
- 6.7 ASP shall obtain consent from eSign users to use their e-KYC information for eSign for availing eSign Services from ESP for DSC application form, key-generation, certificate issuance , signature creation and\_key destruction”

## **7. Service Level Agreement of ESP**

- 7.1 ESP shall provide services in accordance with the service levels (‘Service Level Agreement’) as specified in ‘Schedule II’ appended to this Agreement. In case of breach of such service levels, ASP shall be authorized to levy such penalty as specified in Service Level Agreement.

## **8. Liquidated damages -**

### **9. Fees**

- 9.1 For each completed Successful Transaction, ASP shall be liable to pay ESP an amount of Rs. \_\_\_\_ (‘Fees’).
- 9.2 ESP shall raise invoice for the Fees on ASP in arrears on monthly basis. Along with the invoices, ESP shall send transaction reference numbers certificate of Successful Transaction(s) for which the invoice has been raised. If requested by ASP, ESP shall also share with ASP either the complete list of transaction numbers or the specific log against requested transaction number, as the case may be. Notwithstanding the foregoing, ASP shall maintain the clear log of transactions for ASP’s reconciliation purposes.
- 9.3 The Fees shall be due and payable upon receipt of invoice by ASP. ASP shall pay ESP for all undisputed Successful Transactions mentioned in an invoice within 30 days of receipt of invoice by ASP. For the disputed Successful Transactions, the amount shall be paid with 30 days of the date on which such dispute is resolved by the Parties.
- 9.4 ASP shall deduct TDS from payments to be made to ESP as per the extant applicable Laws. ASP shall also have the right to deduct any penalties, liquidated damages or other monies

owed by ESP to ASP, from any payments due and payable by ESP to ASP under this Agreement.

9.5 Minimum transaction guarantee.

## **10. Taxes**

10.1 The Fees is exclusive of applicable taxes. All applicable taxes on the Services shall be borne by ASP and shall be paid by ASP to ESP in addition to the Fees.

## **11. Force Majeure**

11.1 The Parties agree that neither of them shall be liable to the other for any loss, delay, damage or other casualty suffered or incurred by the other owing to earthquakes, floods, fires, explosions, acts of God, war, terrorism, or any other such cause, which is beyond the reasonable control of the Party and any failure or delay by any other Party in the Performance of any of its obligations under this Agreement owing to one or more of the foregoing causes shall not be considered as a breach of any of its obligations under this Agreement. The Parties however agree that any financial failure or non-performance of any financial obligations or covenants of the Parties shall not constitute Force Majeure.

11.2 The Party claiming benefit of Force Majeure shall however not be entitled to the same unless it has intimated the other Party of the occurrence of such an event within a period of seventy hours from the occurrence of such Force Majeure event indicating therein the steps that it is taking or intending to take to mitigate the effect of such Force Majeure on the performance of his obligations under this Agreement.

## **12. Confidentiality and data protection**

12.1 Each Party shall treat all information, which is disclosed to it as a result of the operation of this Agreement, as Confidential Information, and shall keep the same confidential, maintain secrecy of all such information of confidential nature and shall not, at any time, divulge such or any part thereof to any third party except as may be compelled by any court or agency of competent jurisdiction, or as otherwise required by law, and shall also ensure that same is not disclosed to any person voluntarily, accidentally or by mistake.

12.2 Parties hereby unequivocally agrees to undertake all measures, including security safeguards, to ensure that the information in the possession or control of the Parties, as a result of operation of this Agreement, is secured and protected against any loss or unauthorised access or use or unauthorised disclosure thereof.

12.3 Parties agree that information liable to be disclosed under the Right to Information Act, 2005 shall not be considered as confidential information.

12.4 It is hereby mutually agreed that this Clause 13 shall survive the termination of this Agreement.

## **13. Intellectual Property Rights**

## **14. Indemnity**

14.1 IPR Indemnity

14.2 General Indemnity

### **15. Limitation of Liability**

15.1 The liability of ESP (whether in contract, tort, negligence, strict liability in tort, by statute or otherwise) for any claim in any manner related to this Agreement, shall be the payment of direct damages only which shall in no event in the aggregate exceed the \_\_\_\_\_ percentage of payments made during the preceding \_\_\_\_ months/years [OR the total value of the project]. Neither Party shall be liable to the other Party for any indirect, consequential or remote damages under this Agreement.

### **16. Audit rights**

16.1 The ASP shall ensure that its operations and systems in terms of this Agreement are audited by Cert-IN empanelled auditor on an annual basis to ensure compliance with ESP and CCA standards and specifications and the audit report should be shared with ESP and CCA upon request. In addition to the above, ESP and/or CCA may choose to, in its/their sole discretion, audit the ASP's operations and systems in terms of this Agreement by itself or through an auditor appointed by ESP/CCA, and the continuation of operations as the ASP shall, at all times, be dependent upon the said audit confirming the compliance by the ASP of the terms and conditions contained in this Agreement, and any failure in compliance of the same, if confirmed in the audit, may entail fine and/or penalties and termination of access to eSign Services. The ASP unequivocally agrees to provide full co-operation to ESP/CCA or any agency approved and/or appointed by ESP/CCA in the audit process, and to provide to ESP/CCA or any agency approved and/or appointed by ESP/CCA, complete access to its procedures, records and information pertaining to services availed. The audit rights of ESP/CCA shall be subject to such confidentiality undertaking as may be reasonably imposed by ASP to protect its confidential information.

### **17. Term**

17.1 This Agreement shall come into force and effect on the date first written above ('Effective Date').

17.2 Unless terminated earlier in accordance with the terms of this Agreement, this Agreement shall remain in force and effect for a period of \_\_\_\_ years from the Effective Date ('Term'). The Term of the Agreement may be extended by the Parties with mutual agreement.

### **18. Termination**

18.1 This Agreement shall be deemed to be automatically terminated (without any notice) if and when:

(a) the agreement between ESP and eKYC provider is terminated;

(b) the license/authority provided by CCA/Certifying Authority to ESP for providing DSC related services is revoked/cancelled/suspended.

18.2 Either Party may terminate this Agreement by giving 30 days prior written notice to the other Party.

### **19. Consequences of termination**

19.1 In case of termination of this Agreement due to any reason, ASP shall, pay ESP all due and payable amounts of Fees for the Successful Transactions completed till the effective date of termination.

19.2 In case of termination of this Agreement due to any reason or upon expiry of this Agreement, the ESP shall retain a copy of all logs, documents, artefacts etc. for a period of 7 years.

### **20. Dispute resolution / Arbitration**

20.1 In the case of any dispute arising upon or in relation to or in connection with this Agreement between the Parties, the disputes shall at the first instance be resolved through good faith negotiations, which negotiations shall begin promptly after a Party has delivered to the other Party a written request for such consultation.

20.2 In the case of any dispute arising upon or in relation to or in connection with this Agreement between the Parties, which have not been settled in accordance with Clause 21.1, any Party can submit the dispute for arbitration under the ICADR Arbitration Rules, 1996. The International Centre for Alternative Dispute Resolution will provide the administrative services in accordance with the ICADR Arbitration Rules, 1996.

20.3 The arbitration shall be presided upon by a sole arbitrator to be appointed by ICADR. The sole arbitrator shall be appointed by ICADR in accordance with and in full satisfaction of the qualifications to be prescribed for such arbitrator, including but not limited to qualifications as to technical experience, nationality and legal experience, by ASP, at the time of constitution of the arbitral tribunal.

20.4 Arbitration proceedings shall be held at New Delhi, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

20.5 The decision of the arbitrator shall be final and binding upon both parties. The expenses of the arbitrator as determined by the arbitrator shall be shared equally by the Parties. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the Party itself. All arbitration awards shall be in writing and shall state the reasons for the award.

20.6 The Parties shall continue to be performing their respective obligations under this Agreement, despite the continuance of the arbitration proceedings, except for the disputed part under arbitration.

20.7 The Parties shall use their best endeavours to procure that the decision of the Arbitrators shall be given within a period of six (6) months or soon thereafter as is possible after it has been demanded.

20.8 This Clause 20 is severable from the rest of this Agreement.

20.9 ASP may terminate this Agreement, by giving a written notice of termination of minimum 30 days to ESP, if ESP fails to comply with any decision reached consequent upon the arbitration proceedings.

## **21. Miscellaneous**

### **21.1 Applicable law and jurisdiction**

This Agreement shall, in all respects, be governed by, and construed in accordance with the laws of India. The Courts in New Delhi, India shall have exclusive jurisdiction in relation to this Agreement, including Clause 20.

### **21.2 Waiver**

No failure by a Party to take any action with respect to a breach of this Agreement or a default by any other Party shall constitute a waiver of the former Party's right to enforce any provision of this Agreement or to take action with respect to such breach or default or any subsequent breach or default. Waiver by any Party of any breach or failure to comply with any provision of this Agreement by a Party shall not be construed as, or constitute, a continuing waiver of such provision, or a waiver of any other breach or failure to comply with any other provision of this Agreement, unless any such waiver has been consented to by the other Party in writing.

### **21.3 Severability**

If any Clause or part thereof, of this Agreement or any agreement or document appended hereto or made a part hereof is rendered invalid, ruled illegal by any court of competent jurisdiction, or unenforceable under present or future Laws effective during the term of this Agreement, then it is the intention of the Parties that the remainder of the Agreement, or any agreement or document appended hereto or made a part hereof, shall not be affected thereby unless the deletion of such provision shall cause this Agreement to become materially adverse to any Party in which case the Parties shall negotiate in good faith such changes to the Agreement, or enter into suitable amendatory or supplementary agreements, as will best preserve for the Parties the benefits and obligations under such provision.

### **21.4 Notices**

Any notice, direction or other documentation required or remitted to be given hereunder shall be in writing and may only be given by personal delivery, international courier, electronic mail or facsimile (with confirmation received) at the addresses hereinafter set forth:

(i) **For ASP:**

Address: \_\_\_\_\_

Attention : \_\_\_\_\_

Phone Numbers: \_\_\_\_\_

Fax No. : \_\_\_\_\_

e-mail: \_\_\_\_\_

(ii) **For ESP:**

Address: \_\_\_\_\_

Attention : \_\_\_\_\_

Phone Numbers: \_\_\_\_\_

Fax No. : \_\_\_\_\_

e-mail: \_\_\_\_\_

**21.5 Enurement**

This Agreement will enure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns.

**21.6 Expenses**

Each of the Parties shall bear the fees and expenses of their respective counsels, accountants and experts and all other costs and expenses as may be incurred by them incidental to the negotiation, preparation, execution and delivery of this Agreement.

**21.7 Surviving provisions**

The provisions of this Agreement, which are intended to survive the term of this Agreement by their very nature, shall survive the termination of this Agreement. Notwithstanding the generality of the above, clauses related to indemnity, confidentiality, arbitration and applicable law and jurisdiction shall survive the termination/expiration of this Agreement.

**21.8 Assignment**

This Agreement shall not be assigned by either Party without obtaining a prior written consent from the other.

**21.9 Entire Agreement**

This Agreement constitutes the entire agreement between the Parties. There are not and will not be any verbal statements, agreements, assurances, representations and warranties or undertakings among the Parties and this Agreement may not be amended or modified in any respect except by written instrument signed by the Parties.

**21.10 Counterparts**

This Agreement may be executed in one or more counterparts, all of which shall be read and construed as one document and any facsimile signature hereto shall be deemed to be an original signature.

**IN WITNESS WHEREOF** the parties have each executed this Agreement by its duly authorized officer as of the day and year first above written

SIGNED AND DELIVERED FOR AND ON BEHALF OF ASP:

Title: \_\_\_\_\_

Designation: \_\_\_\_\_

Signature: \_\_\_\_\_

SIGNED AND DELIVERED FOR AND ON BEHALF OF ESP:

Title: \_\_\_\_\_

Designation: \_\_\_\_\_

Signature: \_\_\_\_\_

## **Schedule I**

### **Scope of work**

#### **For eSign Service Provider**

The services which need to be performed by the eSign Service Provider include the following, but not limited to:

- The ESP should accept only digitally signed e-KYC Service response and the same should be verified against registered e-KYC Provider
- eSign Service provider should facilitate the generation of the subscriber's key pair in accordance with the Information Technology Act
- The key generation process shall generate statistically random key values that are resistant to known attacks
- Keys shall be transferred from the key generation system to the storage device (if the keys are not stored on the key generation system) using a secure mechanism that ensures confidentiality and integrity
- The ESP should secure the key pairs hardware security module which are in accordance with Information Technology Act
- The ESP should generate application form for digital signature using e-KYC and send to the Certifying Authority for generation of digital signature certificate
- The newly generated digital signature value should be attached to the hash of the document sent for signing
- Creates an audit trail for the transaction
- Send the hash of the document which is digitally signed, back to the ASP/ end-user

#### **For Application Service Provider**

The activities which the Application Service Provider needs to take care at its end include, but not limited to the following:

- Provide the end user with the required web interface to enable him to sign the document digitally.
- Creates a document hash (to be signed) on the client side to be sent to the ESP
- A connection needs to be established with the eSign Service Provider so that the request could be sent and received from the ASP's end
- The Application Service Provider should obtain consent for "Application Form Creation based on Aadhaar eKYC authentication response, DSC application form submission, key-generation, certificate issuance, key destruction and signature creation by <ESP Name>" for each eSign
- Provide adequate security mechanism to ensure that the integrity, authenticity of data and resistant to all known attacks.
- The delegation of responsibilities of eSign related obligations should not be delegated other than to the application owned or operated by ASP

Both the parties, that is, Application Service Provider and eSign Service Provider have to follow the guidelines and rules laid down by the Office of Controller of Certifying Authorities regarding the eSign service along with the Information Technology Act.

The parties also need to obey the guidelines issued by the e-KYC provider regarding the usage of e-KYC for authentication of end user and need to comply with it fully before imparting eSign services to the citizens.

\*\*\*\*\*