

## DOCKETED

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| <b>Docket Number:</b>   | 14-HERS-01   |
| <b>Project Title:</b>   | 14-HERS-01 Home Energy Rating System   |
| <b>TN #:</b>            | 210456-9   |
| <b>Document Title:</b>  | Exhibit G - CHEERS Registry Agreement General Provisions                       |
| <b>Description:</b>     | Attachment as to CHEERS Letter for Confidentiality Resubmittal under TN 210232 |
| <b>Filer:</b>           | Patty Paul   |
| <b>Organization:</b>    | ConSol Home Energy Efficiency Rating Services, Inc. (CHEERS)                   |
| <b>Submitter Role:</b>  | Applicant Representative   |
| <b>Submission Date:</b> | 2/18/2016 3:53:13 PM   |
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## EXHIBIT G

### CHEERS REGISTRY AGREEMENT GENERAL PROVISIONS

#### 1. SERVICES

**1.1 Registry User Subscriptions.** The Services may be used by only Registry Users designated by Registry Client on Exhibit B, and as may be revised from time-to-time by Registry Client upon acceptance by CHEERS and the payment of any applicable subscription fees. The functionality of the CHEERS System may vary for each Subscription Category and is subject to change from time-to-time without notice. Unless otherwise specified, (i) Services are available only to Registry Users and may be accessed by no more than the specified number of Registry Users, if applicable, (ii) additional Registry User subscriptions may be added during the applicable subscription term at the same pricing as that for the pre-existing subscriptions thereunder, prorated for the remainder of the subscription term in effect at the time the additional Registry User subscriptions are added, and (iii) the added Registry User subscriptions shall terminate on the same date as the pre-existing Registry User subscriptions. Registry User subscriptions are designated for Registry Users only and cannot be shared or used by more than one Registry User, but may be reassigned to new Registry Users replacing former Registry Users who no longer require ongoing use of the Services.

**1.2 Access Restrictions.** The CHEERS System is restricted by authorization relative to each Subscription Category. Unique secure login and passwords are issued to each Registry User for the purpose of maintaining security, privacy, and integrity of the data and services provided. No Registry User may share his or her login or password with any other person under any circumstance. CHEERS may, in its sole discretion, rescind access rights to Registry Client and any of its Registry Users if Registry Client or any of its Registry Users share their login or password with another or use another's secure login.

**1.3 CHEERS Responsibilities.** CHEERS shall: (i) provide CHEERS basic support for the Services to Registry Client at no additional charge, and/or upgraded support if purchased, (ii) use commercially reasonable efforts to make the Services available 24 hours a day, 7 days a week, except for: (a) planned downtime (of which CHEERS shall give at least 8 hours notice via the Services and which CHEERS shall schedule to the extent practicable during the weekend hours from 6:00 p.m. Friday to 3:00 a.m. Monday Pacific time), or (b) any unavailability caused by circumstances beyond CHEERS's reasonable control, including without limitation, acts of God, acts of government, floods, fires, earthquakes, civil unrest, acts of terror, strikes or other labor problems (other than those involving CHEERS employees), Internet service provider failures or delays, or denial of service attacks, and (iii) provide the Services only in accordance with applicable laws and government regulations.

**1.4 Registry Client Responsibilities.** Registry Client shall (i) comply with all applicable federal, state and local laws, rules and regulations, (ii) be responsible for all Registry Users' compliance with all obligations of Registry Client under this Agreement, including, without limitation, those of HERS Raters under Section 4 of this Agreement, (iii) be liable for all actions taken by its Registry Users, (iv) be responsible for the accuracy, quality and legality of Registry Client data and of the means by which it acquired Registry Client data, (v) use commercially reasonable efforts to prevent unauthorized access to or use of the Services, and notify CHEERS promptly of any such unauthorized access or use, and (vi) use the Services only in accordance with the CHEERS Materials (as hereinafter defined) and applicable laws and government regulations. Registry Client shall not (a) make the Services available to anyone other than Registry Users, (b) sell, resell, rent or lease the Services, (c) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use the Services to store or transmit malicious code, (e) interfere with or disrupt the integrity or performance of the Services or third-party data contained therein, or (f) attempt to gain unauthorized access to the Services or their related systems or networks. Registry Client is solely responsible for all hardware, software and communications equipment necessary to access the CHEERS system.

#### 2. FEES AND PAYMENT

**2.1 Fees.** Registry Client shall pay all fees in accordance with the Fee Schedule. Unless otherwise stated, (i) fees are based on services purchased and not actual usage, (ii) payment obligations are non-cancelable and fees paid are non-refundable, and (iii) the number of Registry User subscriptions purchased cannot be decreased during the relevant subscription term. Registry User subscription fees are based on monthly periods that begin on the subscription start date and each monthly anniversary thereof; therefore, fees for Registry User subscriptions added in

the middle of a monthly period will be charged for that full monthly period and the monthly periods remaining in the subscription term.

**2.2 Invoicing and Payment.** Fees are generally to be paid in advance. In its sole discretion, however, CHEERS reserves the right to invoice certain Registry Clients in advance, at the time of service, or on a monthly schedule. If invoiced by CHEERS, fees are due net 30 days from the invoice date. Registry Client is responsible for providing complete and accurate billing and contact information to CHEERS and notifying CHEERS of any changes to such information.

**2.3 Overdue Charges.** If any amounts invoiced hereunder are not received by CHEERS by the due date, then at CHEERS's discretion, (a) such charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid, and/or (b) CHEERS may condition future Services on payment terms shorter than those specified in the "Invoicing and Payment" section above.

**2.4 Suspension of Service.** If any charge owing by Registry Client is 30 days or more overdue, CHEERS may, without limiting its other rights and remedies, eliminate any discounts or suspend Services until such amounts are paid in full, provided CHEERS has given Registry Client 10 or more days' prior notice that its account is overdue in accordance with the "Notices" section below before suspending Services.

**2.5 Payment Disputes.** CHEERS shall not exercise its rights under the "Overdue Charges" or "Suspension of Service" section above if Registry Client is disputing the applicable charges reasonably and in good faith and is cooperating diligently to resolve the dispute.

**2.6 Taxes.** Unless otherwise stated, CHEERS' fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales and use, or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "**Taxes**"). Registry Client is responsible for paying all Taxes associated with its purchases hereunder. If CHEERS has the legal obligation to pay or collect Taxes for which Registry Client is responsible under this paragraph, the appropriate amount shall be invoiced to and paid by Registry Client, unless Registry Client provides CHEERS with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, CHEERS is solely responsible for taxes assessable against it based on its income, property and employees.

### **3. PROPRIETARY RIGHTS**

**3.1 Reservation of Rights in Services.** Subject to the limited rights expressly granted hereunder, CHEERS reserves all rights, title and interest in and to the Services, including all related intellectual property rights. No rights are granted to Registry Client hereunder other than as expressly set forth herein.

**3.2 Proprietary Information.** Registry Client and its Registry Users may use the CHEERS Training Manuals, User Guides, and other supplementary materials made available by CHEERS to Registry Clients (collectively "CHEERS Materials") and supporting Proprietary Information under the following terms and conditions:

- A. Registry Client agrees that the CHEERS Materials and Proprietary Information are owned exclusively by CHEERS, and are protected by the copyright laws of the United States. Registry Client agrees that Registry Client obtains no rights in the CHEERS Materials or Proprietary Information, except to use them specifically in accordance with this Agreement.

"Proprietary Information" shall mean CHEERS' confidential information, trade secrets and know-how embodied in the CHEERS Materials and not generally known or available to the public, including, but not limited to, data communication processes and systems design.

- B. The CHEERS Materials and Proprietary Information may only be used by the Registry Users who shall keep strictly confidential the CHEERS Materials and Proprietary Information, and acknowledge that the CHEERS Materials and Proprietary Information constitute valuable property and work

product of CHEERS, that any breach of the confidentiality obligations hereunder may cause CHEERS irreparable harm and damage, and that all confidentiality obligations hereunder shall survive any expiration or termination of this Agreement.

C. Registry Client and its Registry Users may not do the following:

1. Make copies of the CHEERS Materials.
2. Alter, remove or conceal any copyright or trademark notice on CHEERS Materials.
3. Assign or transfer any rights to use the CHEERS Materials or Proprietary Information except as set forth in this Agreement.

D. CHEERS shall have the right, without prior approval from or notice to Registry Client, to make changes, updates, modifications or enhancements to any of the CHEERS Materials or other work product or manuals, and such changes, updates, modifications and enhancements shall remain the property of CHEERS.

**3.3 Restrictions.** Registry Client shall not (i) permit any third party to access the Services except as contemplated by Section 3.4 below, (ii) create derivative works based on the Services except as permitted herein, (iii) copy, frame or mirror any part or content of the Services, other than copying or framing on Registry Client's own intranets or otherwise for its own internal business purposes, (iv) reverse engineer the Services, or (v) access the Services in order to (a) build a competitive product or service, or (b) copy any features, functions or graphics of the Services.

**3.4 Third Party Representatives.** The CHEERS system may permit Registry Client to specifically authorize others to act on Registry Client's behalf ("Third Party Representative"), such as giving others signature authority on certain governmental forms. Registry Client hereby authorizes CHEERS to accept and act upon all actions taken by any Third Party Representative for all intents and purposes. Registry Client represents and warrants to CHEERS that any such delegation of authority by Registry Client to a Third Party Representative (including delegation of signature authority) complies with all laws, rules and regulations. Registry Client acknowledges and agrees that Registry Client is solely responsible for all actions taken by Third Party Representatives.

**3.5 Suggestions.** CHEERS shall have a royalty-free, worldwide, irrevocable, perpetual license to use and incorporate into the Services any suggestions, enhancement requests, recommendations or other feedback provided by Registry Client, including Users, relating to the operation of the Services.

#### **4. SPECIAL REQUIREMENTS FOR HERS RATERS**

**4.1 Representations of HERS Raters.** Registry Client hereby represents and warrants to CHEERS that its Registry Users that are HERS Raters have completed all CHEERS required training courses and passed required certification courses, as recorded by training certificates posted on the System.

**4.2 Obligations of HERS Raters.** All Registry Users of Registry Client who are HERS Raters shall (i) comply with all CHEERS performance and quality assurance procedures which may be amended from time-to-time by CHEERS ("Procedures"), (ii) comply with all applicable federal, state and local laws, rules and regulations, including, without limitation, those specified at Section 1673(b) of the Regulations (as hereinafter defined), (iii) provide true, accurate and complete data collection, analysis, ratings, and field verification and diagnostic testing, (iv) not accept payment or consideration in exchange for reporting data gathered for a rating, analytical results used for a rating, or a rating result that was not in fact conducted and reported in compliance with the Regulations, (v) comply with the conflict of interest requirements specified in Section 1673(j) of the Regulations, (vi) personally complete all required field verification and diagnostic testing, (vii) transmit all data to the CHEERS System within forty-eight (48) hours of completing the field verification and diagnostic testing, (viii) shall be responsible for all data transmitted, (ix) shall keep as confidential all ratings, field verifications and diagnostic testing results and all information gathered from rating customers except for transmission to the CHEERS System, and (x) shall notify CHEERS within 5 business days of severing or changing your employment status with your existing Rating Company as listed in the CHEERS database. All confidentiality obligations of Registry User

and Registry Client shall survive termination of this Agreement. No Registry User (HERS Rater) may rate or perform a field verification or diagnostic test on any home in which the Registry User has any financial interest.

**4.3 Rater Agreement.** Each Registry User of Registry Client that is a HERS Rater shall sign an agreement to be bound by the provisions of this Agreement (“Rater Agreement”).

**4.4 Acknowledgement.** The failure of Registry Client or any of its Registry Users to abide by the terms and conditions of this Agreement may result in the rescission of access rights to the Services. Registry Client acknowledges that access to a data registry is a requirement of maintaining active status as a HERS Rater and if data registry access is denied or suspended, the HERS Rater may be decertified or suspended automatically.

## **5. WARRANTIES, EXCLUSIVE REMEDIES AND DISCLAIMERS**

**5.1 CHEERS Warranties.** CHEERS warrants that (i) it has validly entered into this Agreement and has the legal power to do so, (ii) the Services shall perform materially in accordance with its specifications, and (iii) the functionality of the Services will not be materially decreased during a subscription term. For any breach of a warranty above, Registry Client’s exclusive remedy shall be as provided in the “Termination by Registry Client” and “Effect of Termination” sections below.

**5.2 Modifications to Services and Materials.** CHEERS reserves the right to make any and all changes at any time and from time-to-time to the CHEERS System, Services, and the CHEERS Materials without prior notice to Registry Client.

**5.3 Registry Client’s Warranties.** Registry Client warrants that it has validly entered into this Agreement and has the legal power to do so. Use of the Services is at Registry Client’s sole risk.

**5.4 Disclaimer.** The Services are provided on an “as is, as available” basis. EXCEPT AS EXPRESSLY PROVIDED HEREIN, CHEERS MAKES NO WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.

## **6. INDEMNIFICATION AND LIMITATION OF LIABILITY**

**6.1 Indemnification by Registry Client.** Registry Client shall indemnify, defend and hold CHEERS and its employees, officers, directors, shareholders, agents, representatives, and independent contractors harmless from and against any claim, demand, suit or proceeding arising from, relating to or in connection with this Agreement or the use of the Services except for claims finally adjudicated to be from the sole negligence or willful conduct of CHEERS.

**6.2 Limitation of Liability.** THE LIABILITY OF CHEERS WITH RESPECT TO ANY SINGLE INCIDENT ARISING OUT OF OR RELATED TO THIS AGREEMENT (WHETHER IN CONTRACT OR TORT OR UNDER ANY OTHER THEORY OF LIABILITY) SHALL EXCEED THE AMOUNT PAID BY REGISTRY CLIENT HEREUNDER IN THE 12 MONTHS PRECEDING THE INCIDENT, PROVIDED THAT IN NO EVENT SHALL THE AGGREGATE LIABILITY OF CHEERS ARISING OUT OF OR RELATED TO THIS AGREEMENT (WHETHER IN CONTRACT OR TORT OR UNDER ANY OTHER THEORY OF LIABILITY) EXCEED THE TOTAL AMOUNT PAID BY REGISTRY CLIENT HEREUNDER.

**6.3 Exclusion of Consequential and Related Damages.** IN NO EVENT SHALL CHEERS HAVE ANY LIABILITY FOR ANY LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

## **7. TERM AND TERMINATION**

**7.1 Term of Agreement.** This Agreement commences on the Effective Date and continues until terminated in accordance with this Agreement.

**7.2 Termination by Registry Client.** Registry Client may terminate this Agreement upon prior written notice to CHEERS at any time.

**7.3 Termination by CHEERS.** Upon written notice to Registry Client, CHEERS may terminate this Agreement upon the occurrence of any of the following events by any Registry User, employee, officer, or owner of the Registry Client:

- A. Failure to comply with any of the terms and conditions of this Agreement or any other agreement between Registry Client and CHEERS.
- B. Conviction of a felony.
- C. Disciplinary action by the Contractors State License Board or any like authority.
- D. Willful failure to provide a true, accurate and complete rating, field verification or diagnostic testing.
- E. Pattern of failure to provide a true, accurate and complete rating, field verification, diagnostic testing or data entry, whether willful or not.
- F. Two or more complaints from ratings customers or potential customers.
- G. Failure to pay any amounts due CHEERS as per the CHEERS Fee Schedule.
- H. Misrepresentation of Registry Client's relationship with CHEERS.
- I. Any act or failure to act which, in CHEERS' opinion, harms its name or reputation
- J. For any reason deemed reasonable by CHEERS unless prohibited by law.

**7.4 Other Termination.** This Agreement shall automatically terminate upon the occurrence of any of the following events: Registry Client is adjudged bankrupt, placed in the hands of a receiver, makes an assignment for the benefit of creditors, takes the benefit of any insolvency act, or is liquidated or dissolved.

**7.5 Effect of Termination.** Upon termination of this Agreement, Registry Client and its Registry Users shall have no further access to the System. Upon any termination for cause by Registry Client, CHEERS shall refund Registry Client any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination. Upon any termination for cause by CHEERS, Registry Client shall pay any unpaid fees covering the remainder of the term after the effective date of termination. In no event shall any termination relieve Registry Client of the obligation to pay any fees payable to CHEERS for the period prior to the effective date of termination. Upon termination of this Agreement Registry Client shall immediately return to CHEERS any and all CHEERS Materials or other Proprietary Information in Registry Client's or any of its Registry Users' possession or control.

**7.6 Surviving Provisions.** The sections titled "Fees and Payment," "Proprietary Rights," "Warranties, Exclusive Remedies and Disclaimers," "Indemnification and Limitation of Liability," "Effect of Termination," "Surviving Provisions" and "General Provisions" shall survive any termination or expiration of this Agreement.

## **8. GENERAL PROVISIONS**

**8.1 Relationship of the Parties.** The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties. Neither Registry Client nor any of its Registry Users may represent itself to be an employee, agent or representative of CHEERS, provided, however, during the term of this Agreement, a Registry User who is a HERS Rater and complies with all applicable terms and conditions relative to HERS Raters under this Agreement may indicate that he or she is a CHEERS Certified Rater.

**8.2 No Third-Party Beneficiaries.** There are no third-party beneficiaries to this Agreement.

**8.3 Notices.** Except as otherwise specified in this Agreement, all notices, permissions and approvals hereunder shall be in writing and shall be deemed to have been given upon: (i) personal delivery, (ii) upon delivery if sent by Federal Express, UPS or similar service, or (iii) the second business day after mailing and sending by confirmed facsimile. Notices under this Agreement shall be addressed to the address for such party on the first page of this Agreement or as changed by a party from time-to-time by providing written notice thereof to the other party. Notwithstanding anything herein to the contrary, CHEERS may post any changes to the Services to the CHEERS System (including, without limitation, any changes to the Fee Schedule and Procedures), and such changes shall become effective upon reasonable notice to Registry Client (not to exceed thirty (30) days). Any use of the Services by Registry Client or any of its Registry Users after any such changes are posted to the CHEERS System shall be conclusively deemed Registry Client's consent to such changes.

**8.4 Waiver.** No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right.

**8.5 Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

**8.6 Assignment.** Registry Client may not assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of CHEERS.

**8.7 Governing Law and Dispute Resolution.** This Agreement, and any disputes arising out of or related hereto, shall be governed exclusively by the internal laws of the State of California, without regard to its conflicts of laws rules. Any dispute arising from, relating to or in connection with this Agreement or the Services shall be finally resolved by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in the City of Stockton, California. The losing party shall pay the prevailing party's reasonable costs and expenses (including reasonable attorneys' fees) in connection with any arbitration under this Agreement.

**8.8 Regulations.** Registry Client acknowledges that Registry Client has read California Code of Regulations, Title 20, Chapter 4, Article 8, Sections 1670-1675 ("Regulations"), a copy of which is attached as Exhibit D and incorporated herein by reference, understands the Regulations and the HERS Technical Manual and, if applicable, agrees to provide home energy rating, field verification services and diagnostic testing services in compliance with the Regulations and HERS Technical Manual. Registry Client specifically agrees to comply with the conflict of interest requirements as specified in Section 1673(j) of the Regulations, and the following requirements as specified in Section 1673(b) of the Regulations: "Provide true, accurate, and complete data collection, analysis, ratings and field verification and diagnostic testing," and "Not accept payment of consideration in exchange for reporting data gathered for a rating, analytical results used for a rating, or a rating result that was not in fact conducted and reported in compliance with these regulations."

**8.9 Entire Agreement.** This Agreement, including all exhibits and addenda hereto, constitutes the entire agreement between the parties and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom the

modification, amendment or waiver is to be asserted. Notwithstanding any language to the contrary therein, no terms or conditions stated in any Registry Client purchase order or other communication or documentation shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

**8.10 Counterparts.** This Agreement may be executed by facsimile and in counterparts, which taken together shall form one legal instrument.



# Rater Agreement Terms and Conditions

The undersigned HERS Rater, hereby (i) represents and warrants that he or she (A) is affiliated (as an employee or otherwise) with a Registry Client of CHEERS, and (B) has received, read and understood the CHEERS Registry Agreement to which such Registry Client is a party ("Agreement"), and (ii) agrees to comply with all of the terms and conditions of the Agreement, including, without limitation, those applicable to HERS Raters under Section 4 of the Agreement.

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Rater's Printed Name

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Rater's Signature

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Date