

# Heraeus Precious Metals North America General Terms and Conditions on the Refinement of Precious Metal-Containing Material (03/2015)

## 1 Scope of Application

These General Terms and Conditions (these "**Terms**") govern the refinement by Heraeus Precious Metals North America LLC ("**Heraeus**") of precious metal-containing material delivered by the Customer ("**Refining Material**").

These Terms, together with the quotation of Heraeus provided with these Terms ("**Quotation**"), contain all agreements and understandings between the parties with regard to any refining contracts to be concluded between Heraeus and the Customer, and the provisions of these Terms and the Quotation are conclusive and binding upon the parties. Heraeus hereby rejects any terms and conditions of the Customer which deviate from these Terms or from applicable rules or law. The Customer's terms and conditions will be accepted only with the express written consent of Heraeus.

## 2 Delivery of the Refining Material

2.1 The Refining Material shall be delivered "DDP", Incoterms 2010 (place of destination as indicated in the Quotation) at the Customer's risk and expense.

2.2 During an incoming inspection of the Refining Material, Heraeus will determine the type and number of containers and the gross incoming weight. The gross incoming weight will be recorded in writing and the Customer will be notified. If the Customer does not object within 4 working days to the weight so notified, the weight will be deemed accepted by the Customer. "**Working day**" means any day other than Saturdays, Sundays, legal holidays and bridge days of the Heraeus plant.

During the incoming inspection, Heraeus is not obliged to open the containers or to check the delivered material for consistency with the documentation regarding the Refining Material provided by the Customer.

If Heraeus discovers in the course of the incoming inspection or at a later point in time that the Refining Material is not consistent with the documentation regarding the Refining Material provided by the Customer, Heraeus must inform the Customer of the respective inconsistencies only if Heraeus refuses to perform the refining based on these inconsistencies. Heraeus will also inform the Customer if the Refining Material is quarantined due to inconsistencies with the documentation regarding the Refining Material or if the Refining Material containers were compromised.

2.3 Upon completion of weighing and sampling, Customer's title to the Refining Material will pass to Heraeus, unless otherwise agreed by the parties.

## 3 No Guarantee of Success

Heraeus will perform its services for the Customer with due and reasonable diligence, following the processes and procedures customarily applied by Heraeus to precious metal containing material. Heraeus does not guarantee any specific outcome or assume any responsibility beyond performing its services to this standard. In particular, Heraeus does not and cannot guarantee the successful pretreatment,

homogenization, sampling or refining of the Refining Material.

## 4 Removal of Materials, Homogenization, Pretreatment and Sampling

4.1 Heraeus will determine the net incoming weight by deducting the tare weight from the gross incoming weight. If necessary, Heraeus will pretreat and homogenize the Refining Material. In certain cases, low-grade materials or materials to be discarded will be removed in consultation with the Customer prior to refining. The weight of the homogenized material, less (a) the weight of the retained samples and (b) any weight loss from drying, will be the settlement weight relevant for final settlement ("**Settlement Weight**").

4.2 After homogenization of the Refining Material, Heraeus will extract at least the agreed number of samples. From the extracted samples, an agreed number of samples will be given to the Customer.

4.3 Pretreatment, homogenization, sampling and splitting of samples will be performed consistent with the processes and procedures customarily applied by Heraeus.

4.4 If technically feasible, the Customer or its representative may attend the sampling. If the Customer or its representative is present during sampling, the Customer must acknowledge the applicable written sampling protocol, a copy of which the Customer will receive for its records. If neither the Customer nor its representative attend the sampling, the Customer will not receive a copy of the sampling protocol.

## 5 Assay of the Refining Material

Whether or not the Customer is represented at sampling, Heraeus considers a variety of factors in determining the settlement value for the refining material ("**Settlement Value**"), including among others, the character and historic quality of Customer's Refining Material, Heraeus' laboratory analysis and the uncertainties thereof, Customer's estimate or projection of precious metal content in the Refining Material, the estimated yield on final recovery, Heraeus' risks and costs, and Heraeus' refining practices and processes. Only the precious metals that have been agreed between the parties ("**Covered Precious Metals**") will be included in Heraeus' statement of Settlement Values (and subsequently refunded to the Customer). If the Customer does not demand an exchange of Settlement Values, the Settlement Value determined by Heraeus and communicated to the Customer shall be the settlement basis for final settlement ("**Settlement Basis**"). If the Customer wishes an exchange of Settlement Values, the Settlement Basis will be determined as follows:

Heraeus and the Customer will simultaneously exchange one Settlement Value by registered mail on an agreed date. Thereafter:

If the exchanged Settlement Values fall within the splitting limits, the arithmetic mean of the exchanged Settlement Values will be the Settlement Basis. The splitting limits are set forth in the Quotation.

If the exchanged Settlement Values are outside the splitting limits, the exchange of the Settlement Values will be repeated. The second exchange will automatically supersede the results of the first exchange. If the Settlement Values of the second exchange are still outside the splitting limits, the parties will endeavor to amicably agree on a Settlement Basis. If no agreement is reached, a neutral umpire laboratory will conduct an umpire assay on a retained umpire sample.

The umpire laboratory will be selected from a pre-approved list provided with the Quotation after eliminating: (a) any laboratory that represented either party at the sampling of the Refining Material; (b) any laboratory that conducted assays for any party and (c) one laboratory by each party for any or no reason.

If the result obtained by the umpire (calculated as the arithmetic mean of the assay results determined by the umpire) falls between the Settlement Values exchanged by the parties in the second assay exchange, the arithmetic mean of the umpire's result and the Settlement Value of the second assay exchange that is closest to the umpire's result will be the Settlement Basis. If the result of the umpire is outside the Settlement Values of the parties, the Settlement Value of the second assay exchange that is closest to the umpire's result will be the Settlement Basis.

The process in the preceding paragraph also applies if the exchange of Settlement Values is not repeated before an umpire assay.

The cost of the umpire assay must be paid by the party whose Settlement Value deviates most from the umpire's result.

Heraeus will keep unused samples for six months after the date of collection or the applicable sampling protocol.

If the Customer fails to engage with Heraeus in an exchange of the Settlement Values for longer than six months, the Settlement Value communicated by Heraeus will be the Settlement Basis.

## 6 Final Settlement

6.1 The Precious Metal Credit for each Covered Precious Metal ("**Precious Metal Credit**") will be determined as follows:

Precious Metal Credit (in the agreed unit of weight) =

$$\text{Settlement Basis in } \frac{\%}{100} \times \text{Return Rate in } \frac{\%}{100} \times$$

Settlement Weight in the agreed unit of weight

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Additional calculation parameter: Minimum Deduction

If a Minimum Deduction is agreed with the Customer, this Minimum Deduction will not be considered for the calculation of the Precious Metal Credit.

The Minimum Deduction (if agreed) and the Return Rates for the Covered Precious Metals are set forth in the Quotation.

Unless otherwise expressly agreed in writing, Heraeus does not return or compensate for any low-grade material or other materials discarded in consultation with the Customer.

6.2 The final settlement will be made within the Precious Metal Credit availability period agreed with the Customer. If the availability period of the Precious Metal Credit is expressed in days, the term days shall

mean calendar days. It is the understanding of the parties that the refining order will be deemed performed by Heraeus upon completion of the final settlement. Unless otherwise agreed between Heraeus and the Customer, Heraeus will credit the refundable precious metals to the Customer's precious metal weight account maintained at the Heraeus location indicated on the Quotation.

## 7 Precious Metal Weight Accounts

Heraeus will maintain a precious metal weight account for each Covered Precious Metal. Any physical metal, however, will be commingled. After the Precious Metal Credit is credited against a precious metal weight account, the parties' mutual claims for the delivery of precious metals will be replaced by a claim to the balance of account.

Any objections against a balance confirmation or a weight account statement must be raised by the Customer within six weeks of the Customer's receipt of such balance confirmation or weight account statement. The absence of a timely objection will be deemed to constitute approval by the Customer of the applicable balance or account statement. The parties will resolve any account dispute in good faith.

## 8 Further Disposition of Credited Precious Metals

8.1 With regard to the precious metals credited to its weight account, the Customer has the following options:

- a) Sale of the precious metals to Heraeus under a separate purchase agreement on the basis of a purchase price offered by Heraeus. Heraeus is under no obligation to purchase the offered precious metals.
- b) Physical return of the precious metals (bars, granules, sponge or powder), which may take up to 10 working days after the applicable precious metal is available. Heraeus will notify the Customer in advance of any costs associated with such return.

The return shipment will be ex works Heraeus facility identified on the Quotation excluding packaging, transport and transport insurance.

If the Customer elects to receive the precious metals in the form of bars or grains, the Customer will pay the additional costs for manufacture. Upon request, Heraeus will inform the Customer of the amount of such costs.

The precious metals to be returned shall be of the following quality:

Platinum	sponge, 99.95 % *
Gold	granules, 99.99 %
Silver	granules, 99.95 %
Iridium	powder, 99.90 %*
Rhodium	powder, 99.90 %*
Palladium	sponge, 99.95 %*, ground, grain size ≤ 2 mm
Ruthenium	powder, 99.90 %*

\* this value may be further reduced by a loss of reduction (LOR) not exceeding 0.05%

- c) Return of the precious metals as part of products purchased by the Customer from Heraeus under separate purchase agreements provided that Heraeus accepts a corresponding order, and further subject to applicable rule or law.

d) Holding the precious metal balance in the precious metal weight account at Heraeus.

e) Transfer to other weight accounts subject to Heraeus's consent expressed in compliance with applicable rule or law. Heraeus will notify the Customer in advance of any costs associated with such transfer.

8.2 Heraeus may, at any time and without stating reasons, cancel precious metal weight accounts of the Customer with 10 working days' notice and physically return precious metals to the Customer in order to balance the Customer's weight accounts. The quality requirements for the precious metals to be returned are set forth in Section 8.1 (b) above.

## **9 Provision of Securities for the Benefit of Heraeus**

9.1 In an addition to any transfer of title, and in the event title to the metal does not perfect with Heraeus, by shipping the Refining Material, the Customer grants to Heraeus a first-priority security interest in all of the Covered Precious Metal and other tangible property delivered by the Customer to the possession, custody, or control of Heraeus to secure all liabilities and obligations of every kind and nature now or hereafter owing by the Customer to Heraeus, whether pursuant to these Terms or relating to any other transaction between the Customer and Heraeus. Heraeus' rights are those of a secured party under the Uniform Commercial Code of New York. Without limiting its other rights, Heraeus may file a financing statement or other documentation as evidence of such security interest, and the Customer must execute and deliver any necessary documents to perfect Heraeus' security interest.

9.2 Heraeus has the right, at any time but with subsequent notice to the Customer, to set off any liability of Heraeus to the Customer against any liability of the Customer to Heraeus, whether or not the same is then due and payable, and to convert metal to money or money to metal at market value on the date of such set off.

The right of setoff also permits the set-off of claims of companies that are affiliates of Heraeus against claims of companies that are affiliates of the Customer.

## **10 Force Majeure**

An act of God, war, invasion, act of foreign enemy, hostilities, civil war, rebellion, civil strife, strikes or industrial dispute, insolvency or bankruptcy of a supplier, any law, rule, regulation, order or other action by any public authority, transportation delays or the refusal of any necessary license is a event of force majeure. An event of force majeure will also be deemed to exist if Heraeus can prove (a) that the Refining Material provided by the Customer cannot be homogenized or sampled using the methods customarily applied by Heraeus and/or (b) that Heraeus production plants that are essential for refining become partly or fully inoperative due to reasons that could not be foreseen by Heraeus and/or (c) that production plants are permanently or temporarily inoperative due to the incorrect specification of Refining Material. Each party will exercise reasonable commercial efforts to resolve any force majeure event as promptly as practicable.

## **11 Representations of the Customer**

The Customer represents and warrants:

- that it is the owner of the Refining Material offered for refinement or for purchase and that the Refining Material is free from any third-party claims or liens; and
- that it will carry out all refining orders or sales transactions in its own name and for its own account and that it will not act as undisclosed agent for third parties in connection with any transaction between the Customer and Heraeus; and
- that the Refining Material offered for refinement or for purchase does not contain any conflict minerals as defined in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas; and
- the information and data provided by it in the Code of Conduct for Heraeus Precious Metal Suppliers and in the Materials Questionnaire (if requested by Heraeus) are correct and complete.

## **12 Extraordinary Termination Rights of Heraeus**

Heraeus may terminate any refining contract for cause with immediate effect if

- it is revealed that the documentation regarding the Refining Material provided by the Customer (including Material Safety Data Sheet) was incorrect or incomplete and the missing or incorrect information was a substantial factor for Heraeus' decision to accept the Refining Material; or
- the Refining Material could not be successfully homogenized or sampled using the methods customarily applied by Heraeus or if a successful homogenization or sampling is deemed unlikely; or
- Heraeus concludes that the refining is economically unviable (i.e., the refining costs are higher than the value of the precious metals expected to be recovered); or
- the refining order cannot be executed as scheduled in accordance with Regulation (EC) No. 1013/2006; or
- the Refining Material is not delivered in accordance with applicable rule or law; or
- a representation made by the Customer pursuant to Section 11 is found to be incorrect or incomplete in any material aspect or the Customer fails to make a representation within a reasonable grace period.

Further extraordinary rights of termination of Heraeus shall remain unaffected by the preceding provision.

In the event of an extraordinary termination by Heraeus, Heraeus shall return the Refining Material to the Customer in the then current condition at the Customer's risk and expense. The Customer shall not be entitled to assert any claims for compensation or damages against Heraeus due to the extraordinary termination or the return of the Refining Material.

## **13 Warranties, Liability, Indemnification**

13.1 The Customer will indemnify, defend and hold harmless Heraeus, its directors, officers, employees, and agents from and against any and all liability, loss, damage and expense (including, reasonable attorneys' fees and costs) in connection with any third-party suit,

demand, or action to the extent such liability loss, damage, or expense is based on, arises from, or is connected with (a) the negligent or willful acts or omissions by the Customer, or any of its employees, officers, or agents, (b) any right, title or interest in the Materials, (c) hazardous substances for which the Customer failed to notify and obtain Heraeus' specific written approval, (d) any failure to package, label, or deliver materials in accordance with applicable rules or laws, and (e) any instructions or false or misleading information of any character whatsoever given or supplied by the Customer that has a materially adverse effect on Heraeus. The Customer is not required to indemnify, defend and hold harmless Heraeus for the portion of any liability, loss, damages or expense attributable to the negligent act of Heraeus, its employees or agents.

13.2 Heraeus warrants that, upon delivery of the precious metal, (a) Heraeus has all rights, title, and interest in such precious metal free of all liens, encumbrances, or similar restrictions, and (b) unless otherwise agreed by the parties in writing, such precious metals will have the quality set forth in Section 8.1 (b). THESE WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, HERAEUS MAKES NO WARRANTY AS TO THE FITNESS OF ANY PRECIOUS METAL FOR A PARTICULAR PURPOSE OR NEED OF THE CUSTOMER OR ANY THIRD PARTY, OR AS TO THE MERCHANTABILITY OF SUCH PRECIOUS METAL.

13.3 HERAEUS' LIABILITY FOR ANY BREACH OF WARRANTY, AND THE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR SUCH BREACH, IS ABSOLUTELY LIMITED AS FOLLOWS: (I) IN THE CASE OF ANY DEFECT IN HERAEUS' RIGHT, TITLE OR INTEREST IN OR TO ANY PRECIOUS METAL, TO CLEARING SAME, AND (II) IN THE CASE OF ANY LIEN, ENCUMBRANCE, OR SIMILAR RESTRICTION, TO THE REMOVAL OF SAME. HERAEUS MAY ALSO REMEDY BREACH BY REPLACING THE APPLICABLE PRECIOUS METAL WITH PRECIOUS METAL THAT COMPLIES WITH ALL WARRANTIES UNDER THESE TERMS.

13.3 All claims for breach of warranty of minimum purity must be made in writing to Heraeus within 20 calendar days after receipt of the precious metal. Heraeus' liability is strictly conditioned upon its timely receipt of such notice. The Customer's failure to notify Heraeus within the 20 day period constitutes its acceptance of the Precious Metal and a waiver and release of all claims and disputes relating to or arising from any non-conformity thereof. Incorporation of precious metal into the Customer's products or sale to a third party terminates the warranty for purity in Section 8.1(b).

13.4 No Precious Metal may be returned to Heraeus unless (i) written notice has been given to Heraeus, (ii) Heraeus representatives have had the opportunity to inspect the precious metal to determine any non conformity, and (iii) Heraeus has authorized a return shipment in writing. Customer must prepay all freight, insurance and other applicable costs of authorized returns of non-conforming precious metal. Risk of loss during the return of non-conforming metals will pass to Heraeus upon Heraeus' acceptance of the non-conforming metals at Heraeus' receiving dock.

13.5 Any claim or dispute arising under these Terms will expire and will be deemed waived if the Customer does not notify Heraeus in writing within 30 days after the earlier of (i) the occurrence of the event giving rise to such claim or dispute or (ii) the date of settlement. The Customer's failure to notify Heraeus within such period constitutes a waiver and release of all such claims and disputes against Heraeus.

13.6 EXCEPT AS PROVIDED UNDER SECTION 13.2 AND FOR ANY CLAIM OR DISPUTE THAT HERAEUS FAILED TO MAKE A REQUIRED DELIVERY OF PRECIOUS METALS, HERAEUS' SOLE LIABILITY FOR DAMAGES IN CONNECTION WITH ANY CLAIM OR DISPUTE, WHETHER BASED ON CONTRACT, TORT OR OTHER LEGAL THEORY, WILL BE LIMITED TO THE REFUND OF FEES PAID BY THE CUSTOMER. IN NO EVENT WILL HERAEUS BE LIABLE TO THE CUSTOMER OR ANY THIRD PARTY FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES OR LOST PROFITS BY REASON OF ANY ALLEGED BREACH OF THESE TERMS, BREACH OF WARRANTY, MISCONDUCT, NEGLIGENCE OR ON ANY OTHER GROUNDS HEREUNDER.

#### **14 Applicable Law, Court of Arbitration**

14.1 These Terms are governed by the laws of the State of New York without reference to its conflict of laws rules.

14.2 Any dispute arising out of these Terms shall be resolved by arbitration administered and resolved by the American Arbitration Association ("AAA") by a single arbitrator in accordance with the Commercial Arbitration Rules of the AAA in effect at the time the arbitration is commenced (except as modified herein). Any arbitration or award shall issue within one (1) year from the date claimant filed its notice of intention to arbitrate (i.e. the demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. Judgment on the award rendered by the arbitrator is final and binding on the parties hereto, and may be entered in any court having appropriate jurisdiction.

#### **15 Severability, Written Form**

15.1 Should any provisions of these Terms be or become ineffective or impracticable, this will not affect the legal effectiveness of the remaining provisions.

15.2 The parties agree on the written form. No waiver or modification of this written form requirement will be valid or binding unless executed in a writing signed by both parties.

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