

## BUSINESS ASSOCIATE AGREEMENT

**\*\*DISCLAIMER\*\***

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## BUSINESS ASSOCIATE AGREEMENT

This Business Associate Agreement (“the Agreement”) is entered into this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between \_\_\_\_\_ (“Business Associate”), a New York [ENTITY TYPE], with its principal place of business at \_\_\_\_\_, and \_\_\_\_\_ (“Covered Entity”), a New York [ENTITY TYPE], with its principal place of business at \_\_\_\_\_. The Business Associate and Covered Entity are referred to herein individually as “Party” and collectively as “the Parties”.

### BACKGROUND

1. Covered Entity is required by law to comply with the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E (“the Privacy Rule”), the Security Standards for the Protection of Electronic Health Information at 45 CFR Parts 160 and 164, Subparts A and C (“the Security Rule”), and the Data Breach Notification Rule, 45 CFR Part 164, Subpart D (collectively, the “HIPAA Rules”).
2. Business Associate is required by law to comply with certain provisions of the HIPAA Rules.
3. Covered Entity and Business Associate are also required to comply with applicable state law and regulations governing the privacy and security and breach notification requirements related to personal information, as such may be amended from time to time (collectively, “State Laws”).
4. The Parties wish to enter into or have entered into a services agreement, \_\_\_\_\_ (“the Services Agreement”), under which Business Associate will provide certain services to, or on behalf of, Covered Entity.
5. Under the Services Agreement, Business Associate will have or may have access to Covered Entity’s Protected Health Information created, received, maintained or transmitted by Business Associate on behalf of Covered Entity (“PHI”).
6. In consideration of the Parties’ obligations under the Services Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties enter into this Agreement, as an addendum to the Services Agreement.

DEFINITIONS; INTERPRETATION - Except as otherwise defined herein, any and all capitalized terms in this Agreement shall have the definitions set forth in the HIPAA Rules and the HITECH Act. In the event of any inconsistency between the provisions of this Agreement, the Services Agreement, and the requirements of the HIPAA Rules, the HIPAA Rules shall control. Any ambiguity in this Agreement shall be resolved in favor of a meaning that permits the parties to comply with the HIPAA Rules. All references to the HIPAA Rules are deemed to include all amendments to such rules contained in the HITECH Act and its implementing regulations, and any subsequently adopted amendments or regulations, as are applicable to this Agreement.

A. OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE - Business Associate agrees:

1. To not use or disclose PHI other than as permitted or required by this Agreement, applicable State Laws, or as Required by Law.

2. To implement appropriate administrative, physical and technical safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to Electronic PHI, to prevent the use or disclosure of PHI other than as provided for by this Agreement.
3. Pursuant to the HITECH Act and its implementing regulations, to comply with all applicable requirements of the Privacy Rule.
4. To not directly or indirectly receive remuneration in exchange for any PHI, nor engage in any communication involving PHI which might be deemed to be Marketing under the HIPAA Rules, without the express written consent of the Covered Entity.
5. To report to Covered Entity any use or disclosure of PHI, of which it becomes aware, which is not in compliance with the terms of this Agreement, including but not limited to Breaches of Unsecured PHI or personal information, and any security incident of which it becomes aware.
6. Following the discovery of a Breach of PHI, to notify the Covered Entity of such Breach pursuant to the terms of 45 CFR §164.410, and cooperate in the Covered Entity's Breach analysis procedures and risk assessment, if requested. A Breach shall be treated as discovered by Business Associate as of the first day on which such Breach is known to Business Associate or its workforce or, by exercising reasonable diligence, would have been known to Business Associate or its workforce. Business Associate will provide such notification to Covered Entity without unreasonable delay and in no event later than five (5) calendar days after discovery of the Breach. Such notification shall contain the information required by 45 C.F.R. §164.410.
7. To mitigate, to the extent practicable, the harmful effect caused by Business Associate's use or disclosure of PHI which is in violation of this Agreement or by any Breach of PHI by Business Associate, its employees, agents or subcontractors, and to provide notice to Covered Entity of such mitigation efforts.
8. To make its internal practices, books, and records relating to the use and disclosure of PHI, available to the Secretary of Health and Human Services, at a reasonable time and in a reasonable manner or as designated by the Secretary, for purposes of the Secretary determining Covered Entity's compliance with the HIPAA Rules.
9. To ensure that its employees and agents are aware of and agree to the same restrictions and conditions which apply to Business Associate with respect to PHI.
10. In accordance with 45 CFR 164.502(e)1(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit PHI on behalf of the Business Associate agree to the same restrictions, conditions, and requirements that apply to the Business Associate with respect to such information.
11. To the extent the Business Associate is to carry out one or more of Covered Entity's obligation(s) under Subpart E of 45 CFR Part 164, comply with the requirements of Subpart E that apply to the Covered Entity in the performance of such obligation(s).

B. AVAILABILITY OF PHI -Business Associate agrees:

1. To make PHI available to the Covered Entity (or, at the direction of the Covered Entity, to the individual) to the extent and in the manner necessary for Covered Entity to satisfy the access requirements of Section 164.524 of the Privacy Rule.

2. If Business Associate maintains Electronic PHI, it agrees to make such EPHI electronically available to the applicable individual in the format required by the HIPAA Rules and as directed by the Covered Entity.
3. To make PHI available for amendment and incorporate any amendments to PHI in accordance with the requirements of Section 164.526 of the Privacy Rule.
4. To document disclosures of PHI by Business Associate and maintain an accounting of such disclosures, as required under the HIPAA Rules and in guidance provided by OCR, and to provide such documentation and accounting to Covered Entity, upon Covered Entity's specific request, to permit it to respond to a request by an Individual for an accounting of PHI disclosures, as required by Section 164.528 of the Privacy Rule and Section 13405(c)(3) of the HITECH Act. Business Associate shall cooperate with Covered Entity in providing any accounting required on a timely basis.
5. To comply with any requests for restrictions on certain disclosures of PHI, to which Covered Entity has agreed and of which Business Associate is notified by Covered Entity, or which are required by the HITECH Act.

C. PERMITTED USES AND DISCLOSURES OF PHI BY BUSINESS ASSOCIATE

1. Except as otherwise limited in this Agreement, Business Associate may use or disclose PHI to perform the functions, activities or services for, or on behalf of, Covered Entity as specified in the Services Agreement, provided that such use or disclosure would not violate the Privacy Rule if performed by Covered Entity.
2. Business Associate may use or disclose PHI as Required by Law.
3. Business Associate agrees to use and disclose the minimum necessary PHI in performing its obligations under the Services Agreement.

D. NOTICE OF MATERIAL LIMITATIONS OR RESTRICTIONS

Covered Entity shall notify Business Associate of any material limitations or restrictions it has agreed to or is required to abide by under 45 CFR 164.522, to the extent such limitations or restrictions may affect Business Associate's use or disclosure of PHI.

E. TERM AND TERMINATION

1. Term. The Term of this Agreement shall be effective on the date set forth above, and shall be coterminous with the term of the Services Agreement, unless earlier terminated as provided for herein.
2. Termination. Upon Covered Entity becoming aware of a violation of this Agreement by Business Associate, or reasonably believes that Business Associate will be in violation of this Agreement, Covered Entity may:
  - a. Immediately terminate this Agreement and the Services Agreement if Covered Entity determines that Business Associate has breached a material term of this Agreement; or
  - b. Alternatively, in Covered Entity's sole discretion, provide notice and an opportunity for Business Associate to cure the violation, not to exceed ten (10) days, and terminate this Agreement and the Services Agreement if Business Associate does not cure within such time; or
  - c. If neither termination nor cure is feasible, take such action as may be allowed or required by the HIPAA Rules.

3. Effect of Termination

- a. Except as provided in paragraph b, below, upon termination of this Agreement for any reason, Business Associate shall return or destroy, at Covered Entity's option, all PHI. Business Associate shall insure compliance with this requirement by its subcontractors, if any. Any such destruction shall comply with the applicable guidance of HHS in effect at the time of such destruction and Business Associate shall provide to Covered Entity a certification attesting to such compliance.
- b. Should Business Associate conclude that returning or destroying any PHI is not feasible, Business Associate shall immediately notify Covered Entity in writing of the circumstances upon which it bases this conclusion. Upon Covered Entity's written concurrence that such return or destruction of PHI is infeasible, Business Associate shall extend the protections of this Agreement to such PHI, and shall limit its further uses and disclosures to those purposes that necessitate Business Associate continuing to maintain this PHI. The obligation of Business Associate under this provision shall survive termination of this Agreement, shall continue for as long as Business Associate maintains the PHI, and shall continue to bind Business Associate, its agents, contractors, successors and assigns, for however long the PHI is held by any of them.

F. MISCELLANEOUS

1. Except as expressly stated herein or in the HIPAA Rules, the Parties do not intend to create any rights in any third parties.
2. The Business Associate is not the agent of the Covered Entity and the Covered Entity does not control, supervise or instruct the Business Associate or any of its subcontractors. None of the provisions of this Agreement are intended to create, nor will they be deemed to create, any relationship between the Parties other than that of independent parties contracting with each other solely for the purposes of implementing the provisions of this Agreement and the Services Agreement.
3. Any breach of this Agreement by Business Associate may cause irreparable harm to the Covered Entity. Therefore, Covered Entity may seek any legal remedy, including an injunction or specific performance for such harm, without bond, security or necessity of demonstrating actual damages.
4. Business Associate shall indemnify Covered Entity, its owners, employees and representatives, for any losses, fines, penalties, costs or damages incurred as a result of Business Associate's breach of any provision of this Agreement or violation of any State Laws.
5. This Agreement may be amended or modified only in a writing signed by the Parties. The Parties intend, however, that this Agreement comply with all applicable laws and regulations and that the requirement of any new or amended law or regulation affecting this Agreement be incorporated herein at such time as it becomes effective. Notwithstanding the foregoing, the Parties agree to take such action to amend this Agreement from time to time as is necessary for either Party to comply with any requirement of federal or state law or regulation, or any amendments thereto. Should a Party believe in good faith that any provision of this Agreement fails to substantially comply with the then-current requirements of law, that Party shall notify the other Party in writing, specifying the purported non-compliance and proposed revision(s). The Parties shall negotiate in good faith, for a period of up to fifteen (15) calendar days, to so amend the terms of this Agreement. If, after such 15-day period, the Parties cannot agree to an acceptable amendment(s), then either Party can terminate the Agreement upon written notice to the other Party, with such termination being effective immediately upon receipt.

6. No Party may assign its respective rights and obligations under this Agreement without the prior written consent of the other Party.
7. No change, waiver or discharge of any liability or obligation hereunder on any one or more occasions shall be deemed a waiver of any continuing or other liabilities or obligations, nor shall they prohibit enforcement of any liabilities or obligations on any other occasions
8. Any notice required or permitted under this Agreement shall be given in writing and delivered by hand, via overnight delivery service, or via registered or certified mail, return receipt requested, to the following, and any change in address shall be noticed as provided for herein:

Covered Entity: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Business Associate: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

9. This Agreement shall be governed by the laws of the state of New York, and the venue and exclusive jurisdiction over any legal disputes between the Parties arising under this Agreement shall be in the state and federal courts of the state of New York.
10. Should any provision of this Agreement be held invalid or unenforceable by a court of competent jurisdiction, the remaining provisions will continue in full force and effect.
11. This Agreement is the entire agreement of the Parties related to its subject matter and supersedes all prior agreements, both written and oral, between the Parties, related thereto.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first written above.

[BUSINESS ASSOCIATE]

[COVERED ENTITY]

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

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