



Product Testing Services Agreement

This **eHealth Exchange Product Testing Program Agreement** (this “**Agreement**”) is made and entered into as of _____, 20____ (the “**Effective Date**”) by and between Healtheway, Inc. (dba eHealth Exchange) (“**eHealth Exchange**”), a Virginia non-stock, membership corporation and _____ (“**Organization**”), a _____ (INSERT TYPE OF LEGAL ENTITY AND STATE). Each of eHealth Exchange and Organization shall be referred to in this Agreement as a Party or collectively as Parties.

RECITALS

WHEREAS, the eHealth Exchange requires that all information technology systems successfully pass testing before they can be used on the eHealth Exchange;

WHEREAS, Organization wishes to have its HIE system qualify as a validated product for usage on the eHealth Exchange.

THEREFORE, in consideration of the mutual agreements of the Parties as set forth in this Agreement and other good and valuable consideration, the adequacy and sufficiency of which is hereby acknowledged, the Parties do agree as follows:

1. Definitions

- a. “**Confidential Information**” means all non-public information or material disclosed or provided by one party to the other, either orally or in writing, or obtained by the recipient party from a third party or any other source, concerning any aspect of the business or affairs of the other party.
- b. “**Content Testing**” means documentation, requirements and tooling required for eHealth Exchange product Organizations to use for interoperability testing to enable the exchange of clinical content between participants as described here: <https://ehealthexchange.org/testing-program/content-testing/>
- c. “**eHealth Exchange Interoperability Testing Platform (ITP)**” means the conformance tooling and utilities, and related documentation, to test conformance to health information exchange standards and interoperability requirements.
- d. “**eHealth Exchange Validated Product Testing Program**”, or **eHealth Exchange Testing Program**, means eHealth Exchange’s program of testing as described herein and in the eHealth Exchange Validated Product Testing Program which can be found here: <https://ehealthexchange.org/testing-program/product-testing/>.
- e. “**Organization’s HIE Technology**” means the health information exchange technology submitted by Organization to the eHealth Exchange for testing via the eHealth Exchange Testing Program.
- f. “**Retesting Fee**” means the retesting fee charged by the eHealth Exchange for the Testing Program. The amount of the Retesting Fee is set forth in this section 7 (Fees) and may be modified in the future.

- g. **“Sample Messages”** means transactions generated by the Organization’s HIE Technology that accurately reflect the type of data that Organization plans to exchange through the Organization’s HIE Technology.
 - h. **“Specifications”** means the interoperability system requirements adopted for the eHealth Exchange Testing Program.
 - i. **“Specification Version”** A set of testing program items (Specifications and Test Materials) that are associated with the eHealth Exchange Validated Product Program, as described in the eHealth Exchange Product Validation Plan which can be found at: <https://ehealthexchange.org/testing-program/testing-references/>
 - j. **“Test Materials”** means the set of testing requirements that must be successfully demonstrated and validated to comply with the Specifications. This may include, but is not limited to test cases, test scenarios, conformance checklists, as well as use of the eHealth Exchange Interoperability Testing Platform (ITP). Some materials may be found under ‘Product Test Case Documentation’ here: <https://ehealthexchange.org/testing-program/testing-references/>
 - k. **“Testing Requirements”** means validation of Organization’s HIE Technology that indicates that the Organization’s HIE Technology complies with the Specifications and Test Materials.
 - l. **“Testing Process”** means the entirety of the Testing Program used by the eHealth Exchange as defined in the Test Materials to evaluate the compliance of the Organization’s HIE Technology with the Specifications and Test Materials and indicated on the Testing Report.
 - m. **“Testing Date”** means the date on which Organization’s HIE Technology is issued a Testing Report.
 - n. **“Testing Fee”** means the testing fee charged by the eHealth Exchange for the Testing Program. The amount of the Testing Fee is set forth in this section 7 (Fees) and may be modified in the future.
 - o. **“Testing Report”** means a written report issued by the eHealth Exchange that documents the outcomes of the testing process and confirms Organization’s HIE Technology compliance with the Specifications and Test Materials.
 - p. **“Web Site”** means the eHealth Exchange web site at <https://ehealthexchange.org/>.
2. **Description of the Testing Process.**
- a. **Application.** Organization has completed an application (“Organization Application”) to initiate the testing process and has identified the specific testing requirements that it desires to test. A copy of the Organization’s Application is attached to this agreement as Attachment 1. Organization represents and warrants that the Organization Application is truthful and accurate in all material respects. Organization acknowledges that the eHealth Exchange is relying upon the truthfulness and accuracy of the information in the Organization Application to determine that Organization is qualified to participate in the eHealth Exchange Validated Product Testing Program and to perform the actions that the eHealth Exchange must perform in order to allow Organization to conduct testing.
 - i. **Changes to Technology.** If any information provided by Organization in the Organization Application changes before or during the testing process,

Organization shall inform the eHealth Exchange as soon as practicable. The eHealth Exchange will assess whether this new information changes the Testing Process and whether these changes result in additional charges to Organization.

- b. **Testing Outcome.** The eHealth Exchange shall determine the outcome of the testing process and such determination shall be communicated to Organization by delivery of a report which documents the test results (“Testing Report”).
- c. **Appeal Procedures.** If Organization fails testing, then Organization may appeal the failed testing result provided the following additional conditions are met:
 - i. Organization believes, in good faith, that the failed testing is the result of the eHealth Exchange committing errors in the Testing Process; or
 - ii. Organization believes in good faith that the failed testing is the result of the eHealth Exchange being biased towards Organization and not fairly administering the testing; and the final Testing Report does not accurately reflect the compliance of the Organization’s HIE technology with the Specifications and Test Materials

The Parties agree that neither of them will make any public statements or disclosures about Organization’s appeal during or after the appeal except as required by law.

3. The eHealth Exchange Responsibilities

- a. **Testing Report.** Upon completion of the Testing Process, the eHealth Exchange will determine whether Organization successfully completed and passed testing and shall provide Organization with a Testing Report.
- b. **Testing Requirements.** The eHealth Exchange shall post on its web site the current eHealth Exchange Test Materials, as modified from time to time.
- c. **Complaint Process.** The eHealth Exchange shall establish and maintain a process by which third parties may submit complaints regarding a validated product’s potential non-compliance with the Specifications.
- d. **Periodic Review of Sample Messages.** In addition to the eHealth Exchange’s right to respond to suspected non-compliance, the eHealth Exchange has the right to request and review Sample Messages exchanged via Organization’s HIE Technology in a test environment for conformance and interoperability as well as related audit log data as it pertains to Sample Messages.
- e. **Response to suspected non-compliance.** If the eHealth Exchange believes, either as the result of a review or learning of a complaint, that Organization’s HIE Technology (including, but not limited to, Organization’s HIE Technology system configuration, architecture, components, and Sample Messages produced by Organization’s HIE Technology) is not functioning in material compliance with the Specifications, the eHealth Exchange may inform Organization of such belief and request that Organization, within a reasonable time:
 - i. verify that Organization’s HIE Technology remains in compliance with the Specifications by submitting a written attestation of compliance, or
 - ii. explain the reasons for non-compliance and propose a plan for remedying such non-compliance.

If the eHealth Exchange (in its reasonable discretion) is not satisfied with the information Organization provides in response to such request, the eHealth Exchange may inform Organization that its HIE Technology is non-compliant with the Specifications and request that Organization submit Organization's HIE Technology for additional Testing.

4. Organization Rights and Responsibilities

- a. **Specific Point of Contact (SPoC).** Organization shall designate a Specific Point of Contact (SPoC) and make available during the Testing Process its SPoC and other Organization personnel as necessary to effectively complete the testing, as well as for review of the Testing Report and any other elements contained in any other testing methods used in the eHealth Exchange Testing Program and to answer questions and attend meetings as required by the eHealth Exchange. Organization will notify the eHealth Exchange promptly in the event of a change in the SPoC for Organization's HIE Technology.
- b. **Interoperability Testing Program.** Organization shall perform all of Organization's obligations specified for all phases of the eHealth Exchange Validated Product Testing Program, in accordance with this Agreement and Test Materials which are incorporated by reference into this Agreement.
- c. **Duration for Access to the Testing Tools.** Organization shall have access to the eHealth Exchange Interoperability Testing Platform (ITP) as long as this Agreement is in effect.
- d. **Retesting Upon a Finding of Non-Compliance.** Upon receipt of the notice provided pursuant to section 2(b) above, Organization shall have (30) days to either:
 - i. pay the then applicable Fees for retesting, undergo retesting of the allegedly non-compliant Organization HIE Technology and submit a set of new test results to the eHealth Exchange for the allegedly non-compliant Organization HIE Technology; or
 - ii. provide notice of termination of this Agreement to the eHealth Exchange, which termination shall be effective no later than the thirty-first day following Organization's original receipt of notice of such non-compliance. If during such thirty-day period, Organization fails to pay the applicable Fees for retesting, undergo retesting, and submit a set of test results or provide notice of termination, the eHealth Exchange may terminate this Agreement effective immediately upon notice to Organization of such termination.
- e. **Cooperation with Periodic Review.** Organization shall fully cooperate with the eHealth Exchange and Organization's customers for any periodic reviews of Sample Messages that the eHealth Exchange performs.

5. Term and Termination

- a. The initial term of this Agreement shall commence on the Effective Date and expire on the first anniversary of the Effective Date, unless earlier terminated in accordance with this section 5. Each term shall automatically renew for a subsequent period of the same length as the initial term unless either party gives the other written notice of termination at least 30 days prior to expiration of the current term.
- b. **Termination by Organization.** Organization may terminate this Agreement at any time by providing sixty (60) days prior written notice to the eHealth Exchange. Organization will not be entitled to a refund of any Testing Fees paid prior to termination.

- c. **Termination by the eHealth Exchange.** The eHealth Exchange may terminate this Agreement with immediate effect or by giving notice to Organization if:
 - i. Organization is in material breach of any of the terms and conditions of this Agreement and fails to remedy such breach within 30 days after receiving notice of such breach: or
 - ii. Organization's Application includes any information that is not truthful or accurate in any material respect.
- d. **Effect of Termination.** Upon termination of this Agreement for any reason, Organization shall:
 - i. immediately remove the Validation Seal (as defined in section 6 below) from all electronic media; and
 - ii. immediately discard all materials bearing the Validation Seal; and
 - iii. cease future use of the Validation Seal.

Within ten (10) business days of termination of this Agreement, Organization shall confirm to the eHealth Exchange, in writing, that it has complied with subsections (i) and (ii) of this Section. The eHealth Exchange will remove Organization's HIE Technology from its list of the eHealth Exchange Validated software products.

- 6. **eHealth Exchange Validation Seal.** Upon notification by the eHealth Exchange to Organization of successful completion of Testing, Organization shall be entitled to designate Organization's HIE Technology as compliant with the Specifications and "eHealth Exchange Validated" (the "Validation"). The eHealth Exchange will provide to Organization a digital version of a seal signifying such Validation (the "Seal"). The eHealth Exchange grants to Organization a nonexclusive, non-assignable and nontransferable license to use and display the Seal as described herein. Organization shall not use or display the Seal, the Validation or anything similar thereto for any software other than the version of Organization's HIE Technology that successfully completed the Testing. When displaying the Validation, the Validation should be used in such a way that there is no implication of endorsement by the eHealth Exchange. When displaying the Seal, Organization shall not alter or modify the digital version provided by the eHealth Exchange. Organization is authorized to display and use the Seal and Validation as set forth herein in any and all marketing materials for the Organization's HIE Technology. These rights are not transferable to any other entity, or any other program or software produced by Organization. Upon request, Organization shall provide to the eHealth Exchange samples of Organization's use of the Seal and Validation. Organization's failure to appropriately use the Validation, in the sole and absolute discretion of the eHealth Exchange, may result in termination of its right to use the Validation.

7. Fees

- a. **Standard Testing Fee.** Payment of the total Testing Fee must be received in full by the eHealth Exchange before testing may begin. Organization shall pay the following fees to the eHealth Exchange to participate in the eHealth Exchange Validated Product Testing Program and the ITP:
 - i. Validated Product Testing \$34,000. This assumes that the eHealth Exchange will not spend more than ten (10) hours of eHealth Exchange testing resources assisting the Organization. If the eHealth Exchange testing resources must spend more than ten (10) hours, Organization agrees to pay the eHealth Exchange \$250

per hour worked above the first ten (10) hours. The eHealth Exchange will invoice Organization for any testing services monthly with payment due net 30.

ii. Content Testing Requirements (included, no additional fee)

b. **Retesting Fee.** If Organization is required to undergo retesting upon a finding of non-compliance in accordance with section 4 (d), the Retesting Fee will be \$2,500. Payment of the Retesting Fee must be received in full by the eHealth Exchange before a final retesting report can be provided. This assumes that the eHealth Exchange testing resources will not spend more than ten (10) hours, Organization agrees to pay the eHealth Exchange \$250 per hour worked above the first ten (10) hours. The eHealth Exchange will invoice Organization for any testing services monthly with payment due net 30.

c. **Refunds.** Organization is not entitled to a refund of any Testing or Retesting Fees. Organization may reapply at any time in the future by resubmitting its application and the full Testing or Retesting Fee.

8. **Ownership of Materials.** Organization acknowledges that any copyrights, patent rights, trade secrets, trademarks and other intellectual property in or related to the eHealth Exchange Testing Program including, but not limited to, all related materials, information, reports, processes, seals, test cases, test case runner, gateway proxy, test repository database, test case templates, configuration files, and test tool documentation (“the eHealth Exchange Testing Program Intellectual Property “IP””), are the exclusive property of the eHealth Exchange. To the extent any corrections, enhancements, improvements, or derivative works, relating to the eHealth Exchange Testing Program IP are developed by the eHealth Exchange based upon ideas or suggestions submitted by Organization, Organization hereby irrevocably assigns its rights to such ideas or suggestions to the eHealth Exchange, together with all copyrights, trade secrets, patent rights and other intellectual property rights related thereto. Organization shall not challenge the validity of the eHealth Exchange’s ownership of such the eHealth Exchange Testing Program IP. Organization shall not represent that it owns or has any rights in relation to the eHealth Exchange Testing Program IP. Organization shall not apply for registration of any trademark, business name or company name that incorporates any name or logo the same as, substantially similar to or deceptively similar to the eHealth Exchange or the eHealth Exchange marks without the prior written consent of the eHealth Exchange. Organization shall not create any derivative work, program or product based on or derived from the eHealth Exchange Testing Program IP, or use any the eHealth Exchange trade secrets, business processes, or intellectual property related to the eHealth Exchange Testing Program to create any other program or product.

a. Nothing shall prevent Organization from (i) making changes to Organization’s HIE Technology to conform it to the requirements of the testing program or (ii) make such changes available to Organization’s customers.

9. Confidentiality

a. **Confidential Information.** Confidential Information furnished by either party under this Agreement is provided solely for use in the eHealth Exchange Testing Program and both parties desire to ensure the safeguarding of such information and limit its distribution. “Confidential Information” shall include the following:

i. Organization’s HIE Technology documentation and technical information submitted to the eHealth Exchange by Organization under this Agreement;

- ii. Testing Reports;
 - iii. Item-by-item compliance results for Organization's HIE Technology developed during the course of any Testing Process or Appeal; and
 - iv. Any other non-public information that is disclosed by one party (the "Disclosing Party") to the other (the "Recipient"), whether before or after the execution of this Agreement, provided that such information is marked in writing as confidential or proprietary.
- b. **Exclusions.** Irrespective of any marking, Confidential Information shall not include:
- i. Organization's company name, and contact information for Organization's representatives;
 - ii. Item-by-item compliance results, when de-identified as to Organization, and aggregated statistically with corresponding compliance results from other Organizations;
 - iii. Information that is, or subsequently becomes, generally available to the public through no act or fault of the Recipient;
 - iv. Information that was in the possession of the Recipient prior to its disclosure;
 - v. Information that was lawfully acquired by the Recipient from a third party who was not under an obligation of confidentiality to the Disclosing Party; or
 - vi. Information that was independently developed by the Recipient by personnel without access to the Confidential Information.
- c. **Disclosure and Use Restrictions.** Except as otherwise provided herein, the Recipient shall:
- i. retain in confidence all Confidential Information, using at least the same degree of care in safeguarding the Disclosing Party's Confidential Information as it uses in safeguarding its own confidential information, subject to a minimum standard of reasonable diligence and protection;
 - ii. use and disclose Confidential Information only in the course of performing its obligations pursuant to this Agreement; and
 - iii. disclose Confidential Information within its organization only to those of its employees, faculty, agents or subcontractors who both have a need to know such information for the Recipient's performance under this Agreement and have a legal duty to protect it comparable to that of the Recipient.
- d. **Injunctive Relief.** Each party recognizes and acknowledges that any use or disclosure of the Confidential Information of the other party in a manner inconsistent with the provisions of this Agreement may cause such other party irreparable damage for which remedies at law may be inadequate, and each party agrees that in any request to a court of competent jurisdiction by such other party for injunctive or other equitable relief seeking to restrain such use or disclosure, it will not maintain that such remedy is not appropriate under the circumstances.

10. Limitation of Liability; Right of Action

- a. The eHealth Exchange expressly disclaims any liability whatsoever for the use of the eHealth Exchange Testing Program by Organization or the results of any testing. The eHealth Exchange makes no representations of any sort about the value of the eHealth Exchange Testing Program. Organization assumes all risk of using the Testing Program.

- b. EXCEPT WITH RESPECT TO THE CONFIDENTIALITY OBLIGATIONS IN SECTION 6 OF THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT OR BY STATUTE OR OTHERWISE) TO THE OTHER OR TO ANY THIRD PARTY FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE LOSS, DAMAGES OR EXPENSES (INCLUDING LOST PROFITS OR SAVINGS).
- c. No claim or cause of action, regardless of form, arising out of or related to the eHealth Exchange Testing Program, this Agreement, or the breach thereof, or any other dispute between the eHealth Exchange and Organization may be brought in an arbitral, judicial, or other proceeding by any party more than one year after the cause of action has accrued, regardless of any statute, law, regulation, or rule to the contrary. (“Limitation Period”). The Limitation Period shall commence the day after the day on which the cause of action accrued. Failure to institute a proceeding within the Limitation Period will constitute an absolute bar and waiver of the institution of any proceedings, whether in arbitration, court, or otherwise, with respect to such cause of action. A cause of action that has become time-barred may not be exercised by way of counter claim or relied upon by way of exception.
- d. The eHealth Exchange and the Organization hereby irrevocably waive, to the fullest extent permitted by law, all rights to trial by jury in any action, proceeding or counterclaim (whether in contract, statute, tort (such as negligence), or otherwise) relating to this agreement.

11. Warranties; Disclaimer.

- a. Organization warrants and represents that it has the full power and authority to execute the application for Testing and to enter into this Agreement and that any representative of Organization who signed the Organization Application or signs this Agreement had or has full power and authority to do so on behalf of Organization.
- b. Organization warrants and represents that the information submitted to the eHealth Exchange in the Organization Application, Organization’s Testing Report, any other documentation or information provided by Organization to the eHealth Exchange is, to the best of Organization’s knowledge, accurate and complete.
- c. Organization warrants and represents that the Organization’s HIE Technology is the same health information exchange technology that will be used by Organization’s customers in production for the testing options selected.
- d. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT: (a) NEITHER PARTY MAKES NOR WILL BE DEEMED TO MAKE OR HAVE MADE ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, DIRECTLY OR INDIRECTLY, EXPRESS OR IMPLIED (EITHER IN FACT OR BY OPERATION OF LAW); AND, (b) EACH PARTY EXPRESSLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY, TITLE, DESIGN, NON-INFRINGEMENT, OPERATION OR FITNESS FOR A PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM CONDUCT, COURSE OF DEALING OR CUSTOM OR USAGE IN TRADE.

12. **Notices.** Any formal notice or other significant communication given pursuant to this Agreement must be in writing and shall be deemed to have been received either (a) upon personal delivery (or refusal thereof) to the party for whom intended or (b) on the date receipt is confirmed by a



courier service or the United States Post Office (sent certified mail, return receipt requested), in each case addressed to such party at the address specified below (or such other address designated by notice to the other party).

For Organization:

Organization: _____

Street: _____

City/State/ZIP: _____

Attn: _____

For Healthway, Inc. (dba the eHealth Exchange):

8300 Boone Boulevard, Suite 500

Vienna, VA 22182

Attn: eHealth Exchange Program Director

13. General

- a. **Non-Disclosure of Organization Status.** Except as specifically provided in the Testing Report, without Organization’s prior written approval (which may be given by email), the eHealth Exchange shall not:
 - i. advertise or otherwise name Organization as a participant in the eHealth Exchange Testing Program; nor
 - ii. publicly disclose the results of Organization’s participation in the eHealth Exchange Testing Program, except in de-identified form.

Notwithstanding the foregoing, upon Organization’s successful completion of testing, the eHealth Exchange is permitted to include the Organization’s HIE Technology in the list of the eHealth Exchange Validated healthcare information technology systems.

- b. **Force Majeure.** Neither party shall be responsible for any delays or failures in performance due to circumstances beyond its reasonable control, including, without limitation, failures of computers, computer-related equipment, hardware or software.
- c. **Severability.** If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be modified to the minimum extent necessary to achieve the purpose originally intended, if possible, and the remaining provisions of this Agreement shall remain in full force and effect and enforceable.
- d. **Survival of Rights and Obligations.** All Sections, which by their nature are meant to survive this Agreement, shall survive expiration or termination of this Agreement.

- e. **Governing Law, Forum and Jurisdiction.** In the event of a dispute between the parties, the applicable federal and state conflicts of law provisions that govern the operations of the parties shall determine governing law.
- f. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be considered an original counterpart, and shall become a binding agreement when each party shall have executed one counterpart.
- g. **Captions.** Captions appearing in this Agreement are for convenience only and shall not be deemed to explain, limit or amplify the provisions of this Agreement.
- h. **Independent Parties.** Nothing contained in this Agreement shall be deemed or construed as creating a joint venture or partnership between Organization and the eHealth Exchange. Except as specifically set forth herein, neither party shall have the power to control the activities and operations of, or contractually bind or commit, the other party and their status with respect to one another is that of independent contractors.
- i. **No Third-Party Beneficiary.** Nothing contained in this Agreement will be deemed to create, or be construed as creating, any third-party beneficiary right of action upon any third party or entity whatsoever, in any manner whatsoever.
- j. **Assignment.** None of this Agreement, any of the rights hereunder nor any resulting certification shall be assignable by Organization whether by operation of law or otherwise without the express written approval of the eHealth Exchange.
- k. **Entire Agreement; Waiver.** This Agreement contains the entire understanding of the parties with regard to the subject matter contained herein and may not be amended except by mutual written agreement. The failure of either party to enforce at any time any provision of this Agreement shall not be construed to be a waiver of such provision, nor in any way affect the validity of this Agreement or any part hereof or the right of such party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other or subsequent breach, nor shall any delay by either party to exercise any right under this Agreement operate as a waiver of any such right.

[Signature Page Follows]



[Signature Page to eHealth Exchange Product Testing Program Agreement]

For: Organization

For HEALTHEWAY, INC. (dba eHealth Exchange)

Signature: _____

Signature: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Date: _____

Date: _____



Attachment 1: Product Testing Application

Part 1: Organization Information

Organization Name:	
Address:	
Website:	
Describe the type of organizations that use your product:	
How many of your customers will onboard to the eHealth Exchange within the year following your validation?	

Part 2: Product Information

Type of Product: (eg, EHR, repository HIE, etc)	
Product Name/Description:	
Version Number:	
Is FHIR supported? If so, which versions and implementation guides?	
If your technology includes any external off-the-shelf components, what are they?	

Part 3: Contact Information

Contact Type	Name	Title	Phone	E-mail
Primary				
Testing				
Accounting				
Marketing				
Other				