Participant Testing Services Agreement

This **eHealth Exchange Participant Testing** **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 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“**Applicant**”), a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(INSERT TYPE OF LEGAL ENTITY AND STATE OF DOMICILE). Each of eHealth Exchange and Applicant shall be referred to in this Agreement as a Party or collectively as Parties.

**RECITALS**

**WHEREAS,** eHealth Exchange is organized as a non-profit corporation to provide operational support to the eHealth Exchange (formerly referred to as the Nationwide Health Information Network Exchange);

**WHEREAS**, eHealth Exchange Participant Testing Program tests compliance for health information exchange (HIE) standards as required by the eHealth Exchange Coordinating Committee for onboarding to the eHealth Exchange network;

**WHEREAS,** Applicant wishes to have its HIE system qualify as a Participant 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**
   1. “**Applicant’s HIE Technology**” means the health information exchange technology submitted by Applicant to the Coordinating Committee for the purpose of completing the Testing Process and demonstrating compliance with the Specifications.
   2. “**Data Use and Reciprocal Support Agreement**” means the legal, multi-party trust agreement that is entered into voluntarily by all entities, organizations and Federal agencies that desire to engage in electronic health information exchange with each other using an agreed upon set of Specifications.
   3. “**eHealth Exchange Participant Testing Program**” means the program of Testing as described herein and in the eHealth Exchange Validation Plan, as defined in the DURSA.
   4. “**HIT**” means health information technology.
   5. “**Specifications**” means the system requirements adopted for the eHealth Exchange.
   6. “**Specification Version**” means a set of Testing Program items (Specifications and Test Materials) that are associated with the eHealth Exchange Participant Testing Program, as described in the eHealth Exchange Validation Plan.
   7. “**SPOC**” means Applicant’s designated single point of contact who will oversee and coordinate Applicant’s participation in the Participant Testing Program and respond to eHealth Exchange inquiries as necessary during each phase of the Testing Process.
   8. **“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, etc.
   9. “**Testing Date**” means the date on which Applicant’s HIE Technology is issued a Testing Report.
   10. “**Testing Fee**”means the fee payable at the time of application by Applicant for the evaluation of Applicant’s HIE Technology for the testing process. The amount of the Testing Fee is set forth in Exhibit A attached hereto and may be modified for future programs.
   11. “**Testing Process**” means the process followed by the eHealth Exchange as defined in the Operating Policies and Procedures and Validation Plan to evaluate the compliance of the Applicant’s HIE Technology with the Specifications and Test Materials and indicated on the Testing Report.
   12. “**Test Report**” means a written report issued by the eHealth Exchange that documents the outcomes of the Testing Process; that is, the Applicant’s compliance with the Specifications and Test Materials.
   13. “**Testing**”means validation of Applicant’s HIE Technology that indicates that the Applicant’s HIE Technology is in compliance with the Specifications and Test Materials.
   14. “**Web Site**” means the eHealth Exchange web site at www.ehealthexchange.org.
2. **Testing Process**
   1. **Application Process**. Applicant and the eHealth Exchange shall follow the process described in the eHealth Exchange Operating Policies and Procedures for the submission, review and processing of Applicant’s application for Testing of Applicant’s HIE Technology.
   2. **Testing Process**. Applicant and the eHealth Exchange shall follow the process described in the eHealth Exchange Operating Policies and Procedures and Validation Plan.
   3. **Testing Outcome**. The outcome of the Testing Process shall be communicated to Applicant by delivery of a Test Report.
   4. **Appeal Procedures**. Applicant may appeal the findings in a Test Report only if the Applicant failed testing and Applicant believes, in good faith, that the eHealth Exchange rendered an incorrect decision about the technology compliance based upon how the technology was validated during the test due to perceived bias or error and that, as a result the Test Report does not accurately reflect the compliance of the Applicant’s HIE technology with the Specifications and Test Materials based upon how the Applicant’s HIE Technology was validated by the eHealth Exchange. The Parties agree that neither of them will make any public statements or disclosures about Applicant’s appeal during or after the appeal except as required by law.
3. **Fees**
   1. **Standard Testing Fee**. Applicant shall pay the “**Testing Fee**” set forth on Exhibit A attached hereto. Payment of the total Testing Fee must be received in full by eHealth Exchange before testing may begin.
   2. **Additional Sets of Test Results**. Applicants may practice with the testing tools on an unlimited basis. However, Applicants will be allowed to submit one set of test results to the eHealth Exchange for evaluation as evidence of compliance for the Final Testing Report as a covered by the Standard Testing Fees. If Applicant needs to submit additional test results for review and evaluation to demonstrate its compliance after a technology transition that materially affects their transport architecture, it may do so and will be charged for any additional testing hours described in Exhibit A attached hereto so long as the vendor of the new technology platform is recognized as a [Validated Product Vendor](https://ehealthexchange.org/testing-program/validated-products/) (https://ehealthexchange.org/testing-program/validated-products/). If the vendor of the new technology platform is not recognized as a Validated Product Vendor, the Applicant is ineligible to purchase additional testing hours and must sign a new copy of the Testing Services Agreement.
   3. **Refunds.** Applicant is not entitled to a refund of any Testing Fees.
4. **The eHealth Exchange Responsibilities**
   1. **Test Summary Report.** Upon completion of the Testing, Applicant will be provided with a Test Report by the eHealth Exchange. A copy of the report will be sent to the Coordinating Committee for their use in the eHealth Exchange onboarding process.

**The eHealth Exchange Coordinating Committee has sole authority to determine whether an Applicant has satisfied the requirements to become an eHealth Exchange Participant. Successful completion of Testing does not guarantee that an Applicant will be accepted by the Coordinating Committee as a Participant.**

* 1. **Test Requirements**. The eHealth Exchange will post on its web site the current eHealth Exchange Validation Plan and Test Materials, as modified from time to time in accordance with the DURSA.

1. **Applicant Responsibilities**
   1. **eHealth Exchange Participant Testing Program**. Applicant shall perform all of Applicant’s obligations specified for all phases of the eHealth Exchange Participant Testing Program,in accordance with this Agreement and the eHealth Exchange Validation Plan and Test Materials which are incorporated by reference into this Agreement.
   2. **SPOC**. Applicant shall designate a SPOC, and make available during the Testing Process its SPOC and other Applicant personnel as necessary to effectively complete the Testing, as well as for review of the Test Report and any other elements contained in any other testing methods used in the eHealth Exchange Participant Testing Programand to answer questions and attend meetings as required by the eHealth Exchange. Applicant will notify the eHealth Exchange promptly in the event of a change in the SPOC for Applicant’s HIE Technology.
2. **Ownership of Materials**. Applicant acknowledges that any copyrights, patent rights, trade secrets, trademarks and other intellectual property in or related to eHealth Exchange Participant 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 IP”), are the exclusive property of the eHealth Exchange or its licensors. To the extent any corrections, enhancements, improvements, derivative works, relating to the eHealth Exchange IP are developed by the eHealth Exchange based upon ideas or suggestions submitted by Applicant, Applicant hereby irrevocably assigns its rights to such ideas or suggestions to the eHealth Exchange or its licensors’, together with all copyrights, trade secrets, patent rights and other intellectual property rights related thereto. Applicant shall not challenge the validity of the eHealth Exchange’s or its licensors’ ownership of the eHealth Exchange IP. Applicant shall not represent that it owns or has any rights in relation to the eHealth Exchange or its licensors’ IP. Applicant 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 any the eHealth Exchange or eHealth Exchange marks without the prior written consent of the eHealth Exchange. Applicant shall not create any derivative work, program or product based on or derived from the eHealth Exchange IP, or use any the eHealth Exchange trade secrets, business processes, or intellectual property related to the eHealth Exchange Participant Testing Program to create any other program or product.
3. **Confidentiality**
   1. **Confidential Information**. Confidential Information furnished by either party under this Agreement is provided solely for use in the eHealth Exchange Participant Testing Program and both parties desire to ensure the safeguarding of such information and limit its distribution. “**Confidential Information**” shall include the following:
      1. Applicant’s HIE Technology documentation and technical information submitted to the eHealth Exchange by Applicant under this Agreement;
      2. Test Reports (exclusive of reports sent to the Coordinating Committee as described in the Validation Plan);
      3. Item-by-item compliance results for Applicant’s HIE Technology developed during the course of any Testing Process or Appeal; and
      4. 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.”
   2. **Exclusions**. Irrespective of any marking, Confidential Information shall not include:
      1. Applicant’s company name, and contact information for Applicant’s representatives;
      2. Item-by-item compliance results, when de-identified as to Applicant, and aggregated statistically with corresponding compliance results from other applicants;
      3. Information that is, or subsequently becomes, generally available to the public through no act or fault of the Recipient;
      4. Information that was in the possession of the Recipient prior to its disclosure;
      5. 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
      6. Information that was independently developed by the Recipient by personnel without access to the Confidential Information.
   3. **Disclosure and Use Restrictions**. Except as otherwise provided herein, the Recipient shall:
      1. 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;
      2. use and disclose Confidential Information only in the course of performing its obligations pursuant to this Agreement; and
      3. 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.
   4. **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.
4. **Limitation of Liability; Right of Action**
   1. EXCEPT WITH RESPECT TO THE CONFIDENTIALITY OBLIGATIONS IN SECTION 7 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).
   2. No claim or cause of action, regardless of form, arising out of or related to the eHealth Exchange Participant Testing Program, this Agreement, or the breach thereof, or any other dispute between the eHealth Exchange and Applicant 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.
5. **Warranties; Disclaimer**.
   1. Applicant warrants and represents that it has the full power and authority to execute the application to participate in eHealth Exchange and to enter into this Agreement and that any representative of Applicant who signed the Testing application or signs this Agreement had or has full power and authority to do so on behalf of Applicant.
   2. Applicant warrants and represents that the information submitted to the eHealth Exchange in the Testing application, Applicant’s Test Report, any other documentation or information provided by Applicant to the eHealth Exchange is, to the best of Applicant’s knowledge, accurate and complete.
   3. Applicant warrants and represents that the Applicant’s HIE Technology is the same health information exchange technology that will be used by Applicant in production to participate in eHealth Exchange.
   4. 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.
6. **Term and Termination**
   1. **Term**. This Agreement shall commence on the Effective Date and terminate upon termination of the Applicant’s participation in eHealth Exchange, unless terminated earlier in accordance with Sections 10(b) or 10(c).
   2. **Termination by Applicant**. Applicant may terminate this Agreement at any time prior to receiving a Test Report by providing written notice to The eHealth Exchange of its intent to so terminate this Agreement. Applicant will not be entitled to a refund of any Testing Fees paid prior to termination except as set forth in Section 3(d).

The Applicant may terminate this Agreement and replace it with the latest Testing Services Agreement if the Applicant wishes to test a new technology platform and a newer version of the Testing Services Agreement is available.

* 1. **Termination by The eHealth Exchange.** The eHealth Exchange may terminate this Agreement with immediate effect by giving notice to Applicant if:
     1. Applicant 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
     2. Applicant breaches a material provision of this Agreement where such breach is not capable of remedy.

1. **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, (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 Applicant:**

Organization:

Street:

City/State/ZIP:

Attn:

**For Healtheway, Inc. (dba the eHealth Exchange):**

8300 Boone Boulevard, Suite 500

Vienna, VA 22182

Attn: eHealth Exchange Program Director

1. **General**
   1. **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.
   2. **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.
   3. **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.
   4. **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.
   5. **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.
   6. **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.
   7. **Independent Parties**. Nothing contained in this Agreement shall be deemed or construed as creating a joint venture or partnership between Applicant 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.
   8. **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.
   9. **Assignment.** None of this Agreement, any of the rights hereunder nor any resulting certification shall be assignable by Applicant whether by operation of law or otherwise without the express written approval of the eHealth Exchange.
   10. **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 Application and Participant Testing Agreement]***

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| --- | --- | --- | --- | --- |
| **For: Applicant** | |  | **For HEALTHEWAY, INC. (dba eHealth Exchange)** | |
| Signature: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  | Signature: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Printed Name: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  | Printed Name: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Title: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  | Title: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Date: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  | Date: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**Exhibit A**

**Fee Schedule**

**Standard Testing Fees**

Smoke Test Cases1,2 $11,000

Security Test Cases1,2 $8,000

Content Testing3 Included in Annual Participation Fee

Notes:

1. This assumes that the eHealth Exchange will not spend more than ten (10) hours of staff time working on the Testing. If the eHealth Exchange must spend more than ten (10) hours of staff time, Applicant agrees to pay the eHealth Exchange $180 per hour worked above the first ten (10) hours. These supplemental hours will be purchased in a minimum block of four (4) hours. The eHealth Exchange will invoice Organization for any Testing services as hours are purchased with payment due net 30.
2. Applicants that are using an eHealth Exchange Validated Product (<https://ehealthexchange.org/testing-program/validated-products/>) are only required to complete the Smoke Tests and not the Security Tests. **The standard testing fees do not apply to Applicants using an approved Qualified Technology Solution (QTS) vendor.**
3. Content Testing (<https://ehealthexchange.org/testing-program/content-testing/>) is required for all Applicants responding to queries with document content to other Participants.

**Payment Options:**

1. Mail checks (payable to The eHealth Exchange) to:
   1. The eHealth Exchange 8300 Boone Boulevard, Suite 500, Vienna, VA 22182
2. For ACH & Wire instructions: Send a request to [accounting@ehealthexchange.org](mailto:accounting@ehealthexchange.org).
3. To request an Invoice: Send a request to [accounting@ehealthexchange.org](mailto:accounting@ehealthexchange.org).

Note: You may, if you wish, also pay the eHealth Exchange participation fees at this time.  Payment of the participation fees can either be made in conjunction with the testing fees or separately once you are ready to go into production on the eHealth Exchange. Annual participation fees are detailed in the eHealth Exchange Participation Agreement.