



## Participation Agreement for the eHealth Exchange

This Participation Agreement for the eHealth Exchange ("Agreement") is entered into as of the last date written below ("Effective Date") by and between Healtheway, Inc. (dba "eHealth Exchange"), a Virginia nonstock membership corporation, and the undersigned Participant, \_\_\_\_\_ a \_\_\_\_\_ ("Participant") (collectively "the Parties").

**WHEREAS**, there exists a multi-party health information exchange activity, the eHealth Exchange among agencies of the United States government and non-federal organizations that is conducted pursuant to the mechanism established under the Data Use and Reciprocal Support Agreement (the "DURSA") to which these federal agencies and non-federal organizations are signatories;

**WHEREAS**, the DURSA created a Coordinating Committee (the "Coordinating Committee") to govern the operations of the eHealth Exchange and the DURSA sets out the responsibilities and composition of the Coordinating Committee;

**WHEREAS**, the Coordinating Committee has engaged Healtheway, Inc. to provide support services to the eHealth Exchange network;

**WHEREAS**, Participant either does or wants to participate in the eHealth Exchange and is a signatory to the DURSA;

**WHEREAS**, pursuant to the eligibility criteria for participation in the eHealth Exchange established by the Coordinating Committee pursuant to the Data Use and Reciprocal Support Agreement (DURSA), in order for Participant to participate in the eHealth Exchange, Participant must enter into this Participation Agreement with eHealth Exchange; and

**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.

**NOW THEREFORE**, in consideration of the foregoing and the other mutual promises between the Parties contained herein, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the Parties hereby agree as follows:

1. **Structure of this Agreement.** eHealth Exchange supports the safe and secure exchange of health information among those organizations that have signed the DURSA (Participants). eHealth Exchange supports the legal and policy framework that supports the eHealth Exchange Coordinating Committee which governs eHealth Exchange. Participants must comply with the DURSA, eHealth Exchange Operating Policies and Procedures, eHealth Exchange Performance Specifications and the terms of this Participation Agreement, inclusive of all Addenda that reflect specific services that Participant uses. eHealth Exchange offers a variety of services to Participants to facilitate their compliance. The exact list of additional services will change over time and are listed in Attachment 1 to this Agreement.

For each additional service that Participant chooses to purchase, an Addendum to this Participation Agreement will be added that includes specific terms and conditions for the additional service. The Addenda are part of this Agreement and whenever the word “Agreement” is used herein, it shall expressly include this main text and all Addenda.

2. **Relationship to the DURSA.** Participant represents and warrants that it is a signatory to the DURSA. Except as specifically set forth herein, nothing herein shall be construed to amend or supersede Participant’s obligations with respect to the transaction of message content pursuant to the DURSA. to participate in the eHealth Exchange, in addition to being a signatory to the DURSA, an organization must also enter into this Participation Agreement with eHealth Exchange.

3. **Applicable Fees.**

- a. eHealth Exchange has approved the establishment of a fee schedule for an organization to be recognized as a Participant in the eHealth Exchange. (“Participation Fee”). The current version of the fee schedule is available on the eHealth Exchange website at <https://ehealthexchange.org/onboarding/fees/> with the initial version of the fee schedule provided in Exhibit A (eHealth Exchange Participation Fee Schedule). This fee schedule will change from time to time as approved by eHealth Exchange. Any changes to the fee schedule will be effective upon the beginning of a renewal term. eHealth Exchange does provide notice to all Participants of changes in the fee schedule so that Participants are aware that their fees will change at renewal. It is important to note that this fee schedule must be paid by all Participants unless eHealth Exchange approves an exception. In addition, Participants are required to pay additional fees for the services that the Participant uses. Those fees will be established by eHealth Exchange and made available to all Participants.
- b. Except as noted below in subsection (c), the Participation Fee payment for the Initial Term is due within thirty (30) calendar days following the Effective Date. Prior to the end of the Initial or any Renewal Term (each as defined in Section 4), eHealth Exchange will invoice Participant the applicable Participation Fee based on the then-current fee schedule. Participation Fees for each Renewal Term are due within thirty (30) calendar days of invoicing. Participation Fees for a Renewal Term that are not received within thirty (30) calendar days of invoicing will bear interest at the rate of one and a half percent (1.5%) per month unless the Participant is prohibited by law from paying interest charges. Participant also agrees to pay all costs incurred by eHealth Exchange to collect amounts due pursuant to this Agreement unless the Participant is prohibited by law from paying collection costs. Participant agrees that, once paid, all applicable fees are nonrefundable if Participant ceases to participate in eHealth Exchange for any reason, including termination of participation in the eHealth Exchange. Participant must pay all applicable fees as set forth herein in order to remain a Participant in good standing with eHealth Exchange.
- c. For Participants that are: (i) health plans (Payers); (ii) organizations that provide technology solutions (Vendors) or; (iii) a health information network (HIN) or health information exchange (HIE), as those terms are defined in the Information Blocking Final Rule at 45 CFR Part 171, that is **not** tax-exempt pursuant to the Internal Revenue

Code section 501(c)(3), exempt from taxation pursuant to state law or other binding legal authority, or a governmental agency (For-Profit HIE/HINs), the Participation Fee consists of two (2) components: the Base Fee and the Technology Component as set forth in Exhibit A. Payers, Vendors and For-Profit HIE/HINs will pay the Base Fee annually as set forth in subsection (b) above. Payers, Vendors and For-Profit HIE/HINs will pay the Technology Component every six (6) months. The amount of the Technology Component will be adjusted every six (6) months as set forth in Appendix A. eHealth Exchange will invoice these Participants every six (6) months for the applicable Technology Component. Participants are required to pay the Technology Component invoice within thirty (30) calendar days of invoicing. Payment of the Technical Component that is not received within thirty (30) calendar days invoicing will bear interest at the rate of one and a half percent (1.5%) per month. Participant also agrees to pay all costs incurred by eHealth Exchange to collect amounts due pursuant to this Agreement unless the Participant is prohibited by law from paying collection costs.

4. **Participation Term.** Participant agrees that the initial term of participation in the eHealth Exchange shall commence on the Effective Date and expire on the first anniversary of the Effective Date (“Initial Term”). Following the Initial Term, Participant’s payment of all applicable fees, which will vary based upon the services that Participant chooses to obtain from eHealth Exchange, no later than last day of the Initial Term shall constitute a renewal of its participation in the eHealth Exchange, provided that Participant continues to meet all other requirements for participation in the eHealth Exchange as defined by the Coordinating Committee (“Renewal Term”). Each Renewal Term shall be valid for one year. Failure to make a timely renewal payment in accordance with Section 3 of this Agreement shall be cause for suspension or termination of access to and participation in the eHealth Exchange.

5. **Suspension and Termination of Access to the eHealth Exchange.**

- a. In the event that Participant fails to pay all applicable fees for a Renewal Term within thirty (30) calendar days of invoicing, eHealth Exchange may suspend Participant’s access to and participation in the eHealth Exchange. In the event that Participant fails to pay all applicable fees within sixty (60) calendar days of invoicing, eHealth Exchange may terminate Participant’s access to and participation in the eHealth Exchange. During a suspension, the Participant can be reinstated upon payment of all applicable fees plus accrued interest charges on the unpaid amount and other amounts that are due unless Participant is prohibited by law from paying interest and other fees related to late payments.
- b. Participant acknowledges and agrees that eHealth Exchange’s right to suspend or terminate Participant’s access to and participation in the eHealth Exchange is separate and distinct from the Coordinating Committee’s rights to suspend and terminate a participant as set forth in the DURSA. eHealth Exchange is not obligated to comply with the suspension and termination provisions of the DURSA or the Operating Policies and Procedures in connection with its suspension or termination of a Participant for non-payment.

6. **Notices.** All notices required hereunder shall be in writing and sent to the Participant’s

representative designated below at the address set forth below or to such addresses as such Participant's representative may later specify by written notice to eHealth Exchange.

NAME OF PARTICIPANT'S  
DESIGNATED REPRESENTATIVE  
TO RECEIVE NOTICES: \_\_\_\_\_

PARTICIPANT'S NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

EMAIL: \_\_\_\_\_

PHONE: \_\_\_\_\_

**If Participant's representative does not notify eHealth Exchange of updated contact information, then Participant waives any right to receive any notice.**

7. **Governing Law.** This Agreement shall be construed and controlled by the laws of the Commonwealth of Virginia, without reference to conflict of laws principles. Notwithstanding the foregoing, if Participant is a Federal agency, then this Agreement shall be construed and controlled by all applicable Federal laws; if Participant is a State Governmental Entity, then this Agreement shall be construed and controlled by all applicable state law that applies to the State Governmental entity.
8. **Jurisdiction and Venue.** The Parties agree that all disputes between Participant and eHealth Exchange that arise in any way out of or in connection with this Agreement shall be heard exclusively in, and eHealth Exchange and Participant irrevocably consent to jurisdiction and venue in, an appropriate Federal court or state court located in the Commonwealth of Virginia. Notwithstanding the foregoing, if Participant is a Federal agency, then any dispute between Participant and eHealth Exchange shall be heard in the appropriate United States District Court or other Federal court that is legally permitted to preside over such matters.
9. **Complete Agreement; No Waiver.** This Agreement, inclusive of all Addenda, sets forth the entire understanding of eHealth Exchange and the Participant and supersedes all prior agreements and understandings with respect to its subject matter, unless otherwise stated in this Agreement. The waiver of any breach or default will not constitute a waiver of any other right hereunder or any subsequent breach or default.
10. **Amendment.** this Agreement may be amended by eHealth Exchange by providing notice to Participant at least thirty (30) days before any such amendment takes effect and the terms of the amended Agreement will be effective with respect to Participant unless Participant provides its notice of termination within thirty (30) days of the notice of amendment.
11. **No Third-Party Beneficiaries.** This Agreement is entered into for the benefit of the Parties and not for the benefit of any third party, except the Coordinating Committee.
12. **Compliance with Laws.** Notwithstanding anything contained in this Agreement to the contrary, the obligations of the Parties will be subject to all applicable laws, regulations and

orders, present and future, of any governmental authority having jurisdiction over the Parties. It is the intention of the Parties that this Agreement will comply with all applicable laws and regulations.

13. **General Construction.** As used in this Agreement, the plural form and singular form each shall be deemed to include the other in all cases where such form would apply. “Includes” and “including” are not limiting, and “or” is not exclusive.
14. **Independent Contractors.** The relationship of eHealth Exchange and the Participant established by this Agreement is that of independent contractors. This Agreement does not give eHealth Exchange or the Participant the power to direct and control the day-to-day activities of another; constitute eHealth Exchange, the Participant, any other participant in the eHealth Exchange or any member of eHealth Exchange as partners, joint ventures, co-owners, principal agent(s), or otherwise as participants in a joint or common undertaking; or allow eHealth Exchange or the Participant to create or assume any obligation on behalf of another for any purpose whatsoever.
15. **Warranty of Signature.** This Agreement must be signed by a representative of the Participant that is authorized to commit the Participant to all of the terms of this Agreement. By signing this Agreement, the person signing represents and warrants that he or she has been authorized by the respective Participant to enter into the obligations set forth in this Agreement and has read and understood this Agreement.
16. **Ownership of Testing Materials.** Participant acknowledges that it will be required to successfully complete specific testing as required by the eHealth Exchange Coordinating Committee as part of the eHealth Exchange Participant Testing Program. Participant agrees 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 Participant, Participant 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. Participant shall not challenge the validity of the eHealth Exchange’s or its licensors’ ownership of the eHealth Exchange IP. Participant shall not represent that it owns or has any rights in relation to the eHealth Exchange or its licensors’ IP. Participant 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. Participant 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.

Participant: \_\_\_\_\_

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

Name: \_\_\_\_\_

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

Date: \_\_\_\_\_

Acceptance:

This Participation Agreement is accepted as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Healtheway, Inc., (dba, eHealth Exchange) a Virginia  
corporation

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

Name: \_\_\_\_\_

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

Date: \_\_\_\_\_

# Exhibit A - eHealth Exchange Participation Fee Schedule

## 1. Annual Fees for Providers, Non-Profit Health Information Exchanges or Networks (NP HIN), & State, Tribal, Local and Territorial health departments (STLTs):

Annual Base Fee**	<ul style="list-style-type: none"> <li>If Provider's Adjusted or Net Patient Revenue is:</li> <li>If Non-Profit Health Information Exchanges or Networks (NP HIN), or State, Tribal, Local and Territorial health departments (STLTs) Total Expenses are:</li> </ul>
\$41,000	\$5 Billion or greater
\$27,000	\$500 Million to less than \$5 Billion
\$25,000	\$100 Million to less than \$500 Million
\$19,000	\$10 Million to less than \$100 Million
\$11,000	\$1 Million to less than \$10 Million
\$5,000	Less than \$1 Million
** No additional fees are charged for Carequality or TEFCA exchange. Although uncommon, an additional \$4,000 annual fee will be applied for each supplemental gateway (technology platform) directly connected to eHealth Exchange.	

## 2. Annual Fees for Payers, Vendors and For-Profit Health Information Exchanges or Networks There are two components: the **Base Fee** and the **Technology Component**.

### a. Base Fee

Annual Base Fee for Payers, Vendors and For-Profit Health Information Exchanges or Networks	If Total Annual Revenue <sup>1</sup> or Represented Annual Revenue is:
\$400,000	>\$10 Billion
\$206,000	\$2.5 Billion to less than \$10 Billion
\$167,000	\$1.5 Billion to less than \$2.5 Billion
\$138,000	\$1 Billion to less than \$1.5 Billion
\$115,000	\$700 Million to less than \$1 Billion
\$106,000	\$500 Million to less than \$700 Million
\$88,000	\$250 Million to less than \$500 Million
\$75,000	\$150 Million to less than \$250 Million
\$62,000	\$100 Million to less than \$150 Million
\$48,000	\$75 Million to less than \$100 Million
\$40,000	\$50 Million to less than \$75 Million
\$34,000	\$25 Million to less than \$50 Million
\$26,500	\$10 Million to less than \$25 Million
\$20,500	\$5 Million to less than \$10 Million
\$15,000	\$2 Million to less than \$5 Million
\$12,500	<\$2 Million

<sup>1</sup> "Annual Revenue" is the total annual revenue from the most recently complete calendar year.

b. **Technology Component** (In addition to Annual Base Fee for Payers, Vendors, and For-Profit Health Information Exchanges)

Incremental Fee to <u>Respond</u> to Transactions Initiated by other Organizations	Incremental Fee to <u>Initiate</u> Queries (Request Data) Routed Through eHealth Exchange's Technology Platform
\$0 <sup>2</sup>	\$.0004 for each Targeted Query made by your organization to match to a patient in another organization's system, for document lists, to retrieve data, as well as requests to send data to other organizations.
\$0 <sup>2</sup>	\$.0002 for each Broadcast or Group Query where the same patient request is being sent to multiple organizations. For example, an organization sends a patient discovery transaction to five different organizations as part of a Group Query. The incremental fee would be \$.0002 for each of the four additional transactions. This also includes requests to send data to multiple organizations

<sup>2</sup>Included in Annual Base Fee

eHealth Exchange will regularly measure the volume of queries (transactions) processed through Hub for Payers, Vendors, and For-Profit Health Information Exchanges. Six (6) months after the Effective Date of the Initial Term and six (6) months after the effective date of each Renewal Term, eHealth Exchange shall conduct a reconciliation of the total transactions processed versus 50 percent (%) of transactions estimated at the beginning of the Initial or Renewal Term.

- If the number of transactions processed exceeds 50 percent (%) of the transactions estimated for the year, eHealth Exchange will invoice the Participant for the revised estimate of total transactions for the year less the amount invoiced at the beginning of the Initial Term or Renewal Term.

At the end of the Initial Term or Renewal Term, eHealth Exchange shall conduct a reconciliation of the total transactions processed versus the transactions estimated at the beginning of the Initial or Renewal Term.

- If the number of transactions processed exceeds the transactions estimated for the year, eHealth Exchange will invoice the Participant for the actual number of total transactions for the year less the transaction fees invoiced and paid for the Initial Term or Renewal Term.
- If the actual number of transactions processed is less than the transactions estimated for the year, eHealth Exchange will refund the excess transaction fees paid.



## **Addendum 1**

### **Business Associate Addendum**

This Business Associate Addendum effective \_\_\_\_\_ (“Effective Date”), is attached to and made a part of the eHealth Exchange Participation Agreement (the “Agreement”) entered into by and between \_\_\_\_\_ (“Participant”) and Healtheway, Inc. (“Business Associate”).

**WHEREAS**, Business Associate will have access to Protected Health Information (PHI) as part of the services that it provides to Participant via the eHealth Exchange;

**WHEREAS**, the Participant requires a HIPAA compliant business associate agreement with any organization that has access to its PHI.

**NOW, THEREFORE**, in consideration of the mutual promises contained in this Addendum, and other valuable consideration, the Parties agree as follows:

- 1. Defined Terms.** Unless otherwise indicated below or elsewhere in this Addendum, all capitalized terms shall have the meanings provided in either the DURSA, the Participation Agreement or 45 C.F.R 160.103, 164.103 and 164.501.
  - a. “Privacy Rule” means 45 C.F.R. Part 160 and 45 C.F.R. Part 164, Subparts A and E, Standards for Privacy of Individually Identifiable Health Information.
  - b. “Protected Health Information” or “PHI” means individually identifiable health information as defined in 45 C.F.R 160.103 that Business Associate receives or to which Business Associate has access.
  - c. “Security Rule” means 45 C.F.R. Part 164, Subpart C, Security Standards for the Protection of Electronic Protected Health Information.
- 2. Relationship to the Participation Agreement.** This Business Associate Addendum supplements the eHealth Exchange Participation Agreement. The terms and provisions of this Business Associate Addendum shall control to the extent they are contrary, contradictory or inconsistent with the terms of the eHealth Exchange Participation Agreement. Otherwise, the terms and provisions of the eHealth Exchange Participation Agreement shall remain in full force and effect.
- 3. Business Associate Obligations.**
  - a. **Compliance with Privacy and Security Obligations.** Business Associate agrees that the requirements of HIPAA and the HITECH Act that relate to the privacy and security of PHI, and are made applicable with respect to business associates, shall be applicable to it for any services that it provides to Participant via the eHealth Exchange.

- b. **Limits on Use and Disclosure.** Business Associate may only use or disclose PHI to perform functions, activities, or services to operate the eHealth Exchange and, otherwise, as permitted or required by applicable law and regulations. This includes, but is not limited to, the following:
  - i. Use PHI for its proper management and administration or to carry out its legal responsibilities under the laws of the United States; and
  - ii. Disclose PHI for its proper management and administration, provided that disclosures are Required by Law, or Business Associate obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person, and that the person will notify Business Associate of any instances of which it is aware in which the confidentiality of the information may have been breached in accordance with the requirements of this Business Associate Addendum. Business Associate shall remain liable to Participant for all acts or omissions of any third party to which it discloses PHI.
- c. **Minimum Necessary.** Any use or disclosure of PHI by Business Associates will be limited to the minimum PHI necessary to accomplish the function for which the PHI is used or disclosed and shall be restricted to those employees, subcontractors or agents subject to a written obligation of confidentiality with Business Associate that is at least as protective of the PHI as this Addendum. Business Associate shall comply with any guidance issued by the Secretary of HHS regarding compliance with the minimum necessary standard.
- d. **Safeguards.** Business Associate will comply with all applicable provisions of Applicable Law including, but not limited to, the Privacy Rule and the Security Rule and will implement and maintain reasonable and appropriate administrative, physical and technical safeguards to protect the availability, integrity and confidentiality of the PHI as permitted and/or required by Applicable Law. Business Associate shall also develop and implement policies and procedures and maintain documentation of such policies and procedures to assure compliance with Applicable Law including, but not limited to, the Privacy Rule and the Security Rule.
- e. **Reports of Unauthorized Access, Use or Disclosure.** Business Associate shall report in writing to Participant, without unreasonable delay, (i) any use or disclosure of PHI that is not authorized by this Addendum or the DURSA including, but not limited to, Adverse Security Events, as defined in the DURSA, and (ii) any Breach of Unsecured Protected Health Information. Business Associate shall deliver such notice no later than five (5) calendar days after the date on which it (or any member of its workforce or its agent, except the person(s) responsible for the unauthorized use or disclosure or Breach), became aware, or in the exercise of reasonable diligence should have become aware, of such unauthorized use or disclosure or Breach. Notice of any unauthorized use or disclosure or Breach shall include the following information if know at the time of the Notice: (i) describe the event resulting in the unauthorized use or disclosure or Breach; (ii) describe the types of PHI that were involved in the unauthorized use or disclosure or Breach; and (iii) describe what Business Associate is doing to investigate, mitigate losses arising from and protect against any further unauthorized use or

disclosure or Breach. Business Associate shall maintain, for six (6) years, all documentation associated with the investigation of a potential unauthorized use or disclosure or Breach, including any information influencing its determination that the use or disclosure was or was not a Breach and any exceptions applied to the use or disclosure. On request, Business Associate shall provide Participant with the documentation relevant to the circumstances surrounding the unauthorized use or disclosure or Breach.

- f. **Mitigation Procedures.** In the event of any improper use and/or disclosure of Protected Health Information Business Associate shall work cooperatively with Participant to implement procedures for mitigating the harmful effects of such improper use and/or disclosure.
- g. **Accounting of Disclosures.** In accordance with 45 C.F.R. § 164.528, Business Associate agrees to produce, and maintain for at least six (6) years, a record of any disclosure of the PHI, which record will include, for each disclosure, the date of disclosure, the name and address of the recipient, a description of the PHI disclosed (if known), the name of the individual who is the subject of the PHI (if known) and the reason for disclosure. Upon request from Participant, Business Associate will make its record of disclosure available to Participant within the time frame and in the manner permitted and/or required by Applicable Law or as otherwise agreed by the Participant and Business Associate in writing.
- h. **Access to Individuals.** Business Associate agrees to provide Individuals with access to their Protected Health Information, as held in a Designated Record Set by Business Associate, in order to meet the requirements under 45 CFR § 164.524, including in the electronic form or format requested by the Individual, as required by 45 CFR § 164.524. In the event any individual requests access to Protected Health Information directly from Business Associate, it shall forward such request to Participant in a timely manner to allow Participant to respond to the Individual.
- i. **Amendment of Protected Health Information.** Business Associate agrees to make any amendment(s) to Protected Health Information it holds in a Designated Record Set, as directed by Participant pursuant to 45 CFR § 164.526. In the event the request for an amendment is delivered by an individual directly to Business Associate, it will promptly forward the request to Participant and upon direction by Participant, it shall amend the Protected Health Information and incorporate the amendment into its records.
- j. **Right to Restrict.** Business Associate agrees to comply with, upon communication from Participant, any restrictions to the use or disclosure of Protected Health Information that Participant has agreed to in accordance with 45 CFR § 164.522.
- k. **Marketing/Sale of Protected Health Information.** Business Associate shall not directly or indirectly receive remuneration in exchange for any Protected Health Information and shall not engage in marketing activities or the sale of Protected Health Information, as defined in the HIPAA Privacy & Security Rules, without the prior written consent of Participant and individual written authorization, as required by law. For the avoidance of doubt, the Participant Fees paid by Participant to eHealth Exchange shall not be a violation of this section.

- l. **De-Identified PHI.** Upon the prior written approval of Participant, Business Associate may use Protected Health Information that has been de-identified in accordance with 45 CFR § 164.514 for its normal business operations.
- m. **Aggregation.** Upon the prior written approval of Participant, Business Associate may use Protected Health Information to provide Data Aggregation Services related to Participant's Health Care Operations, as permitted by 45 CFR § 164.504(e)(2)(i)(B).
- n. **Subcontractors.** Business Associate shall ensure that any subcontractor to whom it provides PHI agrees to the same restrictions and conditions that apply to Business Associate through this Addendum and under Applicable Law. Business Associate shall remain liable to the Participant for all acts or omissions of any subcontractor or agent to which Business Associate discloses PHI; however, in no case shall Business Associate be liable for any party who is under a direct contract with Participant.
- o. **Availability of Books and Records.** Business Associate agrees to make its internal practices, books and records relating to its uses or disclosures of the PHI available to Participant, or, if directed in writing, the Secretary for purposes of determining compliance with Applicable Law, subject to attorney-client and other applicable privileges.

#### **4. Participant Obligations.**

- a. Participant agrees to use appropriate safeguards to protect the confidentiality and security of PHI in transmitting the PHI to Business Associate pursuant to the DURSA, the Participation Agreement and this Addendum.
- b. Participant shall notify Business Associate of any limitations in its Notice of Privacy Practices (NPP) that it provides to Individuals as well as any changes to its NPP to the extent that such limitations or changes may affect Business Associate's use or disclosure of PHI.
- c. Participant shall notify Business Associate of any changes in, or revocation of, permission by an Individual to use or disclose PHI, to the extent that such changes affect Business Associate's use or disclosure of PHI.
- d. Participant shall notify Business Associate of any restrictions on the use or disclosure of PHI that Participant has agreed to in accordance with 45 CFR 164.522 to the extent that such restrictions may affect Business Associate's use or disclosure of PHI.

#### **5. Term and Termination.**

- a. **Term.** This Addendum shall become effective on the Effective Date unless the Participant and Business Associate mutually agree in writing to an alternative effective date.
- b. **Termination.**

- i. **Automatic Termination.** This Addendum will automatically terminate upon the termination or expiration of the Participation Agreement. This Addendum cannot be terminated by Participant, except as provided for below in the event of a material breach that is not cured, unless Participant terminates its Participation Agreement and withdraws from the eHealth Exchange.
  - ii. **Material Breach of Business Associate Addendum.** Notwithstanding any provisions in this Addendum, either Participant or Business Associate may terminate this Addendum if it determines that another Party has breached a material term of this Addendum and has not cured such breach with thirty (30) days of receiving notice of the breach.
  - iii. **Effect of Termination.** The PHI to which Business Associate will have access by virtue of Participant's participation in eHealth Exchange is necessary to the ongoing operation of the eHealth Exchange in support all of the other eHealth Participants. It is not possible for Business Associate to destroy or return the PHI even if Participant withdraws from eHealth Exchange. Upon termination of the Participation Agreement, Business Associate will extend the protections of this Addendum to all of Participant's PHI in perpetuity.
6. **Independent Contractors.** In all cases, Business Associate will be acting as an independent contractor of Participant. Nothing contained in the Participation Agreement or this Addendum shall be construed to create a partnership or a joint venture or to authorize Business Associate to act as a general or special agent of Participant except as Participant may expressly authorize in writing.
7. **Miscellaneous Terms.** This Addendum supersedes all prior understandings and agreements, written or oral, between Participant and Business Associate with respect to its subject matter. This Addendum is incorporated into the Participation Agreement. The section titles used in this Addendum are provided for convenience only and are not intended to affect the interpretation of any provision. Any ambiguity in this Addendum shall be resolved in favor of a meaning that permits the Participant and the Business Associate to comply with Applicable Law. Any and all references in this Addendum to a statute or regulation mean the section as in effect or as amended. Participant and Business Associate agree that if Applicable Law changes, this Addendum will be deemed to incorporate such changes as necessary for them to operate in compliance with the amended or modified requirements of Applicable Law. Otherwise, this Addendum may only be amended by a written instrument signed by both Participant and Business Associate. Nothing in this Addendum is to be construed as conferring any right, remedy or claim on any person or entity other than the Participant and Business Associate and their respective successors and assigns. This Addendum may not be assigned by either Participant or Business Associate unless the entire Participation Agreement is assigned. The unenforceability of any provision in this Addendum will not affect the enforceability of any other provision. The waiver of any right or obligation under this Addendum will not be deemed to be a continuing waiver or the waiver of another right or obligation. All waivers must be in writing signed by both the Participant and Business Associate. This Addendum may be executed in counterparts, which when considered together will constitute one and the same document. Facsimile or email transmission of a signed photocopy, facsimile document or other electronic image of this Addendum will be deemed delivery of an original.



## **ADDENDUM 2 NATIONAL LEVEL GATEWAY SERVICE**

SCOPE OF ADDENDUM: This Addendum applies to a Participant that wishes to use the eHealth Exchange National Level Gateway Service (Hub).

UNLESS DEFINED IN THE PARTICIPATION AGREEMENT OR THIS ADDENDUM 2, TERMS SHALL HAVE THE MEANING ASCRIBED TO THEM IN THE DURSA.

### **1. eHealth Exchange Responsibilities.**

- a. Gateway Services. eHealth Exchange grants to Participant, for itself and its Participant Users, a non-exclusive and non-transferrable right to access and use the Gateway subject to the terms and conditions of this Addendum, the Participation Agreement, the DURSA inclusive of all Performance Specifications and Operating Policies and Procedures adopted by eHealth Exchange.
- b. Gateway Vendor. Participant understands that eHealth Exchange has contracted with a third party to provide the Gateway (the Gateway Vendor). The Gateway Vendor is required under the terms of its contract with eHealth Exchange to meet specific Service Level Agreements with respect to the availability and performance of the Gateway and there are penalties for failure to meet these SLAs. eHealth Exchange will require that the Gateway Vendor meet and maintain the American Institute of Certified Public Accountants' (AICPA) standard for SOC 2, HiTrust CSF certification, or similar risk management framework requirements. Participant agrees to cooperate with eHealth Exchange and with the Gateway Vendor as reasonably requested to enhance the effective and efficient operation of the Gateway.
- c. Administrative Portal. eHealth Exchange may choose to provide Participant with access to an Administrative Portal as part of the Gateway Service (the GAP). If provided, the GAP would allow Participant to monitor its use of the Gateway. The GAP would also support the creation of automated administrative reports that are delivered to Participant. The exact type and nature of information that is available to Participant on the GAP may change over time. eHealth Exchange will work with Participant to make information available via the GAP that is valuable to Participant.
- d. Onboarding to the Gateway. After Participant signs this Addendum and provides the GAP Designee contact information, eHealth Exchange will prepare a work

order to onboard Participant to the Gateway and send this to the Gateway Vendor. Gateway Vendor will then work directly with Participant to onboard Participant to the Gateway.

## 2. Participant Responsibilities.

- a. Access to and Use of Gateway. Participant, on behalf of itself and its Participant Users, agrees to only access and use the Gateway in connection with its authorized use of eHealth Exchange. For Participant, this means supporting discovery of the Gateway endpoints for the Transaction of Message Content by its Participant Users and accessing and using the Gateway Administrative Portal. For Participant Users, this means using the Gateway endpoints for the Transaction of Message Content. All other attempts to access or use the Gateway are prohibited. As between Participant and eHealth Exchange, Participant is responsible for the actions of its Participant Users in respect of the Gateway since eHealth Exchange does not have any direct contractual relationship with those Participant Users.
- b. Administrative Portal. Participant shall designate one individual who will have access to the Gateway Administrative Portal (the “GAP Designee”) if the eHealth Exchange chooses to provide the GAP. Participant shall provide to eHealth Exchange the name, title, e-mail address and telephone number (GAP Designee contact information) of its GAP Designee so that eHealth Exchange can create the credentials necessary to allow access and use to the Administrative Portal. Participant is responsible for providing to eHealth Exchange any and all changes to the GAP Designee contact information. Participant shall not allow anyone, other than its GAP Designee, to have access to the Gateway Administrative Portal.
- c. Payment of fees. Participant shall pay eHealth Exchange a fee to access and use the Gateway according to the fee schedule attached to the Participant Agreement.

## 3. Privacy and Security.

- a. Basic Obligations. Each party shall be responsible for ensuring that performance of its obligations and exercise of its rights under this Addendum complies with all applicable privacy and security laws, including the HIPAA Regulations, and local and state laws rules and regulations. Participant and eHealth shall each use appropriate safeguards to prevent inappropriate use of the Gateway including appropriate administrative, physical, and technical safeguards that protect the confidentiality, integrity, and availability of information available through the Gateway. eHealth Exchange agrees that the Gateway will not alter clinical data unless explicitly mutually agreed in writing after requested by Participant in writing.
- b. Business Associate Agreement. Participant agrees that eHealth Exchange will have access to Protected Health Information, as defined by HIPAA, of Participant or

Participants Users, by virtue of its role in supervising the Gateway Service. Addendum 1 to the Participant Agreement is the Business Associate Agreement between eHealth Exchange and Participant.

4. **Monitoring and Auditing the Gateway.** eHealth Exchange, through its agents, employees and independent contractors, shall, for system administration, security, Gateway Vendor requirements and other legitimate purposes, monitor and audit all access to and use of the Gateway and the content of any data or messages communicated to, from or through the Gateway in accordance with the eHealth Exchange Operating Policies and Procedures, as amended from time to time.
5. **Fees.** eHealth Exchange has established a fee for Participant's access to and use of the Gateway which is included in the fee schedule that is part of the Participant Agreement. The provisions of the Participant Agreement govern the invoicing by eHealth Exchange and the payment by Participant of this fee. If any third party including, but not limited to, Participant's EMR vendor, charges Participant a fee(s) related to the Gateway, Participant shall be responsible for paying this fee and it will not be the responsibility of eHealth Exchange.
6. **Limitation of Liability.** Notwithstanding any other provision of the Participant Agreement or the DURSA, Participant agrees that the maximum amount of damages that it can recover from eHealth Exchange for any and all damages that Participant incurs as a result of accessing or using the Gateway, or otherwise related in any way to the Gateway, are limited to the actual amount of fees that Participant paid to eHealth Exchange for Gateway Services during the most recent 12 months prior to the time that any claim by Participant arose.
7. **Term and Termination.** This Addendum is part of the Participant Agreement and will be automatically terminated in the event that the Participant Agreement is terminated for any reason.
8. **Suspension or Termination of Participant.**
  - a. Suspension by eHealth Exchange of Gateway access or use. eHealth Exchange reserves the right to suspend Participant's right to access and use the Gateway if eHealth Exchange determines that Participant has breached a material obligation under this Addendum or that there is a substantial likelihood that Participant's acts or omissions create an immediate threat or will cause irreparable harm to another party, individual, eHealth Exchange or the eHealth Exchange Network. Prior to suspending Participant, eHealth Exchange shall provide written notice of such suspension to Participant unless providing such notice will create an immediate threat to the confidentiality, privacy or security of information exchanged through the Gateway or will cause irreparable harm to another party including, but not limited to an eHealth Exchange Participant or Participant User, the integrity or operation of the eHealth Exchange Network or the Gateway Vendor. The notice shall contain a summary of the reasons for the suspension. Participant shall use



reasonable efforts to respond to the suspension notice with a detailed plan of correction or an objection to the suspension within three (3) business days or, if such submission is not reasonably feasible within three (3) business days, then at the earliest practicable time. If Participant submits a plan of correction, eHealth Exchange shall, within five (5) business days, review and either accept or reject the plan of correction. If the plan of correction is accepted, eHealth Exchange shall, upon completion of the plan of correction, end the suspension. If the plan of correction is rejected, Participant's suspension will continue, during which time eHealth Exchange and Participant shall work in good faith to develop a plan of correction that is acceptable to both Parties.

- b. Termination "For Cause" by eHealth Exchange. eHealth Exchange may terminate this Addendum and Participant's right to access and use the Gateway under the following circumstances:
  - i. eHealth Exchange and Participant cannot reach agreement on a plan of correction to address a suspension action taken by eHealth Exchange;
  - ii. Participant fails to successfully implement an agreed upon plan of correction to cure the condition that led to suspension; or
  - iii. If Participant is in material default of the performance of a duty or obligation imposed upon it by this Agreement and Participant has not substantially cured that default within 60 calendar days following receipt of written notice of that default from eHealth Exchange.
  - iv. eHealth Exchange may also terminate Participant for non-payment of fees, regardless of whether eHealth Exchange suspended Participant pursuant the Participant Agreement, if Participant fails to pay the fees within 60 days of the due date.
- c. Effect of Termination. Upon termination hereof for any reason, Participant agrees to immediately cease all use of the Gateway and cause all use by its Participant Users to immediately cease.

## 9. Disclaimers

- a. Reliance on a System. Participant acknowledges and agrees that (i) the information available through the eHealth Exchange Network is drawn from numerous sources, (ii) eHealth Exchange has not and will not confirm the accuracy of any information available through the eHealth Exchange Network, (iii) the information provided through the eHealth Exchange Network may not include the individual's full and complete medical record or history; and (iv) eHealth Exchange reveals the source of the information so that Participant and Participant Users will be able to make appropriate decisions about their use. The parties agree that eHealth Exchange merely receives such information from eHealth Exchange Participants, eHealth Exchange Users and Partner Network Participants and therefore shall not be held responsible by Participant for any quality issues, including negligence, detrimental reliance or any other theory of law. Participant shall be solely responsible for ensuring appropriate use by Participant and Participant Users of such information.

- b. Availability of the Gateway. Participant acknowledges and agrees that because the Gateway: (a) is accessed over the Internet, (b) relies, in part, on the existence and proper operation of equipment and software that is outside of the control of eHealth Exchange, and (c) relies on access to information from, and the provision of information controlled by, third parties, eHealth Exchange makes no guarantee as to the availability or accessibility of the Gateway or any information contained therein at any particular point in time.
- c. Carrier Lines. The parties acknowledge that access to the Gateway is provided over various facilities and communications lines, and information shall be transmitted over local exchange and Internet backbone carrier lines and through routers, switches, and other devices (collectively, “carrier lines”) owned, maintained, and serviced by third-party carriers, utilities, and Internet service providers, all of which may be beyond the parties’ control. Provided the parties use reasonable security measures, neither party assumes any liability for or relating to the integrity, privacy, security, confidentiality, or use of any information while it is transmitted over those carrier lines, which are beyond the party’s control, or any delay, failure, interruption, interception, loss, transmission, or corruption of any information attributable to transmission over those carrier lines which are beyond the party’s control. Use of the carrier lines is solely at Participant’s risk and is subject to all Applicable Law.
- d. DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS WARRANTIES CONTAINED IN THIS AGREEMENT, EHEALTH EXCHANGE MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, IN FACT OR IN LAW AS TO ANY MATTER WITH RESPECT TO EHEALTH, THE EHEALTH EXCHANGE NETWORK, OR THE GATEWAY SERVICES, INCLUDING, WITHOUT LIMITATION, TRAINING, DATA MANAGEMENT, AND SUPPORT. EXCEPT FOR THE EXPRESS WARRANTIES CONTAINED IN THIS AGREEMENT, THERE IS NO WARRANTY THAT THE INFORMATION AVAILABLE THROUGH THE GATEWAY IS TRUE, COMPLETE, CORRECT, OR ERROR-FREE, VIRUS-FREE OR UNINTERRUPTED. EHEALTH EXCHANGE SHALL HAVE NO LIABILITY WHATSOEVER FOR INFORMATION TRANSACTED THROUGH THE GATEWAY, INCLUDING WITHOUT LIMITATION ITS INTEGRITY AND QUALITY. EXCEPT AS SET FORTH HEREIN, EHEALTH EXCHANGE SPECIFICALLY DISCLAIMS ANY AND ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, FREEDOM FROM INFRINGEMENT AND ANY IMPLIED WARRANTIES ALLEGEDLY ARISING FROM TRADE USAGE OR COURSE OF DEALING. THE GATEWAY IS NOT AN ELECTRONIC HEALTH RECORD, NOR IS IT INTENDED TO REPLACE ANY OFFICIAL MEDICAL RECORDS MAINTAINED BY PARTICIPANT. EHEALTH EXCHANGE DOES NOT WARRANT AND WILL NOT BE LIABLE FOR THE INTERPRETATION OF ANY OF THE INFORMATION AVAILABLE THROUGH THE GATEWAY, FOR ANY USE OF THE GATEWAY BY PARTICIPANT, PARTICIPANT USERS OR PARTICIPANT UNAUTHORIZED USERS. ANY SUCH INTERPRETATIONS OR DECISIONS

RESULTING THEREFROM ARE AT THE SOLE RISK OF PARTICIPANT AND PARTICIPANT USERS.

- e. DISCLAIMER OF INCIDENTAL, SPECIAL AND CONSEQUENTIAL DAMAGES. NEITHER PARTY SHALL BE LIABLE UNDER ANY CIRCUMSTANCES FOR ANY INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OR ECONOMIC LOSS ARISING OUT OF OR IN CONNECTION WITH THE DELIVERY, USE OR PERFORMANCE OF GATEWAY SERVICES BASED UPON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY IN TORT OR ANY OTHER LEGAL THEORY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS, REVENUE, EQUIPMENT USE, DATA OR INFORMATION OF ANY KIND.

## **Attachment 1 – Additional Services**

1. eHealth Exchange National Level Gateway Service (Hub)