

## **BUSINESS ASSOCIATE AGREEMENT**

This Business Associate Agreement (the "Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the University of Maine System ("University"), and \_\_\_\_\_ ("Business Associate").

WHEREAS, The University and Business Associate are parties to an agreement (the "Underlying Agreement"), pursuant to which Business Associate provides certain services to University and, in connection with those services, University discloses to Business Associate and/or Business Associate discloses and/or uses certain protected health information ("PHI") that is subject to protection under the Health Insurance Portability and Accountability Act of 1996, as amended from time to time ("HIPAA");

WHEREAS, the parties desire to comply with the HIPAA standards for the privacy and security of PHI of Individuals at University;

NOW THEREFORE, for and in consideration of the recitals above and the mutual covenants and conditions herein contained, University and Business Associate enter into this Agreement to provide a full statement of their respective responsibilities.

### **SECTION I - DEFINITIONS**

Unless otherwise provided herein, capitalized terms shall have the same meaning as set forth in HIPAA, as amended, and its implementing regulations, including, but not limited to, 45 CFR 160.103, 164.103, and 164.501.

**ARRA** shall mean the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009, Pub. Law No. 111-5 and its implementing regulations. References in this Agreement to a section or subsection of title 42 of the United States Code are references to sections of ARRA, and any reference to provisions of ARRA in this Agreement shall be deemed a reference to that provision and its existing and future implementing regulations, when and as each is effective.

**Compliance Date** shall mean in each case the date by which compliance is required under the referenced provision of ARRA.

**HIPAA** - The term "HIPAA" shall mean the Health Insurance Portability and Accountability Act of 1996, as amended from time to time.

**Individual** - The term "Individual" shall have the same meaning as the term "Individual" in 45 CFR §160.103 and shall include a person who qualifies as a personal representative in accordance with 45 CFR §164.502(g).

**Privacy Rule** - The term "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A, D and E.

**Protected Health Information or PHI** - The term "Protected Health Information" or "PHI" shall have the same meaning as the term "Protected Health Information" in 45 CFR §160.103, limited to the information created or received by Business Associate from or on behalf of University.

**Required by Law** - The term "required by law" shall have the same meaning as the term "required by law" in 45 CFR §164.103.

**Secretary** - The term "Secretary" shall mean the Secretary of the United States Department of Health and Human Services or his/her designee.

**Security Rule** - The term "Security Rule" shall mean the Security Standards for the Protection of Electronic Protected Health Information at 45 CFR Parts 160, 162 and 164, Subpart C.

**Underlying Agreement** - The term "underlying agreement" shall mean that certain agreement dated \_\_\_\_\_, 20\_\_\_\_, under which Business Associate provides certain services to University and, in connection with those services, Business Associate uses or discloses certain protected health information that is subject to protection under HIPAA from or on behalf of University.

## **SECTION II - OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE**

- 2.1 **Performance of Agreement.** Business Associate, its agents and employees (collectively referred to as "Business Associate") agrees not to use or further disclose PHI other than as permitted or required by this Agreement or as Required by Law. Business Associate shall comply with each applicable requirement of 45 CFR §164.504(e).
- 2.2 **Safeguards for Protection of PHI.** Business Associate shall develop, implement, maintain and use appropriate administrative, technical and physical safeguards to prevent the use or disclosure of PHI, in any form or media, received from, or created or received by Business Associate on behalf of, the University, other than as provided for by this Agreement. Business Associate shall document and keep such security measures current.
- 2.3 **Reporting of Unauthorized Use and/or Security Breach.** Business Associate will promptly report to University any breach of security or use or disclosure of PHI not provided for in this Agreement upon becoming aware of it, as soon as possible and in no case later than sixty (60) calendar days after discovery, and all in accordance with 42 USC § 17932(b) as of its Compliance Date. Business Associate will indemnify and hold University harmless from all liabilities, costs and damages arising out of or in any manner connected with the security breach or unauthorized use or disclosure by Business Associate of any PHI. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a security breach or use or disclosure of PHI by Business Associate in violation of the requirements of this Agreement. Notification of unauthorized use and/or security breach shall include:
  - The nature and extent of the PHI involved, including the types of identifiers and the likelihood of re-identification;
  - The unauthorized person who used the PHI or to whom the disclosure was made;
  - Whether the PHI was actually acquired or viewed; and
  - The extent to which the PHI has been mitigated.
- 2.4 **Use of Subcontractors.** Business Associate agrees to ensure that any agent and/or subcontractor, to whom it provides PHI received from, or created or received by Business Associate on behalf of, University, shall enter into a Business Associate Agreement with such agent or subcontractor adhering to the same restrictions and conditions that apply through this Agreement to Business Associate with respect to such information, including, but not limited to, the implementation of reasonable and appropriate safeguards.
- 2.5 **Access to PHI.** Business Associate agrees to provide access, at the request of University, and in the time and manner designated by University, to PHI in a Designated Record Set, to University or, as directed by University, to an Individual in order to meet the requirements under 45 CFR §164.524 and Maine law. In the event that Business Associate, in connection with the services, uses or maintains an Electronic Health Record of information of or about an Individual, then the Business Associate shall upon request by the University provide an electronic copy of the PHI to the University or to the Individual or a third party designated by the Individual, all in accordance with 42 USC §17935(e), as of its Compliance Date.
- 2.6 **Amendments by Business Associate.** Business Associate agrees to make available for amendment and incorporate any amendment(s) to PHI in a Designated Record Set that the University directs or agrees to pursuant to 45 CFR §164.526 and Maine law at the request of University or an Individual, and in the time and manner designated by University.
- 2.7 **Access by DHHS.** Business Associate agrees to make internal practices, books and records including policies and procedures and PHI relating to the use and disclosure of PHI received from, or created or received by Business Associate on behalf of, University available to the University, or to the Secretary, in a time and manner designated by the University or the Secretary, for the purposes of the Secretary determining University's and Business Associate's compliance with HIPAA and its implementing regulations, including, but not limited to, the Privacy Rule.

- 2.8 Access for University. Upon reasonable notice, Business Associate shall make its facilities, systems, books and records available to University.
- 2.9 Documentation of Disclosures. Business Associate agrees to document such disclosures of PHI and information related to such disclosures as would be required for University to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 CFR §164.528 and, as of its Compliance Date, in accordance with 42 USC §17935(c).
- 2.10 Accounting of Disclosures. Business Associate agrees to provide to University or an Individual, in the time and manner designated by University, information collected in accordance with Section 2.9 of this Agreement, to permit University to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 CFR §164.528 and, as of its Compliance Date, in accordance with 42 USC §17935(c). Each accounting shall provide (i) the date of each disclosure; (ii) the name and address of the organization or person who received the PHI; (iii) a brief description of the information disclosed; and (iv) the purpose for which the information was disclosed and a copy of the request or authorization for disclosure. Business Associate shall maintain a process to provide this accounting of disclosures for as long as Business Associate maintains PHI received from, or created or received by Business Associate on behalf of, University.
- 2.11 Breach or Misuse of PHI. Business Associate recognizes that any breach of confidentiality or misuse of PHI may result in the termination of this Agreement and/or legal action.
- 2.12 Security of Electronic Information. Business Associate shall develop, implement, maintain and use appropriate administrative, technical and physical security measures to preserve the confidentiality, integrity and availability of all electronically maintained or transmitted health information received from, or created or received by Business Associate on behalf of, the University, which pertains to an Individual. Business Associate shall document and keep such security measures current and available for inspection upon request. Business Associate's security measures must be consistent with the Security Rule. As of the Compliance Date of 42 USC §17931, Business Associate shall comply with the requirements set forth in 45 CFR §§164.308, 164.310, 164.312 and 164.316.
- 2.13 Electronic Transactions and Code Set Standards. If Business Associate conducts any Standard Transaction for, or on behalf of, the University, Business Associate shall comply, and shall require any subcontractor or agent conducting such Standard Transaction to comply, with each applicable requirement of 45 CFR Part 162. Business Associate shall not enter into, or permit its subcontractors or agents to enter into, any agreement in connection with the conduct of Standard Transactions for, or on behalf of, the University that: 1) would change the definition, data condition or use of a data element or segment in a standard; 2) add any data elements or segments to the maximum defined data set; 3) use any code or data elements that are either marked "not used" in the standard's implementation specification or are not in the standard's implementation specification(s); or 4) change the meaning or intent of the standard's implementation specification(s).

### **SECTION III - PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE**

- 3.1 General. Except as otherwise limited in this Agreement or as provided in section 3.2, Business Associate may use or disclose PHI to perform functions, activities, or services for, or on behalf of, University as specified in the Underlying Agreement, provided that such use or disclosure would not violate HIPAA if done by University or the "minimum necessary" policies and procedures of the University. Except as permitted by this Agreement, the University shall not request or require Business Associate to use or disclose PHI in any manner that would not be permissible under HIPAA if done by the University.
- 3.2 Specific. Except as otherwise limited in this Agreement, Business Associate may use PHI if necessary for the proper management and administration of the Business Associate or to carry out the legal responsibilities of the Business Associate. Except as otherwise limited in this Agreement, Business Associate may disclose PHI if necessary for the proper management and administration of the Business Associate, or to carry out the legal responsibilities of the Business Associate, provided that disclosure is required by law, or Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will

remain confidential and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and the person notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached. Except as otherwise limited in this Agreement, Business Associate may use PHI to provide Data Aggregation services to University as permitted by 45 CFR §164.503(e)(2)(i)(B). Business Associate may use PHI to report violations of law to appropriate Federal and State authorities, consistent with 45 CFR §164.502(j)(1).

- 3.3 Minimum Necessary. Business Associate shall request, use and/or disclose only the minimum amount of PHI necessary to accomplish the purpose of the request, use and/or disclosure; provided that it shall comply with 42 U.S.C. §17935(b) as of its Compliance Date.
- 3.4 Remuneration. Business Associate shall not directly or indirectly receive remuneration in exchange for any PHI in accordance with 42 USC §17935(d) as of its Compliance Date.
- 3.5 Marketing. Business Associate shall not make or cause to be made any communication about a product or service that is prohibited by 42 USC §17936(a) as of its Compliance Date.
- 3.6 Fund-Raising. Business Associate shall not make or cause to be made any written fund-raising communication that is prohibited by 42 USC §17936(b) as of its Compliance Date.

#### **SECTION IV - OBLIGATIONS OF UNIVERSITY**

- 4.1 Consent. University agrees to obtain any consent, authorization or permission that may be required by the Privacy Rule or applicable state laws and/or regulations prior to furnishing Business Associate the PHI pertaining to an Individual. The University will notify Business Associate of any changes in, or revocation of, permission by the Individual to use or disclose PHI, to the extent that such changes may affect Business Associate's use or disclosure of PHI.
- 4.2 Restrictions. University agrees that it will inform Business Associate of any PHI that is subject to any arrangements permitted or required of University under the Privacy Rule that may materially impact in any manner the use and/or disclosure of PHI by Business Associate under this Agreement, including, but not limited to, restrictions on the use and/or disclosure of PHI as provided for in 45 CFR §164.522 or 42 USC §17935(a) as of its Compliance Date.
- 4.3 Notice of Privacy Practices. University agrees that it will notify Business Associate of any limitation(s) in its Notice of Privacy Practices of the University in accordance with 45 CFR §164.520, to the extent that such limitation may affect Business Associate's use or disclosure of PHI.
- 4.4 Minimum Necessary. University shall request, use and/or disclose only the minimum amount of PHI necessary to accomplish the purpose of the request, use and/or disclosure; provided that it shall comply with 42 U.S.C. §17935(b) as of its Compliance Date.

#### **SECTION V - TERM/TERMINATION**

- 5.1 Term and Termination. The term of this Agreement shall be effective as of \_\_\_\_\_ and shall terminate when all of the PHI provided by University to Business Associate, or created or received by Business Associate on behalf of, University is destroyed or returned to University, or, if it is infeasible to return or destroy the PHI, protections are extended to such PHI in accordance with the termination provisions in this section.
- 5.2 Termination for Cause. Upon University's knowledge of a material breach by Business Associate, University may terminate this Agreement or may provide an opportunity for Business Associate to cure the breach or end the violation and shall terminate this Agreement if Business Associate does not cure the underlying breach or end the violation within the time specified by University. If Business Associate has breached a material term of this Agreement and cure is not possible, University may immediately terminate this Agreement. Material Breach shall include Business Associate's improper use or disclosure of PHI and any changes

or any diminution of Business Associate's reported security procedures or safeguards that render any or all of Business Associate's safeguards unsatisfactory to University. If this Agreement is terminated for cause, the University shall have the right to terminate the Underlying Agreement without penalty. In the event of such termination, University shall not be liable for payment for any services performed by Business Associate after the effective date of termination. If neither termination nor cure are feasible, the University shall report the violation to the Secretary.

As of the Compliance Date of 42 USC §17934(b), if the Business Associate knows of a pattern of activity or practice of the University that constitutes a material breach or violation of this Agreement, then the Business Associate shall either:

- A. Provide an opportunity for the University to cure the breach or end the violation and terminate this Agreement if the University does not cure the breach or end the violation within the time specified;
- B. Immediately terminate this Agreement if the University has breached a material term of this Agreement and cure is not possible; or
- C. If neither termination nor cure are feasible, report the violation to the Secretary.

5.3 Termination after Repeated Violations. In addition, University may terminate this Agreement and the Underlying Agreement without penalty if Business Associate repeatedly violates this Agreement or any provision hereof, irrespective of whether, or how promptly, Business Associate may remedy such violation after being notified of the same. In the event of such termination, University shall not be liable for payment for any services performed by Business Associate after the effective date of termination.

5.4 Effect of Termination:

5.4.1 Except as provided in Section 5.4.2, upon termination of this Agreement, for any reason, Business Associate shall cease and desist all uses and disclosures of University's PHI and shall immediately return or destroy (if University gives written permission to destroy) in a reasonable manner consistent with HIPAA, all PHI received from University, or created or received by Business Associate on behalf of University, provided, however that Business Associate shall cooperate with University to ensure that no original PHI records are destroyed. This provision shall apply to PHI that is in the possession of subcontractors or agents of Business Associate. Except as provided in Section 5.4.2, Business Associate shall retain no copies of the PHI. Except as provided in Section 5.4.2, Business Associate shall certify to University that all PHI has been returned (or destroyed) within 30 days after termination or expiration of this Agreement.

5.4.2 In the event that Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide to University notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of PHI is infeasible, Business Associate shall extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI.

## **SECTION VI - INDEMNIFICATION/INSURANCE**

6.1 Indemnification. Business Associate shall indemnify, defend, and hold University and its employees, directors, trustees, officers, representatives and agents (collectively the Indemnitees) harmless from and against all claims, causes of action, liabilities, judgments, fines, assessments, penalties, damages, awards or other expenses, of any kind or nature whatsoever, including, without limitation, attorneys' fees, expert witness fees, and costs of investigation, litigation or dispute resolution, incurred by the University and relating to or

arising out of any breach or alleged breach of the terms of this Agreement by Business Associate or any other act or omission of Business Associate, its employees or agents.

- 6.2 Insurance. Business Associate agrees that during the term of this Agreement it will maintain the following insurance coverage, in a form and with an insurance company or companies acceptable to the University:

<u>Insurance Type</u>	<u>Coverage Limit</u>
a. Commercial General Liability (Written on an Occurrence-based form)	\$1,000,000 per occurrence or more (Bodily Injury and Property Damage)
b. Workers Compensation	In compliance with Maine law
c. Automobile Liability (Including Hired & Non-Owned)	\$1,000,000 per occurrence or more (Bodily Injury and Property Damage)
d. Directors & Officers Liability	\$1,000,000 per occurrence or more

The University shall be named as an Additional Insured on the Commercial General Liability, Directors & Officers Liability and Auto Liability insurance policies. Business Associate shall provide the University with original Certificates of Insurance for the insurance required by this section. Certificates of Insurance for all of the above insurance shall be filed with the campus, addressed to \_\_\_\_\_

\_\_\_\_\_ prior to the date of performance under this Agreement. Said certificates, in addition to proof of coverage, shall contain the standard accord statement pertaining to written notification to the University in the event of cancellation, with a thirty (30) day notification period. As additional insured and certificate holder, the University should be included as follows:

The University of Maine System  
Office of Facilities  
16 Central St.  
Bangor, ME 04401

#### **SECTION VII - DISCLAIMER**

- 7.1 Disclaimer. UNIVERSITY MAKES NO WARRANTY OR REPRESENTATION THAT COMPLIANCE BY BUSINESS ASSOCIATE WITH THIS AGREEMENT OR THE HIPAA REGULATIONS WILL BE ADEQUATE OR SATISFACTORY FOR BUSINESS ASSOCIATE'S OWN PURPOSES OR THAT ANY INFORMATION IN THE POSSESSION OF BUSINESS ASSOCIATE OR SUBJECT TO ITS CONTROL, OR TRANSMITTED OR RECEIVED BY BUSINESS ASSOCIATE, IS OR WILL BE SECURE FROM UNAUTHORIZED USE OR DISCLOSURE, NOR SHALL UNIVERSITY BE LIABLE TO BUSINESS ASSOCIATE FOR ANY CLAIM, LOSS OR DAMAGE RELATING TO THE UNAUTHORIZED USE OR DISCLOSURE OF ANY INFORMATION RECEIVED BY BUSINESS ASSOCIATE FROM UNIVERSITY OR FROM ANY OTHER SOURCE. BUSINESS ASSOCIATE IS SOLELY RESPONSIBLE FOR ALL DECISIONS MADE BY BUSINESS ASSOCIATE REGARDING THE SAFEGUARDING OF PHI.

#### **SECTION VIII - MISCELLANEOUS**

- 8.1 Construction. This Agreement shall be construed as broadly as necessary to implement and comply with HIPAA, ARRA and the HIPAA regulations. The parties agree that any ambiguity in this Agreement shall be resolved in favor of a meaning that complies and is consistent with HIPAA, ARRA and HIPAA regulations.
- 8.2 Notice. Any notice or other communication required, or which may be given, pursuant to this Agreement, shall be in writing. Any such notice shall be deemed delivered (i) on the day of delivery in person; (ii) five (5) days after deposit in first class registered mail, with return

receipt requested; (iii) on the actual delivery date if deposited with an overnight courier; or (iv) on the date sent by facsimile, if confirmed with a copy sent contemporaneously by first class, certified, registered or express mail; in each case properly posted and fully prepaid to the appropriate address set forth below, or such other address of which a party may provide notice in accordance with this section:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 8.3 **Modification of Agreement.** The parties recognize that this Agreement may need to be modified from time to time to ensure consistency with amendments to and changes in applicable federal and state laws and regulations, including, but not limited to HIPAA. The parties agree to execute any additional amendments to this Agreement reasonably necessary for each party to comply with HIPAA. This Agreement shall not be waived, amended or altered, in whole or in part, except in writing signed by the parties.
- 8.4 **Transferability.** University has entered into this Agreement in specific reliance on the expertise and qualifications of Business Associate. Consequently, Business Associate's interest and obligations under this Agreement may not be transferred or assigned or assumed by any other person, in whole or in part, without the prior written consent of University.
- 8.5 **Governing Law and Venue.** This Agreement shall be governed by, and interpreted in accordance with, the internal laws of the State of Maine, except that its conflicts of law provisions shall not apply.
- 8.6 **Binding Effect.** This Agreement shall be binding upon, and shall extend to the benefit of, the parties hereto and their respective permitted successors and assigns.
- 8.7 **Execution.** This Agreement may be executed in multiple counterparts, each of which shall constitute an original and all of which shall constitute but one Agreement.
- 8.8 **Regulatory References.** A reference in this Agreement to a section in the Privacy Rule or Security Rule means the section as in effect or as amended.
- 8.9 **Relationship of Parties.** Business Associate is an independent contractor of the University, not a partner, agent or joint venturer of the University and neither party shall hold itself out contrary to these terms by advertising or otherwise, nor shall either party be bound by any representation, act or omission whatsoever of the other. Business Associate and its employees are independent contractors for whom no Federal or State Income Tax will be deducted by the University and for whom no retirement benefits, social security benefits, group health or life insurance, vacation and sick leave, worker's compensation and similar benefits available to University employees will accrue. The parties further understand that, if applicable, annual information returns as required by the Internal Revenue Code and Maine's Income Tax Law will be filed by the University with copies sent to Business Associate. Business Associate will be responsible for compliance with all applicable laws, rules, and regulations involving, but not limited to, employment, labor, hours of work, working conditions, workers' compensation, payment of wages and payment of taxes, such as unemployment, social security and other payroll taxes including other applicable contributions from such persons as required by law.
- 8.10 **Survival.** The respective rights and obligations of Business Associate under sections 5.4 and 6.1 of this Agreement shall survive the termination of this Agreement.
- 8.11 **Priority of Agreement.** If any portion of this Agreement is inconsistent with the terms of the Underlying Agreement, the terms of this Agreement shall prevail. Except as set forth above, the remaining provisions of the Underlying Agreement shall remain unchanged.

- 8.12 Non-Discrimination. Business Associate shall not discriminate and shall comply with applicable laws prohibiting discrimination on the basis of race, color, religion, sex, sexual orientation, including transgender status or gender expression, national origin or citizenship status, age, disability, or veteran status. The University encourages the Business Associate in the employment of individuals with disabilities.
- 8.13 Non-waiver. The failure of either party to exercise any of its rights under this Agreement for a breach thereof shall not be deemed to be a waiver of such rights, and no waiver by either party, whether written or oral, express or implied, of any rights under or arising from this Agreement shall be binding on any subsequent occasion; and no concession by either party shall be treated as an implied modification of the Agreement unless specifically agreed in writing.
- 8.14 Severability. In the event one or more clauses of this Agreement are declared invalid, void, unenforceable or illegal, that shall not affect the validity of the remaining portions of this Agreement.
- 8.15 Entire Agreement. This Agreement sets forth the entire agreement of the parties, and replaces and supersedes any previous agreement between the parties on the subject, whether oral or written, express or implied.
- 8.16 Force Majeure. Neither party to this Agreement shall be liable for non-performance of any obligation under this Agreement if such non-performance is caused by a Force Majeure. "Force Majeure" means an unforeseeable cause beyond the control of and without the negligence of the party claiming Force Majeure, including, but not limited to, fire, flood, other severe weather, acts of God, labor strikes, interruption of utility services, war, acts of terrorism, and other unforeseeable accidents.
- 8.17 Compliance. Business Associate shall comply with all applicable federal, state and local laws, rules, regulations and ordinances in performing its obligations under this Agreement and shall secure at its expense all licenses and permits required for performing its obligations under this Agreement.
- 8.18 Documentation. Both parties shall retain all documentation required by HIPAA for six years from the date of its creation or the date when the document was last in effect, whichever is later.

IN WITNESS WHEREOF, the parties hereto have set their hands effective the day and year first above written.

**THE UNIVERSITY OF MAINE SYSTEM**

**BUSINESS ASSOCIATE**

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

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

Name:

Name:

Title:

Title:

Date:

Date: