

BUSINESS ASSOCIATE AGREEMENT (BAA) ALLIANCE-PARTICIPANT

This business associate agreement (this “BAA”) applies to the PHI received, created, maintained or transmitted by Alliance in providing the following business associate services in connection with the CommonWell Health Alliance Services (as such term is defined in the Underlying Agreement) to Participant:

1. Maintenance, use and disclosure of PHI by Alliance on behalf of Participant in providing the Services.
2. Receipt of PHI by Alliance from Participant, receipt of requests for PHI by Alliance from Participant with respect to specific patients, submission on behalf of Participant of those requests to other participating vendors/providers, receipt on behalf of Participant of responses from other participating vendors/providers to Participant requests, and provision to Participant of those responses.

SECTION 1: DEFINITIONS

“**Breach**” will have the same meaning given to such term in 45 C.F.R. § 164.402.

“**Covered Entity**” will have the same meaning given to such term in 45 C.F.R. § 160.103.

“**Designated Record Set**” will have the same meaning as the term “designated record set” in 45 C.F.R. § 164.501.

“**Electronic Protected Health Information**” or “**Electronic PHI**” will have the meaning given to such term under the Privacy Rule and the Security Rule, including, but not limited to, 45 C.F.R. § 160.103, as applied to the information that Alliance creates, receives, maintains or transmits from or on behalf of Participant.

“**Individual**” will have the same meaning as the term “individual” in 45 C.F.R. § 160.103 and will include a person who qualifies as a personal representative in accordance with 45 C.F.R. § 164.502(g).

“**Parties**” will mean, collectively, Participant and Alliance.

“**Party**” will mean, individually, Participant or Alliance.

“**Privacy Rule**” will mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Parts 160 and Part 164, Subparts A and E.

“**Protected Health Information**” or “**PHI**” will have the same meaning as the term “protected health information” in 45 C.F.R. § 160.103, as applied to the information created, received, maintained or transmitted by Alliance from or on behalf of Participant or its Authorized Users. All references to PHI include Electronic PHI.

“**Required by Law**” will have the same meaning as the term “required by law” in 45 C.F.R. § 164.103.

“**Secretary**” will mean the Secretary of the Department of Health and Human Services or his or her designee.

“**Security Incident**” will have the meaning given to such term in 45 C.F.R. § 164.304.

“**Security Rule**” will mean the Security Standards at 45 C.F.R. Parts 160 and Part 164, Subparts A and C.

“**Unsecured PHI**” will have the same meaning given to such term under 45 C.F.R. § 164.402, and guidance promulgated thereunder.

“**Underlying Agreement**” will mean the Participant Services Agreement between Alliance and Participant.

Capitalized Terms. Capitalized terms used in this BAA and not otherwise defined herein will have the meanings set forth in the Privacy Rule, the Security Rule, and the HIPAA Final Rule, and the Underlying Agreement which definitions are incorporated in this BAA by reference.

SECTION 2: PERMITTED USES AND DISCLOSURES OF PHI

- 2.1 Uses and Disclosures of PHI Pursuant to the Underlying Agreement. Except as otherwise limited in this BAA, Alliance may use or disclose PHI solely to perform services for Participant as specified in the Underlying Agreement, provided that such use or disclosure would not violate the Privacy Rule if done by the Participant or a Covered Entity. Alliance may de-identify PHI to performance test, trouble-shoot and improve the Services as provided in the Underlying Agreement. Except as set forth in the prior sentence, in no event may Alliance de-identify or aggregate PHI or Electronic PHI or use or disclose any PHI or Electronic PHI for data mining, to provide data aggregation services or to develop new products or services.
- 2.2 Permitted Uses of PHI by Alliance. Except as otherwise limited in this BAA, Alliance may use PHI for the proper management and administration of Alliance related to the Services, which is defined as risk management, quality control, and support services for the Alliance infrastructure to provide the Services.
- 2.3 Permitted Disclosures of PHI by Alliance. Except as otherwise limited in this BAA, Alliance may disclose PHI for the proper management and administration of Alliance related to the Services, which is defined as risk management, quality control, and support services for the Alliance infrastructure to provide the Services, provided that the disclosures are Required by Law, or Alliance obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and will be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person (which purpose must be consistent with the limitations imposed upon Alliance pursuant to this BAA), and that the person agrees to notify Alliance of any instances of which it is aware in which the confidentiality of the information has been breached. Alliance may use PHI to report violations of law to appropriate federal and state authorities, consistent with 45 C.F.R. § 164.502(j)(1). All other uses or disclosures of PHI or Electronic PHI not expressly authorized by this BAA or Required by Law are strictly prohibited.

SECTION 3: OBLIGATIONS OF ALLIANCE

- 3.1 Appropriate Safeguards. Alliance will use appropriate safeguards and will comply with the Security Rule with respect to Electronic PHI, to prevent use or disclosure of such information other than as provided for by the Underlying Agreement and this BAA. Except as expressly provided in the Underlying Agreement, Alliance shall not assume any obligations of a Covered Entity under the HIPAA Final Rule. To the extent that Alliance is to carry out any of Covered Entity's obligations under the HIPAA Final Rule as expressly provided in the Underlying Agreement, Alliance will comply with the requirements of the HIPAA Final Rule that apply to Participant in the performance of such obligation.
- 3.2 Reporting of Improper Use or Disclosure, Security Incident or Breach. Alliance will report to Participant any use or disclosure of PHI not permitted under this BAA, Breach of Unsecured PHI or any Security Incident, without unreasonable delay, and in any event no more than five (5) days following discovery and will provide a further report within a reasonable period of time after the information becomes available using commercially reasonable efforts to do so within ten (10) days following discovery; provided, however, that Participant acknowledges and agrees that this Section constitutes notice by Alliance to Participant of the ongoing existence and occurrence of attempted but Unsuccessful Security Incidents (as defined below) for which notice to Participant by Alliance will be required only upon request. "Unsuccessful Security Incidents" will include, but not be limited to, pings and other broadcast attacks on Alliance's firewall, port scans, unsuccessful log-on attempts, denials of service and any combination of the above, so long as no such incident results in unauthorized access, use or disclosure of PHI. Alliance's notification to Participant of a Breach will include: (i) the identification of each individual whose Unsecured PHI has been, or is reasonably believed by Alliance to have been, accessed, acquired or disclosed during the Breach; (ii) any particulars regarding the Breach that a Covered Entity would need to include in its notification, as such particulars are identified in 45 C.F.R. § 164.404; and (iii) the remedial actions taken by Alliance to mitigate the adverse effects of the Breach.
- 3.3 Alliance's Agents. In accordance with 45 C.F.R. § 164.502(e)(1)(ii) and 45 C.F.R. § 164.308(b)(2), as applicable, Alliance will enter into a written agreement with any agent or subcontractor that creates, receives, maintains or transmits PHI on behalf of Alliance for services provided to Participant, providing that the subcontractor or agent agrees to restrictions and conditions that are substantially similar to those that apply through this BAA to Alliance with respect to such PHI or Electronic PHI.

3.4 Access to PHI. The Parties do not intend for Alliance to maintain any PHI in a Designated Record Set for Participant. To the extent Alliance possesses PHI in a Designated Record Set, Alliance agrees to make such information available to Participant pursuant to 45 C.F.R. § 164.524, within five (5) business days of Alliance's receipt of a written request from Participant; provided, however, that Alliance is not required to provide such access where the PHI contained in a Designated Record Set is duplicative of the PHI contained in a Designated Record Set possessed by Participant. If an Individual makes a request for access pursuant to 45 C.F.R. § 164.524 directly to Alliance, or inquires about his or her right to access, Alliance will promptly forward such request to Participant.

3.5 Amendment of PHI. The Parties do not intend for Alliance to maintain any PHI in a Designated Record Set for Participant. To the extent Alliance possesses PHI in a Designated Record Set, Alliance agrees to make such information available to Participant for amendment pursuant to 45 C.F.R. § 164.526 within five (5) business days of Alliance's receipt of a written request from Participant. If an Individual submits a written request for amendment pursuant to 45 C.F.R. § 164.526 directly to Alliance, or inquires about his or her right to amendment, Alliance will promptly forward such request to Participant.

3.6 Documentation of Disclosures. Alliance agrees to document such disclosures of PHI and information related to such disclosures as would be required for Participant to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. § 164.528. Alliance will document, at a minimum, the following information ("Disclosure Information"): (a) the date of the disclosure; (b) the name and, if known, the address of the recipient of the PHI; (c) a brief description of the PHI disclosed; (d) the purpose of the disclosure that includes an explanation of the basis for such disclosure; and (e) any additional information required under the HITECH Act and any implementing regulations.

3.7 Accounting of Disclosures. Alliance agrees to provide to Participant, within ten (10) days of Alliance's receipt of a written request from Participant, information collected in accordance with Section 3.6 of this BAA, to permit Participant to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. § 164.528. If an Individual submits a written request for an accounting of disclosures of PHI pursuant to 45 C.F.R. § 164.528 directly to Alliance, or inquires about his or her right to an accounting, Alliance will promptly forward such request to Participant.

3.8 Governmental Access to Records. Alliance will make its internal practices, books and records relating to the use and disclosure of PHI received from, or created or received by Alliance on behalf of Participant available to the Secretary, and ensure a copy of written materials delivered to the Secretary is delivered to Participant, for purposes of the Secretary determining a Covered Entity's or Participant's compliance with the Privacy Rule, the Security Rule, and/or the Final Rule.

3.9 Mitigation. To the extent practicable, Alliance will mitigate and cooperate with Participant's efforts to mitigate a harmful effect that is known to Alliance of a use or disclosure of PHI by Alliance that is not permitted by this BAA.

3.10 Minimum Necessary. Alliance will request, use and disclose the minimum amount of PHI necessary to accomplish the purpose of the request, use or disclosure, in accordance with 45 C.F.R. § 164.514(d), and any amendments thereto.

3.11 HIPAA Final Rule Applicability. Alliance acknowledges that enactment of the HITECH Act, as implemented by the HIPAA Final Rule, amended certain provisions of HIPAA in ways that now directly regulate, or will on future dates directly regulate, Alliance under the Privacy Rule and Security Rule. Alliance agrees to comply with applicable requirements imposed under the HIPAA Final Rule, including any amendments thereto.

3.12 In the event that a Breach is identified and it is determined that, (i) individual and/or public notification is required and (ii) that the requirement for notification is due to the acts or omissions of Alliance, its subcontractors or agents, Alliance shall be responsible for the reasonable and necessary costs incurred by Participant to meet all federal and state legal and regulatory disclosure and notification requirements including but not limited to costs for investigation, risk analysis, any required individual and/or public notification, fines and mitigation activities.

3.13 Reasonable Assurances. Upon reasonable written request of Participant, Alliance will provide Participant with reasonable assurances that Alliance is in compliance with the obligations of this BAA. Such assurances may include, without limitation, information from third party consultants or security reviews, or, as mutually agreed upon with Alliance, a third party audit of the Alliance information technology used to provide the Services.

SECTION 4: PERMISSIBLE REQUESTS BY PARTICIPANT

4.1 Permissible Requests by Participant. Participant will not request Alliance to use or disclose PHI in any manner that would not be permissible under the Privacy Rule, the Security Rule or the HITECH Act if done by Participant, except as permitted pursuant to the provisions of Sections 2.2 and 2.3 of this BAA.

SECTION 5: TERM AND TERMINATION

5.1 Term. The term of this BAA will commence as of the BAA Effective Date, and will terminate when all PHI provided by Participant to Alliance, or created or received by Alliance on behalf of Participant, is destroyed or returned to Participant. If it is infeasible to return or destroy PHI, Alliance will extend the protections to such information, in accordance with Section 5.3.

5.2 Termination for Cause. Upon Participant's knowledge of a material breach by Alliance of this BAA, Participant will provide written notice to Alliance detailing the nature of the breach and providing an opportunity to cure the breach within thirty (30) business days. Upon the expiration of such thirty (30) day cure period, Participant may terminate this BAA and, at its election, the Underlying Agreement, if Alliance does not cure the breach or if cure is not possible. Notwithstanding the above, Alliance agrees that if Participant determines that Alliance has violated a material term of this BAA or HIPAA, Participant has the option to either immediately terminate the Underlying Agreement and this BAA.

5.3 Effect of Termination.

5.3.1 Except as provided in Section 5.3.2, upon termination of the Underlying Agreement or this BAA for any reason, Alliance will return or destroy all PHI received from Participant, or created or received by Alliance on behalf of Participant, and will retain no copies of the PHI. This provision will apply to PHI that is in the possession of subcontractors or agents of Alliance.

5.3.2 If it is infeasible for Alliance to return or destroy the PHI upon termination of the Underlying Agreement or this BAA, Alliance will: (a) extend the protections of this BAA to such PHI and (b) limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Alliance maintains such PHI.

SECTION 6: COOPERATION IN INVESTIGATIONS

The parties acknowledge that certain breaches or violations of this BAA may result in litigation or investigations pursued by federal or state governmental authorities of the United States resulting in civil liability or criminal penalties. Each Party will cooperate in good faith in all respects with the other Party in connection with any request by a federal or state governmental authority for additional information and documents or any governmental investigation, complaint, action or other inquiry.

SECTION 7: SURVIVAL

The respective rights and obligations of Alliance under this BAA will survive the termination of this BAA and the Underlying Agreement.

SECTION 8: EFFECT OF BAA

In the event of any inconsistency between the provisions of this BAA and the Underlying Agreement, the provisions of this BAA will control. In the event of inconsistency between the provisions of this BAA and mandatory provisions of the Privacy Rule, the Security Rule or the HIPAA Final Rule, or their interpretation by any court or regulatory agency with authority over Alliance or Participant, such interpretation will control; provided, however, that if any relevant provision of the Privacy Rule, the Security Rule or the HIPAA Final Rule is amended in a manner that changes the obligations of Alliance or Participant that are embodied in terms of this BAA, then the Parties agree to negotiate in good faith appropriate non-financial terms or amendments to this BAA to give effect to such revised obligations. Where provisions of this BAA are different from those mandated in the Privacy Rule, the Security Rule, or the HIPAA Final Rule, but are nonetheless permitted by such rules as interpreted by courts or agencies, the provisions of this BAA will control.

SECTION 9: GENERAL

This BAA is governed by, and will be construed in accordance with, the laws of the State that govern the Underlying Agreement. Any action relating to this BAA must be commenced within two years after the date upon which the cause of action accrued. This BAA may only be assigned in connection with an assignment of the Underlying Agreement. If any part of a provision of this BAA is found illegal or unenforceable, it will be enforced to the maximum extent permissible, and the legality and enforceability of the remainder of that provision and all other provisions of this BAA will not be affected. All notices relating to the Parties' legal rights and remedies under this BAA will be provided in writing to a Party, will be sent to its address set forth in the Underlying Agreement, or to such other address as may be designated by that Party by notice to the sending Party, and will reference this BAA. This BAA may be modified, or any rights under it waived, only by a written agreement executed by the authorized representatives of the Parties. The Parties agree to take such action as is necessary to amend this BAA from time to time as is necessary for the Parties to comply with the requirements of applicable law. Nothing in this BAA will confer any right, remedy, or obligation upon anyone other than Participant and Alliance. This BAA is the complete and exclusive agreement between the Parties with respect to the subject matter hereof, superseding and replacing all prior agreements, communications, and understandings (written and oral) regarding its subject matter. Any ambiguity in this BAA shall be resolved in favor of the meaning that permits the Parties to comply with applicable law and any current regulations promulgated thereunder. Any failure of a Party to exercise or enforce any of its rights under this BAA will not act as a waiver of such rights.