

March 31, 2009

Health Information Security and Privacy Collaboration

Health Information Exchange Agreement: Private Entity Pilot

Prepared for

RTI International
230 W Monroe, Suite 2100
Chicago, IL 60606

Jodi Daniel, JD, MPH, Director
Steven Posnack, MHS, MS, Policy Analyst
Office of Policy and Research
Office of the National Coordinator for Health IT
200 Independence Avenue, SW, Suite 729D
Washington, DC 20201

Prepared by

Interorganizational Agreements Collaborative
Alaska, Guam, Iowa, New Jersey, North Carolina, South Dakota



Contract Number HHSP 233-200804100EC
RTI Project Number 0211557.000.007.100

Contract Number HHSP 233-200804100EC
RTI Project Number 0211557.000.007.100

March 31, 2009

Health Information Security and Privacy Collaboration

Health Information Exchange Agreement: Private Entity Pilot

Prepared for

RTI International

230 W Monroe, Suite 2100
Chicago, IL 60606

Jodi Daniel, JD, MPH, Director

Steven Posnack, MHS, MS, Policy Analyst

Office of Policy and Research

Office of the National Coordinator for Health IT

200 Independence Avenue, SW, Suite 729D
Washington, DC 20201

Prepared by

Interorganizational Agreements Collaborative
Alaska, Guam, Iowa, New Jersey, North Carolina, South Dakota

Identifiable information in this report or presentation is protected by federal law, section 924(c) of the Public Health Service Act, 42 USC. § 299c-3(c). Any confidential identifiable information in this report or presentation that is knowingly disclosed is disclosed solely for the purpose for which it was provided.

Health Information Exchange Agreement
Private to Private Pilot

This Health Information Exchange Agreement (“Agreement”) is made effective this ____ day of _____, 20__ (the “Effective Date”), by and between _____, a _____ [type of entity] organized under the laws of the State [or Territory] of _____ and having its principal place of business at _____, (“_____”); and _____, a _____ [type of entity] organized under the laws of the State [or Territory] of _____ and having its principal place of business at _____ (“_____”) (each, a “Participant” and together, “Participants”).

WITNESSETH:

WHEREAS, Participants have established electronic patient data exchange systems to allow Authorized Users (as defined below) to electronically exchange patient information; and

WHEREAS, Participants have entered into agreements with health care entities under which each entity has agreed to provide Participants with access to patient information generated by participating entities; and¹

WHEREAS, Participants desire to obtain information located on each other’s Systems (as defined below) to allow Authorized Users to access patient information for the continuing care and treatment of patients and beneficiaries, payment of claims and healthcare operations; and

WHEREAS, each Participant desires to further the privacy and security of Protected Information (as defined below) and its System;

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements set forth below, and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, and wishing to be legally bound hereby, the Participants hereto agree as follows:

1. **Purpose and Scope**. This Agreement governs how Protected Information will be used and disclosed by and between the Participants. It is the intent of all Participants to protect the confidentiality and security of Protected Information subject to this Agreement, in accordance with applicable State and federal law, including without limitation, the federal Health Insurance Portability and Accountability Act of 1996 and its implementing regulations on privacy and security found at 45 C.F.R. Parts 160 and 164, as the same may be amended from time to time (“HIPAA”). This Agreement shall not be deemed to limit or apply to the exchange of information that does not involve the electronic transmission of Protected Information from one System to another, such as information provided through paper or other hard copies.

¹ This Whereas clause should be inserted when at least one of the parties to the Agreement is a network-level entity, such as a RHIO, or other entity representing multiple participants.

2. **Definitions.** When presented as capitalized terms in this Agreement, the following terms have the meanings indicated below:
- a. “*Agreement*” has the meaning set forth in the Preamble.
 - b. “*Authorized User*” shall mean a Participant’s employees, agents, assigns, representatives, independent contractors, or other persons or entities authorized by such Participant, under the procedures set forth in section 3(b), to access, use or disclose information from another Participant’s System.
 - c. “*Confidentiality Agreement*” shall mean an agreement between a Participant and one or more Authorized Users that establishes and defines restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information.²
 - d. “*HIPAA*” has the meaning set forth in Section 2 below.
 - e. “*Participant*” or “*Participants*” has the meaning set forth in the Preamble.
 - f. “*PHI*” shall mean “protected health information” shared under this Agreement, as that phrase is defined in 45 CFR § 160.103 of the HIPAA regulations.
 - g. “*Proprietary Information*” shall mean all of the materials, information and ideas of a Participant including, without limitation: patient names, patient lists, patient records, patient information, operation methods and information, accounting and financial information, marketing and pricing information and materials, internal publications and memoranda and, if notice thereof is given, other matters considered confidential by a Participant. Proprietary Information shall not include information which: (i) is readily available or can be readily ascertained through public sources; (ii) a Participant has previously received from another party unrelated to this Agreement; (iii) would cause a Participant to be in violation of the law; (iv) negatively impacts Participant’s licensure, accreditation or participation in any federally or State funded healthcare program, including without limitation the Medicare and Medicaid programs; or (v) is information received by a Participant that is used in compliance with Section 3.a. below and integrated into the records of the receiving Participant.
 - h. “*Protected Information*” shall mean PHI and Proprietary Information.
 - i. “*Significant Breach*” shall mean a successful unauthorized access, use, disclosure, modification, or destruction of Protected Information, or interference with a Participant’s System, of which such Participant has knowledge or should have knowledge.
 - j. “*State*” shall mean any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.
 - k. “*System*” shall mean software, portal, platform, or other electronic medium controlled or utilized by a Participant through which or by which the Participant

² Participants may want to reference the Confidentiality Agreement in Section 3 and attach a form Confidentiality Agreement to be used. See Footnote 5 below.

exchanges information under this Agreement. For purposes of this definition, it shall not matter whether the Participant controls or utilizes the software, portal, platform or other medium through ownership, lease, license, or otherwise.

3. **Use of and Access to Protected Information.**

- a. **Permitted Uses and Disclosures.** The Participants agree to permit access to the Protected Information for the purposes of treatment, payment, and health care operations as those terms are defined in HIPAA.³ The Participants may reasonably use and disclose Protected Information if necessary for proper management and administration or to carry out their legal responsibilities.⁴ The Participants agree not to access, use or further disclose Protected Information other than as authorized by this Agreement and permitted by law.
- b. **Authorized Users.** In the event that a Participant has reasonable suspicion of a Significant Breach by another Participant or one or more of its Authorized Users, following reasonable request, the Participant suspecting such Significant Breach shall receive from the other Participant the names of those Authorized Users who have accessed the System of the Participant suspecting the Significant Breach during the relevant period. Such request shall include a brief description of the bases for its suspicions and likely possible dates of such access. If the responding Participant is unable to provide a list of those Authorized Users with actual access, it shall provide a list of all Authorized Users during the relevant period of time. Participants shall use reasonable care in selecting Authorized Users and shall require that they act in compliance with relevant provisions of this Agreement. Participants shall apply appropriate sanctions against any Authorized User who fails to comply with the requirements of this Agreement. Each Participant shall immediately remove an Authorized User's access to Protected Information if the Authorized User is determined by the Participant to no longer qualify as an "Authorized User." Each Participant will be responsible for initiating, updating, monitoring, controlling and removing or suspending access of its Authorized Users in accordance with the law and any requirements contained in this Agreement, including but not limited to Section 5. Before allowing access to, use or disclosure of Protected Information, Participants shall require each Authorized User to agree to a Confidentiality Agreement detailing the permitted uses, federal and State compliance requirements and the Authorized User's roles and responsibilities.⁵ Each Participant's Authorized User's consent to the Confidentiality Agreement must be logged in an audit trail or

³ The parties to this Agreement may wish to allow for broader or narrower uses of the information to be shared, depending on the particular purposes of the arrangement. If so, the parties will need to revise this sentence as appropriate and should further consider whether additional protections to the information are warranted.

⁴ If Participants are granting access to each other's Systems, the following may need to be inserted: "Each Participant is hereby granted a limited license to allow its Authorized Users to access and use other Participants' System(s) for the purposes set forth in this Agreement. Upon termination, all licenses granted to a Participant relating to access to or use of the Protected Information will cease." Participants also may have to account for licensing fees and other related issues.

⁵ A form Confidentiality Agreement may be attached, in which case insert "as set forth in Attachment __".

otherwise documented. Each Participant shall require that any Authorized User that is an Independent Contractor shall enter into a Business Associate Agreement or an agreement with protections against disclosure at least equal to those required to be in a business associate agreement.

c. Access to Protected Information.

- (i) Under this Agreement, the Participants will make available Protected Information dating as far back as the information is generally accessible in electronic format and is maintained on each Participant's System. The Participants acknowledge that the Protected Information provided is drawn from numerous sources. Certain categories of information, including but not limited to HIV status, mental health records, substance abuse records and genetic information, may be more sensitive and may be accorded extra protections under State and federal law. For this or other reasons, the Protected Information provided may not include an entire record.
- (ii) Each Participant shall maintain Protected Information on its System for the greater of six years or as required by applicable law.
- (iii) The Participants shall provide Protected Information in a timely manner.⁶
- (iv) Subject to the provisions of Section 7.a., the Participants understand that this Agreement primarily depends on the Participants to reasonably determine that information disclosed is accurate and complete. If a Participant becomes aware of any material inaccuracies in its own Protected Information or System, it agrees to communicate such inaccuracy to affected Participants as soon as reasonably possible. Each Participant shall provide concurrent notice of any impact on the availability of Protected Information for an extended period of time due to changes to its System upon attempted access by another Participant. If a Participant is unable reasonably to provide all information requested due to material inaccuracies, it shall provide a statement with any Protected Information indicating such limitations.
- (v) In the event that a Participant shall agree to place additional restrictions on Protected Information of an individual, such Participant shall be solely liable for maintaining such restrictions. Each Participant agrees and acknowledges that a Participant that receives Protected Information hereunder may assume that, and treat such Protected Information as if, there are no additional restrictions placed on such Protected Information except as otherwise stated in this Agreement or required by relevant law applicable to the recipient Participant.

- d. Ownership.** Disclosure of information under this Agreement does not change the ownership of such information under State and federal law. If Protected Information has been used or disclosed for treatment, payment, or health care

⁶ The Participants should agree upon standards for the timely delivery of information. These standards will be included as an attachment that is referenced in this provision. In such case, we suggest inserting language such as "as set forth in Attachment __".

operations, it may thereafter be integrated into the records of the recipient. This Agreement does not grant to a Participant any rights in the System or any of the technology used to create, operate, enhance or maintain the System of another Participant.

4. **Participant Requirements.** Each Participant, whether providing, receiving or using information hereunder, shall:⁷
 - a. establish and implement appropriate policies and procedures to prevent unauthorized access, use and disclosure of Protected Information and ensure that such policies and procedures do not conflict with and are not less restrictive than this Agreement;⁸
 - b. regularly monitor and audit access to Protected Information and take reasonable steps to pursue, address and mitigate any breach or other privacy and security issues detected by such monitoring;⁹
 - c. notify the affected Participants, as soon as reasonably possible, of any Significant Breach and take all reasonable steps to mitigate the breach (for purposes of this subsection c., “affected Participants” shall include any Participant regarding which there is a reasonable possibility that the Participant’s System or data thereon could be negatively impacted by the Significant Breach);
 - d. make its internal practices, books and records relating to uses and disclosures of Protected Information available to the Secretary of the U.S. Department of Health and Human Services or his/her designee, as necessary to comply with HIPAA or other applicable State and federal law;
 - e. provide all Authorized Users with appropriate education and training on the requirements of this Agreement; and
 - f. provide upon request copies or detailed summaries of its privacy and security policies and procedures to the other Participants and, upon reasonable request by another Participant, demonstrate compliance with its policies and procedures.¹⁰

⁷ If the Participants include a clinical laboratory, language addressing CLIA should be included. For example, the following language may be appropriate: “In accordance with the Clinical Laboratory Improvement Amendments of 1988 (42 U.S.C. § 263a), the regulations promulgated thereunder (42 C.F.R. Part 493) and corresponding state laws (collectively ‘CLIA’), each Participant who will access clinical laboratory results on behalf of an Authorized User represents and warrants that it has obtained, and shall maintain through the Term, the written authorization of those providers who are Authorized Users and will access such results. Such authorization shall contain a statement that the Authorized User has authorized the Participant to access results reports and other patient information directly from such Authorized User’s ancillary providers, such as reference clinical laboratories. As a condition of participation hereunder, the Participant will also ensure that each such Authorized User has agreed in writing that the Protected Information accessed hereunder does not constitute a ‘report of record’.”

⁸ It is anticipated that the Participants will agree upon standards that will be included in an attachment. This attachment would then be referenced here by stating, “Such policies and procedures shall comply with the standards set forth in Attachment __.”

⁹ As described in Note 7 above, minimum standards regarding security as well as addressing mitigation of breaches may be included in an attachment.

¹⁰ The parties may wish to add an attachment setting out procedures for providing policies and procedures and methodologies for showing compliance therewith. We note that information shared under this provision will be protected by confidentiality provisions of the Agreement.

5. **Privacy and Security Safeguards.**

- a. Each Participant will use and maintain appropriate administrative, technical and physical safeguards to protect the confidentiality, integrity, and availability of information and to prevent the use or disclosure of any Protected Information received from or on behalf of another Participant other than as permitted or required by federal or State law and this Agreement. To that end, each Participant shall: (i) provide for appropriate identification and authentication of Authorized Users; (ii) provide appropriate access authorization; (iii) guard against unauthorized access to Protected Information; and (iv) provide appropriate security audit controls and documentation.
- b. A Participant shall apply appropriate sanctions against any person, subject to the Participant's privacy and security policies and procedures, who fails to comply with such policies and procedures. The type and severity of sanctions applied shall be in accordance with the Participant's privacy and security policies and procedures. Participants shall make employees, agents, and contractors aware that certain violations may result in notification by a Participant to law enforcement officials as well as regulatory, accreditation and licensure organizations.
- c. A Participant shall require that its agents, assigns, and affiliates, including without limitation subcontractors, to whom Protected Information is provided under this Agreement, agree to the same restrictions and conditions that apply to the Participant with respect to such information including, without limitation, those set forth in Section 8 below.
- d. A Participant may, at its discretion, deny access to any person, including without limitation any Participant or Authorized User, it reasonably believes has accessed, used, or disclosed Protected Information other than as permitted under this Agreement.
- e. The Participants agree and acknowledge that a minimum standard of privacy and security is required to protect the Protected Information regardless of legal obligations of a Participant. As such, regardless of whether or not a Participant is a "covered entity" or "business associate" as defined under HIPAA, each shall comply with the requirements of HIPAA as though each were a covered entity under HIPAA except to the extent that a Participant is a business associate and complies with the requirements of a valid business associate agreement.

6. **Term and Termination.**

- a. **Term.** The term of this Agreement shall commence as of the Effective Date and shall continue in full force and effect for one (1) year from such date. Thereafter, the Agreement will automatically renew for additional one (1) year periods, provided that during any such renewal period, any Participant may terminate its own participation in this Agreement without cause by providing thirty (30) days' prior written notice to the other Participants. So long as at least two Participants remain parties to this Agreement, the withdrawal of any Participant shall not be considered a termination of the Agreement, and the remaining Participants shall continue to participate under the terms of the Agreement, as amended.

- b. **Immediate Termination.** Each Participant shall have the right to immediately terminate this Agreement if required by Section 9 below or to comply with any legal order, ruling, opinion, procedure, policy, or other guidance issued, or proposed to be issued, by any federal or State agency, or to comply with any provision of law, regulation or any requirement of accreditation, tax-exemption, federally funded health care program participation or licensure which (i) invalidates or is inconsistent with the provisions of this Agreement; (ii) would cause a Participant to be in violation of the law; or (iii) jeopardizes the good standing status of licensure, accreditation or participation in any federally or State funded health care program, including without limitation Medicare and Medicaid programs. Notwithstanding the foregoing, so long as at least two Participants remain, the withdrawal of any Participant shall not be considered a termination of the Agreement, and the remaining Participants shall continue to participate under the terms of the Agreement, as amended.
- c. **Termination With Cause.** Notwithstanding any other provision of this Agreement, any Participant may terminate its participation in this Agreement if another Participant has materially violated its responsibilities under this Agreement and has failed to provide satisfactory assurances within ten (10) days of written notice of such material violation that reasonable steps are being taken to effect a cure, and in any event: (i) such cure will be completed no later than thirty (30) days from notice of such material violation; and (ii) the breaching Participant has taken reasonable steps to prevent the recurrence of such material violation.
- d. **Termination of Access to Protected Information.** Notwithstanding subsection c. above, each Participant reserves the right to terminate immediately another Participant's access to Protected Information at any time if the Participant has reason to believe that another Participant has suffered a Significant Breach of the security of its System, has violated any of the terms of this Agreement, including without limitation accessing any information that a Participant would not otherwise be authorized to receive pursuant to this Agreement, improperly disclosing Protected Information or failing to abide by appropriate policies and procedures.
- e. **Remedies for Breach.** The Participants agree that money damages may not be a sufficient remedy for any breach of this Agreement regarding the disclosure of Protected Information and that, in addition to all other available legal or equitable remedies, the non-breaching Participant(s) will be entitled to equitable relief, including injunction and specific performance, for any breach of the provisions of this Agreement, without proof of actual damages.¹¹
- f. **Effect of Termination.** Upon a Participant's withdrawal, the Protected Information stored by such a Participant shall no longer be accessible by the other Participants. Following the termination of this Agreement, any and all Protected Information shall continue to be subject to the provisions of this Agreement with

¹¹ This may need review in conformance with individual State law.

regard to the handling of Protected Information including, without limitation, provisions regarding Proprietary Information, privacy and security.

7. **Warranties and Limitation of Liability.**

- a. Participants hereby disclaim all implied and express warranties, conditions and other terms, whether statutory or common law, arising from course of dealing, or otherwise. No Participant warrants that (i) the performance of a System or delivery of the Protected Information or (ii) the content of the Protected Information will be uninterrupted or error free. No Participant shall be liable to another Participant for any consequential, incidental, indirect, punitive, or special damages suffered by a Participant or any other third party. No Participant shall be liable for any damages arising out of or related to the acts or omissions of another Participant in acquiring, accessing, disclosing or using Protected Information.
- b. Without limiting any other provision of this Agreement, each Participant and such Participant's Authorized Users shall be solely responsible for all decisions and actions taken or not taken involving patient care, utilization management, and quality management for their respective patients and clients resulting from or in any way related to the use of Protected Information. No Participant or Authorized User shall have any recourse against, and each shall waive any claims against, other Participants for any loss, damage, claim or cost relating to or resulting from its own use or misuse of Protected Information.

8. **Proprietary Information.**

- a. The Participants acknowledge and stipulate that: (A) during the term of this Agreement, Participants will be placed in a position to become acquainted with various aspects of the Proprietary Information; (B) the use or disclosure of the Proprietary Information by a Participant, except as expressly authorized by the Participant for whom the information is Proprietary Information, is prohibited and would cause serious damage; and (C) in addition to being given access to the Proprietary Information, Participants will receive material benefits as a result of this Agreement. Therefore, the Participants agree as follows:
 - (i) During the term of this Agreement and thereafter, Participants shall not, and shall ensure that their Authorized Users, agents, employees and contractors shall not, without the prior written consent of the Participant for whom the information is proprietary, directly or indirectly:
 - (A) Divulge, furnish or make accessible to any other person, firm, associate, corporation or other entity, or copy, take or use in any manner, any of the Proprietary Information;
 - (B) Take any action which might reasonably or foreseeably be expected to compromise the confidentiality or proprietary nature of any of the Proprietary Information; or
 - (C) Fail to follow the reasonable requests of the disclosing Participant from time to time regarding the confidential and proprietary nature of the Proprietary Information.

- (ii) The provisions of this Section 8.a. shall survive the expiration or termination of this Agreement for any reason.
 - b. Remedies shall be available to a Participant in the event of a breach of the provisions of Section 8.a. according to the following provisions:
 - (i) The parties agree that a breach by a Participant of any of the provisions of Section 8.a. of this Agreement would cause irreparable damage to the Participant for whom Protected Information is considered confidential. Therefore, such Participant shall be entitled to preliminary and permanent injunctions restraining any other Participant and/or its Authorized Users, agents, employees and contractors from breaching or continuing any breach of any of the provisions of Section 8.a. The existence of any claim or cause of action on the part of a Participant and/or its Authorized Users, agents, employees or contractors against the aggrieved Participant, whether arising from this Agreement or otherwise, shall not constitute a defense to the granting or enforcement of this injunctive relief.
 - (ii) If any Participant is required to enforce any of its rights under this Agreement, such party shall be entitled to recover all attorneys' fees, court costs and all other expenses incurred by such party in connection with the enforcement of those rights.
 - (iii) The remedies available to a Participant under this Agreement are cumulative. A Participant may, at its sole discretion, elect to pursue all or any of such remedies. Such remedies are in addition to any others given by law or in equity and may be enforced successively or concurrently.
 - (iv) The provisions of this Section 8.b. shall survive the expiration or termination of this Agreement for any reason.
 - c. Participants have carefully read and considered the provisions of this Agreement and agree that the restrictions set forth herein, particularly those in Sections 8.a. and b., are fair and reasonably required for the protection of each other.
 - d. A Participant shall apply appropriate sanctions against its Authorized Users, employees, agents and contractors with access to the Proprietary Information who fail to comply with the requirements of this Section. The type and severity of sanctions applied shall be in accordance with the Participant's confidentiality and disciplinary policies.
9. **Agreement's Compliance with Laws and Regulations.** The Participants intend and in good faith believe that this Agreement complies with all federal, State and local laws. If any provision of this Agreement is declared void by a court or arbitrator, or rendered invalid by any law or regulation, and if such provision is necessary to effectuate the purposes of this Agreement, the Participants agree to attempt to renegotiate in good faith the Agreement to comply with such law(s) to the satisfaction of all Participants. In the event the Participants are not able to mutually agree to a new agreement within sixty (60) days, then this Agreement shall automatically terminate.

10. **Insurance.** Each Participant agrees to obtain and maintain in force and effect reasonable policies of liability insurance or self-insurance to insure itself and its employees, agents, and contractors for liability arising out of activities to be performed under, or in any manner related to, this Agreement. Upon reasonable request a Participant shall provide relevant information regarding its policies of insurance including, without limitation, coverage limits.
11. **Notices.** Any notice or other communication required under this Agreement shall be in writing and sent to the address set forth in Exhibit ___ attached hereto or to such other address as the Participants shall designate in writing from time to time. Notices or communications to or between the Participants shall be deemed to have been delivered: (a) ___ business days after deposit in the mail when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail; (b) within ___ days if sent by established courier service; or (c) when received, if personally delivered.
12. **Subrogation.** In the event that a Participant (the “Substitute Participant”) shall suffer damages due to the actions or omissions of an entity (the “Malfeasant Entity”) to whom another Participant (the “Replaced Participant”) has disclosed, directly or indirectly, Protected Information (whether an Authorized User, employee, agent, contractor or other of the Replaced Participant), the Substitute Participant shall hereby be granted a right of subrogation to bring any and all available claims against the Malfeasant Entity for any damages suffered or likely to be suffered by the Substitute Participant. The Substitute Participant may bring such claims as though it were the Replaced Participant, regardless of whether such claims are tort, contract, equity and/or any other type of claim. This Section 12 shall not prevent in any way the Replaced Participant from bringing any and all other and/or additional claims against the Malfeasant Entity including, without limitation, claims relating to damages suffered or likely to be suffered in the future or for damages paid by such Replaced Participant to the Substitute Participant.
13. **Governing Law.** In the event of a dispute between or among the Participants arising out of this Agreement: (a) a Participant receiving Protected Information will be held liable to abide by its own State and federal law; (b) the Participant providing Protected Information will be held liable to abide by its own State and federal law; and (c) if the dispute cannot be resolved, the Participants agree to look to federal common law, including the growing body of law regarding health information exchange. A reference in this Agreement to a section in a federal, State, or local statute, law, or regulation means the section as in effect or as amended.

[Alternative 1]

14. **Amendment.**¹² This Agreement may not be modified, altered, or amended except by written instrument duly executed by all Participants.

¹² Participants may choose among the three alternatives, depending on what method they would prefer for adding additional participants. Once an alternative is chosen, the other alternatives should be deleted.

[Alternative 2]

14. **Amendment and Sharing Participants.** This Agreement may not be modified, altered, or amended except by written instrument duly executed by all Participants. Notwithstanding the foregoing, the Participants acknowledge that much of the value in this Agreement derives from the ability to access additional Protected Information for the purposes set forth herein. The Participants further agree and acknowledge that such benefit is enhanced with the addition of new Participants. Such sharing of Protected Information, however, may cause concern with regard to the privacy and security of Protected Information.
- a. The Participants therefore agree and acknowledge that each may execute agreements (each, a “Sharing Agreement”) with one or more additional parties (each, a “Sharing Participant”) (and such Sharing Participants may enter into additional Sharing Agreements) so long as:
- (i) Each Sharing Agreement is substantially similar to this Agreement with the exception of Recitals and Section 11 hereof;
 - (ii) Such Sharing Agreement shall not have any provision that materially conflicts with this Agreement; and
 - (iii) Prior to execution of a Sharing Agreement, a Participant shall take reasonable steps and due diligence to assure the Sharing Participant’s ability to comply with the provisions of the Sharing Agreement as though the Sharing Participant was a Participant of this Agreement.
- b. Sharing Agreement Execution Process:
- (i) The Participant entering into a Sharing Agreement shall provide notice to all other Participants no less than ____ (__) days prior to the execution of such Sharing Agreement. Such notice shall include a copy of the Sharing Agreement materially as to be executed by the parties thereto including, without limitation, the identification of the Sharing Participant.
 - (ii) Upon receipt of such notice, each other Participant shall have ____ (__) days to object thereto by delivering written notice of objection to the Participant wishing to execute a Sharing Agreement.
 - (iii) Upon receipt of such objection (if any), the parties shall have ____ (__) days to negotiate a resolution of any concerns raised through the objection. If no objection is received, the Participant may execute the Sharing Agreement.
 - (iv) If the Participants are unable to resolve such dispute, the Participant may execute such Sharing Agreement, but the objecting Participant may terminate this Agreement upon written notice to each of the other Participants.

- c. Following execution of a Sharing Agreement, each Participant agrees and acknowledges that the Sharing Participant may receive Protected Information that originates from any Participant in compliance with the Sharing Agreement and the Participants shall provide Protected Information as though each Sharing Participant were a party to this Agreement. The Participants further agree and acknowledge that pursuant to the Sharing Agreements, Sharing Participants may execute additional Sharing Agreements providing for receipt of Protected Information. For purposes of this Section 14 only, once a Sharing Participant executes a Sharing Agreement, it shall be deemed a Participant.

[Alternative 3]

14. **Amendment and Addition of New Participants**. This Agreement may not be modified, altered, or amended except by written instrument duly executed by all Participants. Notwithstanding the foregoing, the Participants acknowledge that much of the value in this Agreement is from the ability of the Participants to access additional Protected Information for the purposes set forth herein. The Participants further agree and acknowledge that such benefit is enhanced with the addition of new Participants to this Agreement. The Participants therefore agree and acknowledge that a party may become a Participant in this Agreement by executing the signature page attached hereto in accordance with the following procedures:

- a. As a condition precedent to entering into this Agreement, a prospective Participant (the "New Participant") shall provide written notice of its intent to enter into this Agreement to each Participant no less than ____ (__) days prior to executing the signature page attached hereto.
- b. Each Participant shall have ____ (__) days to object to the addition of such New Participant by delivering written notice of objection to the New Participant and each other Participant.
- c. Upon receipt of such notice of objection (if any), the New Participant and each objecting Participant shall have ____ (__) days to negotiate a resolution of any concerns of the objecting Participant(s).
- d. If each objecting Participant and the New Participant are unable to resolve such dispute, and less than _____ percent (__)% of the Participants have provided notice of objection as required in this Section, then the New Participant may become a Participant, but each objecting Participant may terminate its participation in this Agreement upon written notice to each other Participant.
- e. In the event a Participant terminates its participation in this Agreement pursuant to this Section 14, the Agreement shall nonetheless remain valid and binding upon all other Participants.
- f. If at least _____ percent (__)% of the Participants deliver a notice of objection and the New Participant and each objecting Participant are unable to

resolve such dispute, then the New Participant shall not be permitted to become a Participant.¹³

15. **Assignment**. The Participants shall not assign or transfer this Agreement, or any part thereof, without the prior review and written consent of all other Participants, and any such assignment without each Participant's written consent shall be void and have no binding effect. No Participant shall assign this Agreement, or any of the rights or obligations contained herein, without the prior written consent of all the Participants. This Agreement shall be binding on the Participants, their successors and permitted assigns.
16. **Waiver**. No failure or delay by any Participant in exercising its rights under this Agreement shall operate as a waiver of such rights or estop enforcement thereof, and no waiver of any breach shall constitute a waiver of any prior, concurrent, or subsequent breach or estop enforcement thereof.
17. **Integration**. Subject to Section 2 above, this Agreement sets forth the entire and only Agreement between the Participants relative to the subject matter hereof. Any representations, promise, or condition, whether oral or written, not incorporated herein shall not be binding upon any Participant.
18. **Incorporation by Reference**. All exhibits attached to this Agreement are incorporated by reference and made a part of this Agreement as if those exhibits were set forth in the text of this Agreement.
19. **Severability**. If any portion of this Agreement shall for any reason be invalid or unenforceable, such portion shall be ineffective only to the extent of such invalidity or unenforceability, and the remaining portions shall remain valid and enforceable and in full force and effect.
20. **Relationship of Participants**. Nothing contained in this Agreement shall constitute, or be construed to create, a partnership, joint venture, agency or any other relationship other than that of independent contractors to this Agreement.
21. **Third-Party Beneficiaries**. This Agreement does not and will not create in any natural person, corporation, partnership or other organization other than the Participants any benefits or rights, and this Agreement will be effective only as to the Participants and their successors and permitted assigns.
22. **Force Majeure**. Notwithstanding any provision hereof to the contrary, in the event of a disruption, delay or inability to complete the requirements of this Agreement due to

¹³ In the event that Alternative language 2 or 3 is selected, the Participants should refer to and add an addendum providing for minimum security standards relating to, among potentially other matters, certification, contingency plans, formal mechanism for processing records, information access control, internal audit and tracking, personnel security, security configuration management, security incident procedures, security management processes, termination procedures for employees/contractors, training, intrusion detection systems, virus checking, encryption, physical access, media control, data authentication, integrity controls, entity authentication, e.g., unique passwords, and provision for a copy of a Participant's security risk analysis.

natural disasters, acts of terror or other similar events out of the control of a Participant, such Participant shall not be considered in breach of this Agreement.

23. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which will be deemed an original as against the Participant whose signature appears thereon, but all of which taken together will constitute one and the same instrument.
24. **Authority to Sign.** The Participants warrant that they have the capacity to enter into and perform the obligations under this Agreement and all activities contemplated herein, and all corporate and other actions required to authorize it to enter into and perform this Agreement were properly taken.
25. **Survival.** The respective rights and obligations of the Participants under Sections 3.a., 3.c.(ii), 4.d., 5.e., 6.f., 7, 8, 12, and 13 of this Agreement shall survive the termination of this Agreement.¹⁴

[BALANCE OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the Participants have caused this Agreement to be signed by their duly authorized representatives as of the Effective Date.

PARTICIPANT

By: _____

Its:

PARTICIPANT

By: _____

Its:

¹⁴ Insert any additional provisions required or beneficial under applicable law, e.g., non-discrimination provisions.