

healtheConnect Alaska DSM PARTICIPATION AGREEMENT

This DSM Participation Agreement (the "Agreement") is made between Entity identified in the healtheConnect Alaska DSM Service Agreement ("Participant"), and the healtheConnect Alaska ("healtheConnect"), an Alaska 501(c)(3) non-profit corporation.

1. RECITALS

WHEREAS, healtheConnect's mission is to improve the safety, cost effectiveness, and quality of healthcare in Alaska through widespread secure, confidential electronic clinical information systems including promotion of electronic health records and facilitation of the secure exchange of records;

WHEREAS, Participant and healtheConnect desire to cooperate to establish access to Direct Secure Messaging Services ("DSM");

WHEREAS, the Parties recognize the potential cost efficiencies and potential improvements in the quality of patient care that may be gained from the sharing of information pursuant to this Agreement;

NOW, THEREFORE, in consideration of the covenants herein and therein, the parties hereto wish to enter into this Agreement describing the DSM services, and agree as follows:

2. SERVICES

As a participant in healtheConnect, Participant will have access to a number of services as they become available, and as applicable to its membership category and eligibility status. The services that are offered by healtheConnect and selected by Participant pursuant to this Agreement are limited solely to DSM Services ("Services"). This includes maintenance of Directory Services (e.g. providers, hospitals, pharmacies, labs and imaging) for the purpose of supporting the Services.

Participation in DSM Services is subject to payment of Participation Dues, which are to be paid on an reoccurring basis and are further described in Exhibit A.

3. PERMITTED PURPOSES FOR SERVICES

Participant agrees to send health data or use health data received by it from other participants only for the following purposes:

- A. **Treatment.** Treatment of the Individual who is the subject of the Protected Health Information (PHI) requested or received by the Participant.
- B. **Billing.** Billing for services, which is equivalent to the definition of payment in the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in 45 CFR § 164.501 or may be further defined by regulations promulgated by the State of Alaska Department of Health and Social Services. Participant shall only use the Minimum Necessary PHI for such purposes.
- C. **Providing information as required by law or regulation, but only to the extent permitted by applicable law, including but not limited to HIPAA, AS 18.23.300 et seq. and the regulations enacted thereunder.**

4. RESPONSIBILITIES OF THE PARTIES

- A. **COMPLIANCE WITH LAW.** Each party will comply with all applicable federal, state and local laws. This includes, but is not limited to, the Health Information Portability and Accountability Act of 1996 (HIPAA), Title XII, Subtitle D of the Health Information Technology for Economic and Clinical Health (HITECH) Act, codified at 42 U.S.C. §§ 17921-17954, and

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regulations issued by the Department of Health and Human Services (HHS) to implement the HITECH Act, which are applicable to Business Associates, as of the date by which Business Associates are required to comply with such referenced statutes and HHS regulations, the Alaska Personal Information Protection Act found at Alaska Statutes 45.48 et seq., and AS 18.23.300.

- B. SAFEGUARDS. The recipient of Information pursuant to this Agreement will use appropriate safeguards to prevent the use or disclosure of Information other than as provided for by this Agreement. The recipient of Information pursuant to this Agreement will implement administrative, physical and technical safeguards as required by the HIPAA Security Rule, and that reasonably and appropriately protect the confidentiality, integrity and availability of the Information that it receives pursuant to this Agreement. This may require the development and enforcement of related policies, procedures and documentation standards by Participant or healtheConnect.
- C. SUBCONTRACTORS AND AGENTS. Each party agrees to ensure that any subcontractor or agent to whom it provides Information directly through the Services, or otherwise received from healtheConnect, is bound by the same restrictions and conditions that apply through this Agreement with respect to such Information. Each party will ensure that any agent, including a subcontractor, to whom it provides Information from healtheConnect, agrees to implement reasonable and appropriate safeguards to protect it.
- D. IMPERMISSIBLE. Neither party shall request, use, or disclose Information from healtheConnect in a manner inconsistent with the terms and conditions of this Agreement and/or applicable law or regulation.
- E. SECURITY. Participant acknowledges that healtheConnect has limited control over Participants' designation of Users (as applicable to the Services), and Participant agrees to properly use security measures and Participant's own policies, procedures and software/hardware devices to increase the overall effectiveness of healtheConnect security.

5. GENERAL RESPONSIBILITIES OF PARTICIPANT

- A. EXTERNAL HIE PRIVACY, SECURITY AND COMPLIANCE POLICIES AND PROCEDURES. healtheConnect has established External HIE Privacy, Security and Compliance Policies and Procedures ("External P&Ps") located in the healtheConnect Policies and Procedures at 4.200 et seq. Participant agrees to enforce the External P&Ps with regard to its employees, as applicable for the Services, and shall do so using industry and commercially reasonable means.
- B. PARTICIPANT POLICIES AND PROCEDURES. Participant will ensure compliance with its own applicable privacy and security policies and procedures as required under applicable law. Participant may be asked to provide evidence of compliance with their own privacy and security policies and procedures relevant to this Agreement, upon reasonable written notice by healtheConnect. If a Participant needs assistance with such policies and procedures, it should notify healtheConnect prior to entering into this Agreement, and healtheConnect will provide assistance to the extent that such resources are available.
- C. PARTICIPANT INFRASTRUCTURE. The DSM service provided by healtheConnect is a web-based service. Participant shall be responsible for obtaining the workstation hardware and software, Internet connection and other equipment necessary, if any, to receive the Services ("Participant Infrastructure"). Participant acknowledges and agrees that it has sole responsibility for all costs of procurement, installation and maintenance of the Participant Infrastructure. Participant further represents and warrants that it has installed and maintains industry standard virus and firewall protection across its network infrastructure to minimize the risks of unauthorized user access and viral attack. Participant will provide evidence of such measures upon reasonable request by healtheConnect.

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- D. CONFIDENTIALITY. Participant shall hold in confidence and shall not disclose to any third party (except to its employees, contractors and agents on an as-needed basis) without the other party's prior written consent any Confidential Information (including information, software or other materials from Inpriva and their Third Party Licensors) that is not generally known to the public or, by its nature, should be reasonably considered confidential. The Parties acknowledge and agree that a breach of this Section may cause irreparable harm and that healtheConnect may be entitled to seek equitable relief from such breach.
- E. Operating Policies and Technical Requirements for Direct Secure Messaging. All Participants agree and are required to meet and comply with the Operating Policies and Technical Requirements for this healtheConnect Direct Secure Messaging Agreement listed in *Exhibit A* hereto.
- F. Right to Inspect and Audit. Upon thirty (30) days advance notice, no more than once annually, and during Participant's regular business hours, Participant shall allow healtheConnect and its agents to inspect and audit Participant's records relating to Participant's use of the Services solely and exclusively for the purpose of verifying Participant's compliance with their obligations under this Agreement. Any audit shall be paid for by healtheConnect or its agents; provided, however, that Participant shall pay for the expense of the audit if the audit reveals a material violation of the Agreement. healtheConnect's rights under this article shall not include or extend to Participant's: legal and contract records and files, finance records and files, and risk management records and files; which shall remain the sole and exclusive property of Participant and are not subject to any healtheConnect audit, copying or viewing rights contained in this Agreement.
- G. NPI. If applicable, Participant's current National Provider Identification (NPI) Number must be correctly reflected in the Centers for Medicare and Medicaid Services, National Plan & Provider Enumeration System. If applicable, Participant's current NPI Number and Professional License Number must be correctly reflected and current in the State of Alaska, Department of Commerce, Professional License Database.
- H. Covered Entity Status. Participant attests that it is either a covered entity as defined by HIPAA or has entered into a business associate agreement with a covered entity.
- I. Provider Directory. Participant agrees to provide updated information about its current users to healtheConnect to maintain the accuracy of the Provider Directory.

6. HEALTHECONNECT RESPONSIBILITIES

- A. DSM. healtheConnect will provide Direct Secure Messaging as a Web-mail client via web browser for Participant to utilize.
- B. Assistance to Participant. healtheConnect will provide for availability of central infrastructure and a help desk during reasonable business hours.
- C. Facilitate Exchange. healtheConnect's role is only to facilitate the exchange of information, which may include health data, through the operation of DSM, in accordance with healtheConnect's agreement with the State of Alaska and as provided in this Agreement. healtheConnect has no role in verifying the accuracy of any messages.
- D. EXTERNAL HIE PRIVACY, SECURITY AND COMPLIANCE POLICIES AND PROCEDURES. healtheConnect has established External HIE Privacy, Security and Compliance Policies and Procedures ("External P&Ps") located in the healtheConnect Policies and Procedures at 4.200 et seq. These External P&Ps are posted on the healtheConnect website and incorporated herein by reference for Participants utilizing the DSM services. The External P&Ps will be reasonable and intended to support appropriate direct secure messaging as contemplated by this Agreement. healtheConnect will develop and

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maintain a process for consultation with Participants regarding such External P&Ps, and encourages Participant to provide input into the development of External P&Ps through healthConnect working groups and committees. These External P&Ps will govern healthConnect and Participant use of the Services, and the use, submission, transfer, access, privacy, security and accuracy of data, and the standards for vendor contracting and quality control. Participants in the DSM services agree to be bound by the External P&Ps (incorporated by reference to this Agreement), as may be amended from time to time by healthConnect. healthConnect will provide Participant notice of such changes at least 30 days prior to the effective date of such changes.

7. LICENSE

- A. Grant of License. Subject to the terms and conditions of this Agreement, healthConnect hereby grants to Participant a limited, non-exclusive, non-transferable right to allow Participant to utilize the Services, solely for the purposes authorized herein and in accordance with the terms and conditions hereof. The Services utilize software from Inpriva and its suppliers for use within the Services. Participant shall have no right to use such software in any way other than as authorized under this Agreement.
- B. Restrictions. Any use of the Services not expressly permitted by this Agreement is prohibited. Without limiting the foregoing, except as otherwise expressly provided herein, Participant will not (a) lease, sublease, sublicense, sell, distribute, transfer possession, rent, or grant other rights in the Services or engage in service bureau work or time-sharing arrangements with respect to the Services; (b) use, or permit the use of, the Services to provide services or functions for any person or entity, unless such person or entity is an User or Other Participant. For the avoidance of doubt, Participant's employees, contractors and/or agents may access and use the Services on behalf of and for the benefit of the Participant, provided such individuals are informed about and understand that they will comply with the terms of this Agreement.
- C. Third Party Licensors. The Services contains software supplied to healthConnect by Inpriva and their suppliers ("Third Party Licensors") for use within the Services ("Embedded Software"). Participant shall have no right to use any Embedded Software on a standalone basis or in any way other than as part of the Services.
- D. Ownership Rights. healthConnect, Inpriva, and Third Party Licensors retain all right, title and interest in and to the Services and the Embedded Software. Databases are governed by other provisions of this Agreement and not this Section. No express or implied license, right or interest in or to any intellectual property of healthConnect, Inpriva or Third Party Licensors is conferred by this Participant Agreement. Participant shall not assign, market, or encumber its rights to use the Services or Embedded Software. Participant will use reasonable and industry-standard means to prevent access to the Services or Embedded Software by any unauthorized third party.

8. WARRANTIES, LIABILITY AND INDEMNIFICATIONS

- A. MUTUAL WARRANTIES. Each party hereby represents and warrants to the other party that: (a) it has and will have full power and authority to enter into this Agreement and perform hereunder; (b) it has or will obtain all applicable licenses and approvals from any government authority within any jurisdiction that requires such qualifications, license, approval or other governmental consent necessary to conduct the activities herein, except where the failure to qualify or obtain licenses or approvals would not have a material adverse effect on its ability to perform its obligations under this Agreement; and (c) it will at all times comply with all applicable laws, rules, regulations, decrees and orders of governmental authorities as is necessary to perform its obligations under this Agreement.

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- B. LIMITATION OF DAMAGES. PARTICIPANT ACKNOWLEDGES AND AGREES THAT IT SHALL HAVE NO CLAIM AGAINST healtheConnect'S AGENTS FOR ANY ACTUAL OR ALLEGED DIRECT DAMAGES ARISING OUT OF, BASED ON OR RELATING TO THIS PARTICIPATION AGREEMENT. PARTICIPANT ACKNOWLEDGES AND AGREES THAT ITS SOLE RECOURSE PURSUANT TO THIS AGREEMENT SHALL LIE AGAINST healtheConnect.
- C. DISCLAIMER OF LIABILITY. Except for its indemnification obligations under this Agreement and its breach of confidentiality or unauthorized disclosure of PHI, neither healtheConnect nor Participant will be liable to the other for any special, incidental, exemplary, indirect, consequential or punitive damages (including loss of use or lost profits) arising out of or in connection with claims relating to healtheConnect's or Participant's acts or omissions under this Agreement, including but not limited to claims arising from provision or receipt of data, or the handling or storage of data, or, whether such liability arises from any claim based upon contract, warranty, tort (including negligence), product liability or otherwise, and whether or not either party has been advised of the possibility of such loss or damage. FOR THE AVOIDANCE OF DOUBT, THE PARTIES ACKNOWLEDGE AND AGREE THAT FINES AND PENALTIES RESULTING FROM A VIOLATION BY healtheConnect OF ITS CONFIDENTIALITY OBLIGATIONS HEREUNDER, AND COSTS ASSOCIATED WITH BREACH NOTIFICATIONS REQUIRED AS A RESULT OF A BREACH OF UNSECURED PROTECTED HEALTH INFORMATION BY healtheConnect, SHALL BE DEEMED TO BE DIRECT DAMAGES AND ARE THEREFORE NOT EXCLUDED BY THE FOREGOING SENTENCE. LIABILITY FOR DAMAGES SHALL BE LIMITED AND/OR EXCLUDED AS PROVIDED IN THIS AGREEMENT, EVEN IF ANY EXCLUSIVE REMEDY PROVIDED FOR IN THIS AGREEMENT FAILS OF ITS ESSENTIAL PURPOSE. This limitation on monetary damages will not apply to claims relating to death or personal injury that arise out of products deemed to be consumer goods under applicable law.
- D. DISCLAIMER OF healtheConnect LIABILITY. healtheConnect is not liable for any claims and/or damages arising from the following: (i) Inaccurate or incomplete information provided by Participants through healtheConnect; (ii) Interruption in the ability to access the Services due to technical difficulties, technical maintenance, or system failure; (iii) Access of protected health information through healtheConnect due to Participants' negligent sharing or loss of User IDs and password or leaving the Services accessible when unattended. Any PHI accessed through Participant in this manner may be available to others and is no longer protected by healtheConnect's privacy practices; (iv) Any and all claims due to access by anyone else to any and all PHI printed and/or downloaded by Participant from healtheConnect.
- E. USE OF THIRD-PARTY SOFTWARE SOLUTIONS. Once information is transmitted to Participant's third-party software system (e.g. Outlook, EHR software), Participant shall maintain sole and exclusive responsibility for any liabilities or other obligations resulting from any breach of security or potential breach of security with respect to any information transmitted by any non-healtheConnect administered software solutions. Participants shall also maintain sole and exclusive responsibility for any efforts or costs associated with any notice, investigation, defense costs, settlement amounts or any other costs, penalties or fines resulting from any breach of security or potential breach of security with respect to any information transmitted by any non-healtheConnect administered email software solutions. healtheConnect does not and will not maintain any responsibility for the quality, integrity, accuracy or other characteristics of any Participant data after it is uploaded to, downloaded from or transmitted via any nonhealtheConnect administered software solutions.
- F. AS-IS NATURE OF SERVICES. EXCEPT FOR THE WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SERVICES ARE PROVIDED "AS IS," WITH ALL FAULTS, AND healtheConnect AND ITS AGENTS DISCLAIM ANY AND ALL EXPRESS OR IMPLIED REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE SERVICES AND THE SOFTWARE CONTAINED THEREIN, INCLUDING ANY EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, NON-INFRINGEMENT OR THAT

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THE SERVICES OR EMBEDDED SOFTWARE WILL OPERATE UNINTERRUPTED. THE ENTIRE RISK AS TO THE SELECTION, SATISFACTORY QUALITY, PERFORMANCE AND USE OF THE SERVICES SHALL BE WITH THE PARTICIPANT.

- G. INDEMNIFICATION BY healtheConnect. Except for claims relating to intellectual property infringement, which are governed exclusively by the provisions directly above, healtheConnect hereby agrees that healtheConnect shall: (i) indemnify, defend, hold Participant harmless from, or, at its option, settle, at healtheConnect's sole cost and expense, such portion of any claim, action or proceeding brought by any third party (collectively, "Third Party Action") against Participant or its affiliates, officers, employees, directors, representatives and agents (collectively, "Participant Indemnitees") alleging (a) a breach by healtheConnect of any of its representations, warranties or covenants herein, (b) any negligent act, omission or willful misconduct of healtheConnect personnel in connection with or arising out of the performance of its obligations under this Agreement, (c) the violation by healtheConnect of any applicable law, statute or regulation, or (d) unauthorized or improper use of Information by healtheConnect or its personnel or disclosure by healtheConnect or its personnel for any purpose other than a use allowed under this Agreement, and (ii) indemnify and hold the Participant harmless from any damages or expenses (including legal costs and attorneys' fees) actually and finally awarded against such Participant as a result of such Third Party Action.
- H. INDEMNIFICATION BY PARTICIPANT. Participant hereby agrees that Participant shall: (i) defend or, at its option, settle, at Participant's sole cost and expense, such portion of any claim, action or proceeding brought by any third party (collectively, "Third Party Action") against healtheConnect and its agents (collectively, "healtheConnect Indemnitees") alleging (a) a breach by Participant of any of its representations, warranties or covenants herein, (b) any grossly negligent act, omission or willful misconduct of Participant or its Users in connection with or arising out of their use of the Services or the performance of their obligations under this Agreement, (c) the violation by Participant or its Users of any applicable law, statute or regulation, or (d) unauthorized or improper use of Information by Participant or its Users or disclosure by Participant or its Users for any purpose other than a use allowed under this Agreement, and (ii) indemnify and hold the healtheConnect Indemnitees harmless from any damages or expenses (including attorneys' fees) actually and finally awarded against such healtheConnect Indemnitees as a result of such Third Party Action.
- I. NOTICE; CONTROL OF DEFENSE AND SETTLEMENT; COOPERATION. Each Party's indemnification obligations herein are conditioned upon:
1. The indemnified party ("Indemnitee") providing reasonable notice of the Claims to the indemnifying party ("Indemnitor");
 2. Indemnitee tendering the control of the defense and settlement of any such Claims to Indemnitor at Indemnitor's expense and choice of counsel;
 3. Indemnitee providing reasonable cooperation (at Indemnitor's expense) in defending or settling such Claims; and
 4. Indemnitor not settling any Claims on Indemnitee's behalf without Indemnitee's written permission, which shall not be unreasonably withheld or delayed, and in the event Indemnitor and Indemnitee agree to settle such Claims, each party agrees not to publicize the settlement nor to permit the claimant to publicize the settlement.

Participant releases healtheConnect from any claims arising out of any inaccuracy or incompleteness of data submitted by a Participant, except (i) in circumstances where healtheConnect received accurate and correct data from a Participant but delivered inaccurate and incorrect data to a Participant, or (ii) those arising out of healtheConnect's gross negligence. Participant also releases healtheConnect from any claims relating to clinical, medical or other decisions related to the treatment of a patient, including those arising out of the unavailability of data through the Services, except for those arising out of healtheConnect's gross negligence.

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J. EQUITABLE RELIEF AND TERMINATION RIGHTS. The Parties agree that a breach of any provision in this Article IV may result in irreparable harm to the other Party for which monetary damages may not provide a sufficient remedy. Therefore, the non-breaching Party may seek both monetary damages and equitable relief with respect to any such breach.

9. TERM AND TERMINATION

The term of this Agreement shall become effective upon signature of the healthConnect Alaska DSM Service Agreement and shall continue in force until completion of all terms for Services or it is otherwise terminated by either party in accordance with this Agreement.

healthConnect may terminate this Agreement immediately if Participant fails to cure a material breach of this Agreement within fifteen (15) days after receiving written notice thereof. healthConnect may also immediately suspend Services to Participant if healthConnect reasonably believes that provision of Services places Participant's or other individuals protected information at risk; or if healthConnect fails to obtain sufficient funding to provide the Services.

Upon termination of this Agreement, healthConnect will cease providing access to the Services for the Participant and Participant will stop using the Services. Participant is responsible for all fees owed at the time of termination.

10. EFFECT OF ADDENDUM

Participant acknowledges that he/she has read and fully understands this Agreement.

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Exhibit A

OPERATING POLICIES AND TECHNICAL REQUIREMENTS SPECIFIC TO THE DIRECT SECURE MESSAGING SERVICE

In addition to the other provisions in this Subscription Agreement, all Participants agree and are required to meet and comply at all times with the following Operating Policies and Technical Requirements for the healthConnect Direct Secure Messaging Services:

- Minimum Technical Requirements for Web-mail. healthConnect will be responsible for registration of the entity for participation and verification of any of its Participants who register. Participants must provide a web browser. A separate account is required for each individual Participant's User with a username and password to login. Participant authorizes the system to encrypt email on behalf of Participant and Participant's Users using a common DSM domain (aka "organizational") certificate which is necessary to protect data when it is transmitted over the internet.
- Provider Directory. Participants agree to accurately complete its registration information in the Provider Directory as part of the registration process. Participants agree to have their registration information checked for consistency with other information sources by the healthConnect and understand that inconsistencies will terminate the registration process or this agreement unless corrected by the entity. Participants agree to have their information posted in the Provider Directory, which may be posted on the healthConnect website.

DSM SERVICE FEES

The cost of DSM is **\$75 per mailbox per year billed in advance.**