



# **Data Use and Reciprocal Support Agreement (DURSA)**

For NHIN Limited Production Pilot Activities

*Developed by:*

**NHIN Cooperative DURSA Team**

October 21, 2009

# Introduction

As part of the Nationwide Health Information Network (NHIN) Trial Implementations, a team was assembled as part of the NHIN Cooperative to develop a comprehensive agreement that would govern the exchange of health data through the NHIN. This document reflects the work in progress and presents the team's DRAFT deliverable for the 2008 – 2009 contract year – a draft limited production Data Use and Reciprocal Support Agreement or DURSA. We have prepared Overview to facilitate the reader's understanding of the draft DURSA, and to place the DURSA into an appropriate context.

Please note: This version is a draft trust agreement to support an operational NHIN. This draft DURSA requires additional approvals before it is ready for signature. An initial executable version of this agreement will be finalized by Q 1 2010. Updates to the draft agreement will be made available via the HHS NHIN web page.

## **What is the Data Use and Reciprocal Support Agreement (DURSA)?**

The DURSA is a multi-party agreement, a single agreement that establishes the rules of engagement and obligations to which all NHIN Participants agree and that all NHIN Participants sign as a condition of joining the community.

All NHIN Participants must sign the DURSA to exchange health information with each other via the NHIN.

The DURSA is based upon an existing body of law (Federal, state, local) and the current policy framework. The agreement, while articulated as a contract, underscores a framework for broad-based information exchange among a set of trusted entities. The agreement reflects consensus of state-level, federal and private entities on the following policies:

- Multi-Party Agreement
- Participants in Production
- Privacy and Security Obligations
- Requests for Information Based on Permitted Purposes
- Duty to Respond
- Future Use of Data Received Through the NHIN
- Duties of Requesting and Responding Participants
- Autonomy principle for access
- Responding Participant's Legal requirements
- Authorizations
- Participant Breach Notification
- Mandatory Non-Binding Dispute Resolution
- Allocation of Liability Risk

**Who Developed the DURSA?**

The DURSA was developed by the NHIN Cooperative, including private and governmental entities. This agreement is a contract deliverable for NHIN option year contracts and grants.

**Why is a DURSA Needed?**

The DURSA is an essential tool for trust in the NHIN since it codifies a common set of trust expectations into an enforceable legal framework, while minimizing the need for point-to-point agreements. Further, the DURSA is needed for NHIN Limited Production and must go through the Federal approval process in order for Federal agencies to sign the agreement.

**When will the DURSA be Available?**

An executable DURSA is being prepared and is expected to be signed by the NHIN production pilot participants in Q4 2009.

# Data Use and Reciprocal Support Agreement

This Data Use and Reciprocal Support Agreement is made and entered into by and between the undersigned (hereinafter referred to individually as “Participant” and collectively as “Participants”) (the “DURSA” or the “Agreement”) as of the Effective Date.

WITNESSETH:

WHEREAS, the Participants are either Health Information Exchanges that have each individually been accepted by the NHIN Coordinating Committee for participation in the Nationwide Health Information Network (“NHIN”) (“HIE Participants”), Integrated Delivery Systems that have each individually been accepted by the NHIN Coordinating Committee for participation in the NHIN (“IDS Participants”), State agencies that have each individually been accepted by the NHIN Coordinating Committee (“State Participants”), or Federal agencies that have each individually been accepted by the NHIN Coordinating Committee for participation in the NHIN (“Federal Participants”) (collectively State Participants and Federal Participants shall be referred to as “Governmental Participants”);

WHEREAS, all Participants facilitate and govern the exchange of health data among groups of persons or organizations that wish to request and/or receive health data from other Participants in the NHIN;

WHEREAS, the relationship between the Participant and the individuals whose records are available within or through their respective Systems varies from Participant to Participant and, in some cases, there is no relationship at all;

WHEREAS, as a condition of participation in the NHIN, the Participants must enter into this Data Use and Reciprocal Support Agreement for purposes of electronic data exchange and have agreed to do so;

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, the Participants hereto mutually agree as follows:

**1. Definitions.** For the purposes of this Agreement, the following terms shall have the meaning ascribed to them below. All defined terms are capitalized throughout this Agreement.

- a. **Applicable Law** shall mean: (i) for the Participants that are not Federal Participants, all applicable statutes and regulations of the State(s) or jurisdiction(s) in which the Participant operates, as well as all applicable Federal statutes, regulations, standards and policy requirements; (ii) for the Federal Participants, all applicable Federal statutes, regulations, standards and policy requirements.
- b. **Authorization** shall meet the requirements and have the meaning set forth at 45 CFR § 164.508 of the HIPAA Regulations and include any similar but additional requirements under Applicable Law.

- c. **Breach** shall mean the unauthorized acquisition, access, or disclosure of Message Content through the NHIN. The term “Breach” does not include the following:
- (i) any unintentional acquisition, access or disclosure of Message Content through the NHIN by an employee or individual acting under the authority of a Participant or Participant User if—
    - (I) such acquisition, access or disclosure was made in good faith and within the course and scope of the employment or other professional relationship of such employee or individual, respectively, with the Participant or Participant User; and
    - (II) such Message Content is not further acquired, accessed, used, or disclosed by such employee or individual; or
  - (ii) any acquisition, access, use or disclosure of information contained in or available through the Participant’s System where such acquisition, access, use or disclosure was not directly related to transmission of Message Content through the NHIN.
- d. **Common NHIN Resource** shall mean software, utilities and automated tools made available for use in connection with the NHIN and which have been designated as a "Common NHIN Resource" by the NHIN Coordinating Committee and the NHIN Technical Committee.
- e. **Confidential Participant Information**, for the purposes of this Agreement, shall mean proprietary or confidential materials or information of a Discloser in any medium or format that a Discloser labels as such. Confidential Participant Information includes, but is not limited to: (i) the Discloser’s designs, drawings, procedures, trade secrets, processes, specifications, source code, System architecture, processes and security measures, research and development, including, but not limited to, research protocols and findings, passwords and identifiers, new products, and marketing plans; (ii) proprietary financial and business information of a Discloser; and (iii) information or reports provided by a Discloser to a Receiving Party pursuant to this Agreement. Notwithstanding any label to the contrary, Confidential Participant Information does not include Message Content; any information which is or becomes known publicly through no fault of a Receiving Party; is learned of by a Receiving Party from a third party entitled to disclose it; is already known to a Receiving Party before receipt from a Discloser as documented by Receiving Party’s written records; or, is independently developed by Receiving Party without reference to, reliance on, or use of, Discloser’s Confidential Participant Information. Message Content is excluded from the definition of Confidential Participant Information because other provisions of the DURSA address the appropriate protections for Message Content.

- f. **Definitive Plan** shall mean a written summary, signed by all entities or agencies that will participate in at least a limited production pilot and become signatories to the DURSA, which attests to the planned timeline, including substantive milestones, that will allow the parties to the attestation to begin, no later than December 31, 2010, actively exchanging health information in compliance with the NHIN Specifications in at least a limited production pilot that is consistent with priorities set by the NHIN Technical Committee. The purpose of the Definitive Plan is to provide a mechanism for the NHIN Coordinating Committee to evaluate an entity's eligibility to serve on the Coordinating Committee, as described in Section 4.02 of the Agreement.
- g. **Digital Credentials** shall mean a digital certificate issued by the NHIN Coordinating Committee or its designee to Participants who meet NHIN Participant requirements as defined in the NHIN Operating Policies and Procedures. The Digital Credentials will be presented electronically to Participants to prove identity and the right to access Message Content through the NHIN and will include Server Certificates.
- h. **Discloser** shall mean a Participant that discloses Confidential Participant Information to a Receiving Party.
- i. **Dispute** shall mean any controversy, dispute, or disagreement arising out of or relating to this Agreement.
- j. **Effective Date** shall mean the date specified in Section 25.12 of this Agreement.
- k. **Health Care Operations** shall have the meaning set forth at 45 C.F.R. § 164.501 of the HIPAA Regulations.
- l. **Health Information Exchange or HIE** shall mean an organization that oversees and governs the exchange of health-related information among organizations.
- m. **Health Information Service Provider or HSP** shall mean a company or other organization that will support one or more Participants by providing them with operational, technical, or health information exchange services.
- n. **HIPAA Regulations** shall mean the Standards for Privacy of Individually Identifiable Health Information and the Security Standards for the Protection of Electronic Protected Health Information (45 C.F.R. Parts 160 and 164) promulgated by the U.S. Department of Health and Human Services under the Health Insurance Portability and Accountability Act (HIPAA) of 1996, as in effect on the date of this Agreement and as may be amended, modified, or renumbered.
- o. **Integrated Delivery System or IDS** shall mean a network of health care providers or organizations that provide a continuum of health care services to a

defined population, or a health plan with care delivery components that represent a substantial proportion of its operations. An IDS may, but does not necessarily need to, include community and/ or tertiary hospitals, home health care and hospice services, primary and specialty outpatient care and surgery centers, social services, rehabilitation, preventive care, health education, and managed care financing.

- p. **Material** shall mean, for the purposes of Section 11.03 only, the implementation of, or change to, a NHIN Performance and Service Specification that will: (i) have a significant adverse operational or financial impact on at least 20% of Participants; (ii) require at least 20% of Participants to materially modify their existing agreements with or policies or procedures that govern Participant Users or third parties as required by Sections 17.04 and 17.05; or (iii) require an amendment to this Agreement.
- q. **Message** shall mean a mechanism for exchanging Message Content between Participants through the NHIN, which complies with the NHIN Performance and Service Specifications. Messages are intended to include all types of electronic transactions in the exchange, including, but not limited to, requests, assertions, responses, and notifications, including the data or records transmitted with those transactions.
- r. **Message Content** shall mean that information which is requested or sent by a Participant to another Participant through the NHIN. This includes, but is not limited to, Protected Health Information (PHI), individually identifiable information, de-identified data (as defined in the HIPAA Regulations), pseudonymized data, metadata, Digital Credentials, and schema.
- s. **Nationwide Health Information Network (NHIN)** shall mean a secure, nationwide, interoperable health information infrastructure that allows for the exchange of Message Content between and among Participants in support of the provision and improvement of health and healthcare services.
- t. **NHIN Operating Policies and Procedures** shall mean the policies and procedures adopted by the NHIN Coordinating Committee that describe management, operation, and participation in the NHIN, attached hereto as Attachment 3 and as amended from time to time in accordance with Section 12.03.
- u. **NHIN Performance and Service Specifications** shall mean the NHIN Test Approach and the NHIN Specifications.
- v. **NHIN Specifications** shall mean the specifications adopted by the NHIN Technical Committee to prescribe the data content, technical, and security requirements necessary to support information exchange among NHIN Participants. The NHIN Specifications are attached hereto as Attachment 1, and as amended from time to time in accordance with Sections 11.02 and 11.03.

- w. **NHIN Test Approach** shall mean the framework for Testing and demonstrations for parties seeking to participate in the NHIN. The NHIN Test Approach is attached hereto as Attachment 2, and as amended from time to time in accordance with Sections 11.02 and 11.03.
- x. **Notice or notify** shall mean a written communication, unless otherwise specified in this Agreement, sent to the appropriate Participant's representative at the address listed in Attachment 4 or the NHIN Coordinating Committee in accordance with Section 24.
- y. **ONC** shall mean the Office of the National Coordinator for Health Information Technology in the Office of the Secretary, U.S. Department of Health and Human Services.
- z. **Participant** shall mean any organization that (i) meets the requirements for participation in the NHIN as contained in the NHIN Operating Policies and Procedures; (ii) is provided with Digital Credentials; and (iii) is a signatory to this Agreement or a Joinder Agreement.
- aa. **Participant Users** shall mean those persons who have been authorized to access Message Content in connection with the NHIN through the respective Participant's System and in a manner defined by the respective Participant. "Participant Users" may include, but are not limited to, health care providers; individuals whose health information is contained within, or available through, a Participant's System; and employees, contractors, or agents of a Participant.
- bb. **Payment** shall have the meaning set forth at 45 C.F.R. § 164.501 of the HIPAA Regulations.
- cc. **Permitted Purposes** shall mean the following reasons for which Participant Users may legitimately exchange Message Content through the NHIN:
- Treatment of the individual who is the subject of the Message by the requesting Participant User or Recipient;
  - Payment, provided that: (i) the requesting Participant User is a Health Care Provider (as that term is defined at 45 C.F.R. § 160.103) of the individual who is the subject of the Message, and (ii) the requesting Participant User is requesting Message Content for its own use; and (iii) the Message Content is being transmitted to the requesting Participant User;
  - Health Care Operations, provided that (i) the requesting Participant User has an established Treatment relationship with the individual who is the subject of the Message; (ii) the purpose of the request is for those Health Care Operations listed in paragraphs (1) or (2) of the definition of Health Care Operations in 45 C.F.R. § 164.501 or health care fraud and abuse detection

or compliance; and (iii) the requesting Participant User is requesting Message Content for its own use;

- Public health activities and reporting as permitted by both the HIPAA Regulations at 45 C.F.R. § 164.512(b) and other Applicable Law;
  - Reporting on such clinical quality measures and such other measures to demonstrate “meaningful use,” as specified in regulations promulgated by the Department of Health and Human Services under the American Recovery and Reinvestment Act, Sections 4101 and 4102 and as permitted by both the HIPAA Regulations and other Applicable Law; and
  - Uses and disclosures pursuant to an Authorization provided by the individual who is the subject of the Message or such individual’s personal representative in accordance with 45 C.F.R. § 164.502(g) of the HIPAA Regulations.
- dd. **Protected Health Information or PHI** shall have the meaning set forth at 45 C.F.R. § 160.103 of the HIPAA Regulations.
- ee. **Receiving Party** shall mean a Participant that receives Confidential Participant Information from a Discloser.
- ff. **Recipient** shall mean the person(s) or organization(s) that receives Message Content from a Responding Participant for a Permitted Purpose. “Recipients” may include, but are not limited to, Participant Users and Requesting Participants.
- gg. **Requesting Participant** shall mean the Participant that submits a Message, on behalf of a Participant User, which initiates an exchange of Message Content. A Requesting Participant is also a Recipient upon receipt of Message Content from a Responding Participant.
- hh. **Responding Participant** shall mean the Participant that receives or responds to a Message from a Requesting Participant.
- ii. **Server Certificates** shall mean a digital certificate that enables web servers to operate in a secure mode by unambiguously identifying and authenticating a server and encrypting any information passed between the server and a web browser.
- jj. **System** shall mean software, portal, platform, or other electronic medium controlled by a Participant through which the Participant conducts its health information exchange related activities. For purposes of this definition, it shall not matter whether the Participant controls the software, portal, platform, or medium through ownership, lease, license, or otherwise.

kk. **Testing** shall mean the tests and demonstrations of a Participant's System and processes used for interoperable health information exchange, to assess conformity with the NHIN Specifications and NHIN Test Approach.

ll. **Treatment** shall have the meaning set forth at 45 C.F.R. § 164.501 of the HIPAA Regulations.

**2. Incorporation of Recitals.** The Recitals set forth above are hereby incorporated into this Agreement in their entirety and shall be given full force and effect as if set forth in the body of this Agreement.

**3. Purpose of the DURSA.** The purpose of this Agreement is to provide a legal framework that will enable Participants to exchange Message Content through the NHIN.

**4. NHIN Coordinating Committee.**

4.01. **Formation of the NHIN Coordinating Committee.** To accomplish the necessary planning, consensus building, and consistent approaches to developing, implementing, and operating the NHIN, there will be a NHIN Coordinating Committee.

4.02. **Composition of the NHIN Coordinating Committee.** The NHIN Coordinating Committee shall be composed of (i) one representative from ONC; (ii) one representative from each signatory to the DURSA that is actively engaged in the exchange of Message Content in at least a limited production pilot; (iii) one representative from each entity or agency that is a party to a Definitive Plan that has been accepted by the NHIN Coordinating Committee; and (iv) two representatives chosen by the Cooperative's Leadership Group. An entity or agency shall have only one representative on the NHIN Coordinating Committee even if it meets the requirements of multiple categories of membership as listed above. No entity or agency shall be party to a Definitive Plan unless it can demonstrate to the satisfaction of the NHIN Coordinating Committee that, at the time the Definitive Plan is submitted, it is conducting electronic transactions or exchanges of health information through production systems on a routine and on-going basis, with sufficient data to support priorities as defined by the NHIN Technical Committee.

4.03. **Grant of Authority.** The Participants hereby grant to the NHIN Coordinating Committee the right to provide oversight and facilitation for the continued development, implementation, and operation of the NHIN by conducting activities for the NHIN including, but not limited to, the following:

a. Reviewing, evaluating, and acting upon Definitive Plans submitted by organizations that want to become members of the NHIN Coordinating Committee;

b. Determining whether to admit new participants to the NHIN;

- c. Suspending or terminating Participants in accordance with Section 21 of this Agreement (Suspension and Termination);
- d. Receiving reports of Breaches and acting upon such reports in accordance with Section 16.03 of this Agreement (Breach Notification);
- e. Resolving Disputes between Participants in accordance with Section 23 of this Agreement (Dispute Resolution);
- f. Determining materiality of proposed new, or changes to existing, NHIN Performance and Service Specifications in accordance with Section 11.03 of this Agreement;
- g. Developing and amending NHIN Operating Policies and Procedures in accordance with Section 12 of this Agreement;
- h. Managing the amendment of this Agreement in accordance with Section 25.02 of this Agreement; and
- i. Fulfilling all other responsibilities delegated by the Participants to the NHIN Coordinating Committee as set forth in this Agreement.

To the extent permitted under Applicable Law, this grant of authority to the NHIN Coordinating Committee is unconditional and does not require any further consideration or action by any Participant.

- 4.04. In no case shall a Participant be required to disclose PHI to the Coordinating Committee in violation of Applicable Law. The Coordinating Committee shall not retaliate against a Participant that decides not to disclose PHI upon the request of the Coordinating Committee.

## 5. NHIN Technical Committee.

- 5.01. **Formation of the NHIN Technical Committee.** To accomplish the necessary priority-setting and oversight of changes to the NHIN Performance and Service Specifications, the parties to this Agreement acknowledge that ONC will arrange for the formation of a NHIN Technical Committee.
- 5.02. **Composition of the NHIN Technical Committee.** The NHIN Technical Committee shall be composed of no more than six ONC officials or personnel, including the individuals serving as the NHIN program lead and Federal Health Architecture (FHA) lead, and technical experts with appropriate expertise in the following areas: (i) standards and interoperability; (ii) policy and NHIN technical matters; and (iii) FHA technical matters. The NHIN Technical Committee shall also include five representatives chosen by the NHIN Cooperative Leadership Group. The NHIN Program Lead shall be the Chairperson of the NHIN Technical Committee.

5.03. **Grant of Authority.** The Participants hereby grant to the NHIN Technical Committee the right to prioritize NHIN functions and capabilities, including NHIN Performance and Service Specifications to be developed or modified; and, oversee and adopt changes to NHIN Performance and Service Specifications in accordance with Section 11.03 of this Agreement. To the extent permitted under Applicable Law, this grant of authority to the NHIN Technical Committee is unconditional and does not require any further consideration or action by any Participant.

## 6. Use of Message Content.

6.01. **Permitted Purposes.** The NHIN shall be used only for Permitted Purposes as defined in this Agreement. Each Participant shall require that its Participant Users only use the NHIN for the Permitted Purposes.

6.02. **Permitted Future Uses.** Subject to this Section 6.02 and Section 21.07, Recipients may retain, use and re-disclose Message Content received in response to a Message in accordance with Applicable Law and the Recipient's record retention policies and procedures. If the Recipient is a Participant that is a Business Associate of its Participant Users, such Participant may retain, use and re-disclose Message Content received in response to a Message in accordance with Applicable Law and the agreements between the Participant and its Participant Users.

6.03. **Management Uses.** The NHIN Coordinating Committee may request information from Participants, and Participants shall provide requested information, for the purposes listed in Section 4.03 of this Agreement. Notwithstanding the preceding sentence, in no case shall a Participant be required to disclose PHI to the Coordinating Committee in violation of Applicable Law. Any information, other than Message Content, provided by a Participant to the NHIN Coordinating Committee shall be labeled as Confidential Participant Information and shall be treated as such in accordance with Section 18.

7. **System Access Policies.** Each Participant shall have policies and procedures in place that govern its Participant Users' ability to access information on or through the Participant's System and through the NHIN ("Participant Access Policies"). Each Participant acknowledges that Participant Access Policies will differ among them as a result of differing Applicable Law and business practices. Each Participant shall be responsible for determining whether and how to respond to a Message based on the application of its Participant Access Policies to the information contained in the assertions that accompany the Message as required by the NHIN Performance and Service Specifications. The Participants agree that each Participant shall comply with the Applicable Law, this Agreement, and the NHIN Performance and Service Specifications in responding to Messages.

## 8. Enterprise Security.

8.01. **General.** Each Participant shall be responsible for maintaining a secure environment that supports the operation and continued development of the NHIN. Participants shall use appropriate safeguards to prevent use or disclosure of Message Content

other than as permitted by this Agreement, including appropriate administrative, physical, and technical safeguards that protect the confidentiality, integrity, and availability of that Message Content. Appropriate safeguards for non-Federal Participants shall be those identified in the HIPAA Security Rule, 45 C.F.R. Part 160 and Part 164, Subparts A and C, as safeguards, standards, 'required' implementation specifications, and 'addressable' implementation specifications to the extent that the 'addressable' implementation specifications are reasonable and appropriate in the Participant's environment. If an 'addressable' implementation specification is not reasonable and appropriate in the Participant's environment, then the Participant must document why it would not be reasonable and appropriate to implement the implementation specification and implement an equivalent alternative measure if reasonable and appropriate. Appropriate safeguards for Federal Participants shall be those required by Applicable Law related to information security. Each Participant shall, as appropriate under either the HIPAA Regulations, or under Applicable Law, have written privacy and security policies in place by the earlier of the Participant's respective Effective Date or the date on which it submits a Definitive Plan to the NHIN Coordinating Committee. Participants shall also be required to comply with any NHIN Performance and Service Specifications or NHIN Operating Policies and Procedures adopted by the NHIN Technical Committee or NHIN Coordinating Committee, respectively, that define expectations for Participants with respect to enterprise security.

8.02. **Malicious Software.** In participating in the NHIN, each Participant shall ensure that it employs security controls that meet applicable industry or Federal standards so that the information and Message Content being transmitted and any method of transmitting such information and Message Content will not introduce any viruses, worms, unauthorized cookies, trojans, malicious software, "malware," or other program, routine, subroutine, or data designed to disrupt the proper operation of a System or any part thereof or any hardware or software used by a Participant in connection therewith, or which, upon the occurrence of a certain event, the passage of time, or the taking of or failure to take any action, will cause a System or any part thereof or any hardware, software or data used by a Participant in connection therewith, to be improperly accessed, destroyed, damaged, or otherwise made inoperable. In the absence of applicable industry standards, each Participant shall use all commercially reasonable efforts to comply with the requirements of this Section.

**9. Equipment and Software.** Each Participant shall be responsible for procuring, and assuring that its Participant Users have or have access to, all equipment and software necessary for it to participate in the NHIN. Each Participant shall ensure that all computers and electronic devices owned or leased by the Participant and its Participant Users to be used in connection with the NHIN are properly configured, including, but not limited to, the base workstation operating system, web browser, and Internet connectivity.

**10. Auditing.** Each Participant represents that, through its agents, employees, and independent contractors, it shall have the ability to monitor and audit all access to and use of its System related to this Agreement, for system administration, security, and other legitimate purposes.

Each Participant shall perform those auditing activities required by the NHIN Performance and Service Specifications.

## **11. Performance and Service Specifications.**

**11.01. General Compliance.** Each Participant shall comply with: (i) the NHIN Specifications; and (ii) the NHIN Test Approach. The NHIN Specifications and NHIN Test Approach are collectively referred to as the “NHIN Performance and Service Specifications.”

**11.02. Adoption of Performance and Service Specifications.** The Participants hereby grant the NHIN Technical Committee or its designee the power to adopt new NHIN Performance and Service Specifications, and to adopt amendments to, or repeal and replacement of, the NHIN Performance and Service Specifications at any time through the NHIN Performance and Service Specification Change Process described in Section 11.03.

### **11.03. NHIN Performance and Service Specification Change Process.**

- a. **Determination of Materiality.** The NHIN Technical Committee shall provide reasonable advance notification to the NHIN Coordinating Committee of any proposed new, or change to existing, NHIN Performance and Service Specifications. Upon receiving such notification, the NHIN Coordinating Committee shall determine, in its sole discretion, whether such proposal is Material. If the NHIN Coordinating Committee determines that the proposed NHIN Performance and Service Specification is not Material, then the NHIN Technical Committee shall follow the change process in Section 11.03(b). If the NHIN Coordinating Committee determines that the proposed NHIN Performance and Service Specification is Material, then the NHIN Technical Committee shall follow the change process in Section 11.03(c).
- b. **Non-Material Changes to NHIN Performance and Service Specifications.** The NHIN Technical Committee may implement any new NHIN Performance and Service Specification, or amend, or repeal and replace any existing NHIN Performance and Service Specifications, at any time by providing the Participants notice of the change at least thirty (30) days prior to the effective date of the change so long as the new or amended NHIN Performance and Service Specification is not Material. Within fifteen (15) days of receiving notice of the non-Material change, a Participant may request that the NHIN Technical Committee delay implementation of the change based on unforeseen complications or other good cause. The NHIN Technical Committee shall respond to a request to delay implementation within seven (7) days of receiving the request.
- c. **Material Changes to NHIN Performance and Service Specifications.** If the implementation of a new NHIN Performance and Service Specification, or change to any existing NHIN Performance and Service Specification, is

Material, the NHIN Technical Committee shall notify Participants of the proposed Material change and allow Participants thirty (30) days to submit written comments to the NHIN Technical Committee regarding the proposed Material change. Within sixty (60) days of issuing notice of the proposed Material change, but not before either the end of the thirty (30) day written comment period or acknowledgement that all Participants have responded, the NHIN Technical Committee shall convene a meeting at which the Participants will be allowed to present information on the proposed Material change to the NHIN Technical Committee. Within ninety (90) days of issuing notice of the proposed Material change, the NHIN Technical Committee shall consider and evaluate both written comments received during the comment period and information presented at the meeting, make any revisions to the proposed Material change that are necessary, and provide the Participants final notice of the Material change. Participants shall be given at least one hundred and twenty (120) days after the NHIN Technical Committee provides the final notice to comply with the Material change.

- d. **Change Required to Comply with Federal Statutes or Regulations or the Stability of the NHIN.** If a new or changed NHIN Performance and Service Specification is required for the NHIN or Participants to comply with Federal statute or regulations or to maintain the stability of the NHIN (e.g. the performance and integrity of data exchanged among NHIN Participants), the NHIN Technical Committee shall seek input from the NHIN Coordinating Committee prior to implementing such change, but is not required to follow the processes required by Sections 11.03(b) and (c). The NHIN Technical Committee shall not require Participants to comply with such new or changed NHIN Performance and Service Specification prior to the legally required effective date of such Federal statutes or regulations. The NHIN Technical Committee shall notify Participants immediately in the event of a change that is required in order to comply with Federal statutes or regulations or to maintain the stability of the NHIN.
  
- e. **Participant Duty to Terminate Participation.** If, as a result of a change made by the NHIN Technical Committee in accordance with this Section 11.03, a Participant will not be able to comply with the NHIN Performance and Service Specifications or does not otherwise desire to continue participating in the NHIN after such change becomes effective, then such Participant shall terminate its participation in the NHIN in accordance with Section 21.02.

## **12. NHIN Operating Policies and Procedures.**

- 12.01. **General Compliance.** Each Participant shall comply with the NHIN Operating Policies and Procedures.
  
- 12.02. **Development of the NHIN Operating Policies and Procedures.** The Participants hereby grant the NHIN Coordinating Committee the power to develop the NHIN Operating Policies and Procedures, and to amend, or repeal and replace, the NHIN

Operating Policies and Procedures at any time through the NHIN Operating Policy and Procedure Change Process described in Section 12.03.

12.03. **NHIN Operating Policy and Procedures Change Process.** The NHIN Coordinating Committee may implement any new NHIN Operating Policy and Procedure, or amend, or repeal and replace any existing NHIN Operating Policy and Procedure, at any time by obtaining the approval of at least two-thirds of the non-governmental Participants and at least two-thirds of the Governmental Participants. The NHIN Coordinating Committee shall provide notice of the change at least thirty (30) days prior to the effective date of the change. Within fifteen (15) days of receiving notice of the change, a Participant may request that the NHIN Coordinating Committee delay implementation of the change based on unforeseen complications or other good cause. The NHIN Coordinating Committee shall respond to a request to delay implementation within seven (7) days of receiving the request.

### **13. Expectations of Participants.**

#### **13.01. Minimum Requirement for All Participants.**

- a. All Participants that allow their respective Participant Users to submit Messages that seek Message Content for Treatment shall have a corresponding reciprocal duty to respond to Messages that seek Message Content for Treatment. A Participant shall fulfill its duty to respond by either (i) responding to the Message with the requested Message Content or, (ii) responding with a standardized response that indicates the Message Content is not available or cannot be exchanged. All responses to Messages shall comply with NHIN Performance and Service Specifications, this Agreement, any agreements between Participants and their Participant Users, and Applicable Law. Participants may, but are not required to, respond to Messages that seek Message Content for Permitted Purposes other than Treatment. Nothing in this Section 13.01(a) shall require a disclosure that is contrary to a restriction placed on the Message Content by a patient pursuant to Applicable Law.
- b. Each Participant that allows its respective Participant Users to submit Messages that seek Message Content for Treatment shall exchange Message Content with all other Participants for Treatment, in accordance with Sections 7, 13.01(a) and 15 of this Agreement. If a Participant desires to stop exchanging Message Content with another Participant based on the other Participant's acts or omissions in connection with the NHIN or this Agreement, the Participant may temporarily stop exchanging Message Content with such Participant, to the extent necessary to address the Participant's concerns, and shall notify the NHIN Coordinating Committee of such cessation and the reasons supporting the cessation. The Participants shall submit the Dispute leading to the cessation to the Dispute Resolution Process in Section 23. If the cessation is a result of a Breach that was reported to, and deemed resolved by, the NHIN Coordinating Committee pursuant to Section 16.03, the Participants involved in the Breach and the cessation shall engage in the Dispute Resolution Process in Section 23

in an effort to attempt to reestablish trust and resolve any security concerns arising from the Breach.

13.02. **Participant Users and HSPs.** Each Participant shall require that all of its Participant Users and HSPs use the NHIN only in accordance with the terms and conditions of this Agreement, including without limitation those governing the use, confidentiality, privacy, and security of Message Content. Each Participant shall discipline appropriately any of its employee Participant Users, or take appropriate contractual action with respect to contractor Participant Users or HSPs, who fail to act in accordance with the terms and conditions of this Agreement relating to the privacy and security of Message Content, in accordance with Participant's employee disciplinary policies and procedures and its contractor and vendor policies and contracts, respectively.

13.03. **License to Common NHIN Resources.** Participant is hereby granted a nonexclusive, nontransferable, revocable and limited license to Common NHIN Resources solely for use as a Requesting Participant or a Responding Participant in performance of this Agreement. Participant shall not (a) sell, sublicense, transfer, exploit or, other than pursuant to this Agreement, use any Common NHIN Resources for Participant's own financial benefit or any commercial purpose, or (b) reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code to any Common NHIN Resources. THE COMMON NHIN RESOURCES ARE PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT ANY WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT.

**14. Specific Duties of a Requesting Participant.** A Requesting Participant shall be responsible for:

14.01. Submitting each Message to the NHIN in compliance with the NHIN Performance and Service Specifications and NHIN Operational Policies and Procedures, including representing that the Message is: (i) for a Permitted Purpose; (ii) supported by appropriate legal authority for obtaining the Message Content; and (iii) submitted by a Participant User with the legal authority to make such a request;

14.02. Authenticating that Recipient is an authorized Participant User within the Participant's System and that Recipient has represented that it has requested the Message Content for a Permitted Purpose in accordance with the NHIN Performance and Service Specifications;

14.03. Sending any assertions required by the NHIN Performance and Service Specifications or NHIN Operational Policies and Procedures with the Message; and

14.04. Transmitting a copy of the Authorization, if such Authorization forms the sole legal basis for the Permitted Purpose. Nothing in this Section shall be interpreted as requiring a Requesting Participant to obtain or transmit an Authorization for Message

Content related to Treatment, Payment, or Health Care Operations, consistent with the Permitted Purposes, even though certain Responding Participants require such Authorization to comply with Applicable Law.

**15. Specific Duties of a Responding Participant.** A Responding Participant shall be responsible for:

- 15.01. Authenticating requests for Message Content, meaning that the Responding Participant shall confirm and verify that the request was submitted by a Requesting Participant, in accordance with the NHIN Performance and Service Specifications and NHIN Operating Policies and Procedures;
- 15.02. In accordance with Section 7, determining whether and how to respond to a Message based on the application of its Participant Access Policies to the information contained in the assertions that accompany a Message;
- 15.03. Responding to all authenticated Messages that seek Message Content for Treatment, in accordance with this Agreement, the NHIN Performance and Service Specifications, and the NHIN Operating Policies and Procedures. The Participant may respond to Messages that seek Message Content for a Permitted Purpose other than Treatment, in accordance with this Agreement, the NHIN Performance and Service Specifications, and the NHIN Operating Policies and Procedures;
- 15.04. Authenticating its response to a Message by confirming and verifying that it is transmitting the requested Message Content to the Requesting Participant, in accordance with NHIN Performance and Service Specifications;
- 15.05. Ensuring that any requirements under the Responding Participant's Applicable Law, the NHIN Performance and Services Specifications, or the NHIN Operating Policies and Procedures including, but not limited to, obtaining consent and Authorization, if required, have been met before making Message Content available for exchange through the NHIN; and
- 15.06. For Federal Participants only, in addition to complying with Sections 15.01 through 15.05, ensuring that Message Content transmitted adhere to interoperability standards adopted by the Secretary of Health and Human Services, and the National Institute of Standards and Technology (NIST) and the Federal Information Processing Standards (FIPS), as applicable.

**16. Privacy and Security.**

- 16.01. **Applicability of HIPAA Regulations.** The Message Content exchanged through the NHIN and in accordance with this Agreement may contain PHI. Furthermore, some, but not all, Participants are either Covered Entities or Business Associates of Covered Entities, as those terms are defined in the HIPAA Regulations. Because the Participants are limited to exchanging Message Content through the NHIN for only Permitted Purposes, the Participants do not intend to become Business Associates of each other by virtue of signing this Agreement or exchanging Message Content. As a

result, the DURSA is not intended to serve as a Business Associate Agreement among the Participants. To support the privacy, confidentiality, and security of the Message Content and the NHIN, each Participant agrees as follows:

- a. If the Participant is a Covered Entity, the Participant does, and at all times shall, comply with the HIPAA Regulations to the extent applicable.
- b. If the Participant is a Business Associate of a Covered Entity, the Participant does, and shall at all times, comply with the provisions of its Business Associate Agreements and Applicable Law.
- c. If the Participant is a Governmental Participant, the Participant does, and at all times shall, comply with the applicable privacy and security laws and regulations to which it is subject.
- d. If the Participant is neither a Covered Entity, a Business Associate nor a Governmental Participant, the Participant shall, as a contractual standard, at all times, at a minimum, comply with the provisions of the HIPAA Regulations set forth in Attachment 5 as if it were acting in the capacity of a Covered Entity or such other standards as decided by the NHIN Coordinating Committee.

16.02. **Safeguards.** In accordance with Sections 8, 9 and 10, Participant agrees to use reasonable and appropriate administrative, physical, and technical safeguards and any NHIN Performance and Service Specifications and NHIN Operating Policies and Procedures to protect Message Content and to prevent use or disclosure of Message Content other than as permitted by Section 6 of this Agreement.

16.03. **Breach Notification.**

- a. Each Participant agrees that as soon as reasonably practicable, but no later than twenty-four (24) hours after determining that a Breach occurred, it will notify all Participants likely impacted by the Breach and the NHIN Coordinating Committee or its designee of such Breach. The notification should include sufficient information for the NHIN Coordinating Committee to understand the nature of the Breach. For instance, such notification could include, to the extent available at the time of the notification, the following information:
  - One or two sentence description of the Breach
  - Description of the roles of the people involved in the Breach (e.g. employees, Participant Users, service providers, unauthorized persons, etc.)
  - The type of Message Content Breached
  - Participants likely impacted by Breach
  - Number of individuals or records impacted/estimated to be impacted by the Breach
  - Actions taken by the Participant to mitigate the Breach

- Current Status of the Breach (under investigation or resolved)
- Corrective action taken and steps planned to be taken to prevent a similar Breach.

The Participant shall have a duty to supplement the information contained in the notification as it becomes available and cooperate with other Participants and the NHIN Coordinating Committee or its designee in accordance with Section 22(e) of this Agreement. The notification required by this Section 16.03 shall not include any PHI. If, on the basis of the notification, a Participant desires to stop exchanging Message Content with the Participant that reported a Breach, it shall stop exchanging Message Content in accordance with Section 13.01(b) of this Agreement. If, on the basis of the notification, the NHIN Coordinating Committee or its designee determines that (i) the other Participants that have not been notified of the Breach would benefit from a summary of the notification or (ii) a summary of the notification to the other Participants would enhance the security of the NHIN, it may provide, in a timely manner, a summary to such Participants that does not identify any of the Participants or individuals involved in the Breach.

- Information provided by a Participant in accordance with this Section 16.03, except Message Content, may be “Confidential Participant Information.” Such “Confidential Participant Information” shall be treated in accordance with Section 18.
- This Section 16.03 shall not be deemed to supersede a Participant’s obligations (if any) under relevant security incident, breach notification or confidentiality provisions of Applicable Law.
- Compliance with this Section 16.03 shall not relieve Participants of any other security incident or breach reporting requirements under Applicable Law including, but not limited to, those related to consumers.
- If a Participant is informed by a law enforcement official that the notification required under this Section 16.03 would impede a criminal investigation or cause damage to national security, then the Participant shall: (i) If the statement from the law enforcement official is in writing and specifies the time for which a delay is required, delay such notification for the time period specified by the official; or (ii) If the statement from the law enforcement official is made orally, document the statement, including the identity of the official making the statement, and delay the notification temporarily and no later than 30 days from the date of the oral statement, unless a written statement as described in this Section 16.03(e)(i) is submitted during that time.

**17. Representations and Warranties.** Each Participant hereby represents and warrants the following:

- 17.01. **Accurate Participant Information.** Except to the extent prohibited by Applicable Law, each Participant has provided, and will continue to provide, the NHIN Coordinating Committee with all information reasonably requested by the NHIN Coordinating Committee and needed by the NHIN Coordinating Committee to discharge its duties under this Agreement or Applicable Law, including during the Dispute Resolution Process. Any information provided by a Participant to the NHIN Coordinating Committee shall be responsive and accurate. Each Participant shall provide notice to the NHIN Coordinating Committee if any information provided by the Participant to the NHIN Coordinating Committee materially changes. Each Participant acknowledges that the NHIN Coordinating Committee reserves the right to confirm or otherwise verify or check, in its sole discretion, the completeness and accuracy of any information provided by a Participant at any time and each Participant will reasonably cooperate with the NHIN Coordinating Committee in such actions, given reasonable prior notice.
- 17.02. **Execution of the DURSA.** Prior to participating in the NHIN, each Participant shall have executed this Agreement and returned an executed copy of this Agreement to the NHIN Coordinating Committee. In doing so, the Participant affirms that it has full power and authority to enter into and perform this Agreement and has taken whatever measures necessary to obtain all required approvals or consents in order for it to execute this Agreement. The representatives signing this Agreement on behalf of the Participants affirm that they have been properly authorized and empowered to enter into this Agreement on behalf of the Participant.
- 17.03. **Compliance with this Agreement.** Except to the extent prohibited by Applicable Law, each Participant shall comply fully with all provisions of this Agreement. To the extent that a Participant delegates its duties under this Agreement to a third party (by contract or otherwise) and such third party will have access to Message Content, that delegation shall be in writing and require the third party to agree to the same restrictions and conditions that apply through this Agreement to a Participant.
- 17.04. **Agreements with Participant Users.** Each Participant has valid and enforceable agreements with each of its Participant Users that require the Participant User to, at a minimum: (i) comply with all Applicable Law; (ii) reasonably cooperate with the Participant on issues related to this Agreement; (iii) submit a Message through the NHIN only for Permitted Purposes; (iv) use Message Content received through the NHIN in accordance with the terms and conditions of this Agreement; (v) as soon as reasonably practicable after determining that a Breach occurred, report such Breach to the Participant; and (vi) refrain from disclosing to any other person any passwords or other security measures issued to the Participant User by the Participant. Notwithstanding the foregoing, for Participant Users who are employed by a Participant or who have agreements with the Participant which became effective prior to the Effective Date, compliance with this Section 17.04 may be satisfied through written policies and procedures that address items (i) through (vi) of this Section 17.04 so long as the Participant can document that there is a written requirement that the Participant User must comply with the policies and procedures.

- 17.05. **Agreements with Technology Partners.** To the extent that a Participant uses technology partners in connection with the NHIN, each Participant affirms that it has valid and enforceable agreements with each of its technology partners, including HSPs, that require the technology partner to, at a minimum: (i) comply with Applicable Law; (ii) protect the privacy and security of any Message Content to which it has access; (iii) as soon as reasonably practicable after determining that a Breach occurred, report such Breach to the Participant; and (iv) reasonably cooperate with the other Participants to this Agreement on issues related to the NHIN, under the direction of the Participant.
- 17.06. **Compliance with Specifications, Policies and Procedures.** Each Participant affirms that it fully complies with the NHIN Performance and Service Specifications and the NHIN Operating Policies and Procedures as more fully discussed in Sections 11.01 and 12.01 of this Agreement.
- 17.07. **Creation of Test Data.** Certain Participants have agreed to anonymize PHI to create Test Data to be used by other Participants for Testing. Each Participant that has so agreed represents that the Test Data do not contain PHI and further represents that it has created the Test Data in accordance with the Test Approach.
- 17.08. **Accuracy of Message Content.** When acting as a Responding Participant, each Participant, in accordance with Section 19.02, hereby represents that at the time of transmission, the Message Content it provides is (a) an accurate representation of the data contained in, or available through, its System, (b) sent from a System that employs security controls that meet industry standards so that the information and Message Content being transmitted are intended to be free from malicious software in accordance with Section 8.02, and (c) provided in a timely manner and in accordance with the NHIN Performance and Service Specifications and NHIN Operating Policies and Procedures. Other than those representations in Sections 17.07, 17.08 and 17.09, the Responding Participant makes no other representation, express or implied, about the Message Content.
- 17.09. **Express Warranty of Authority to Transmit Message Content.** To the extent each Participant is a Responding Participant and is providing Message Content to a Recipient, each Participant represents and warrants that it has sufficient authority to provide or make such Message Content available to Recipient.
- 17.10. **Use of Message Content.** Each Participant hereby represents and warrants that it shall use the Message Content only in accordance with the provisions of this Agreement.
- 17.11. **Compliance with Laws.** Each Participant will, at all times, fully comply with all Applicable Law relating to this Agreement, the exchange of Message Content for Permitted Purposes and the use of Message Content.
- 17.12. **Absence of Final Orders.** Each Participant hereby represents and warrants that, as of the Effective Date, it is not subject to a final order issued by any Federal, State, local

or international court of competent jurisdiction or regulatory or law enforcement organization, which will materially impact the Participant's ability to fulfill its obligations under this Agreement. Each Participant shall inform the NHIN Coordinating Committee if at any point during its participation in the NHIN it becomes subject to such an order.

- 17.13. **Federal Program Participation.** Each non-Federal Participant hereby represents and warrants that it is not excluded, debarred, or otherwise ineligible from participating in Federal contracts, subcontracts, grants, and nonprocurement transactions ("Federal Programs"). Each non-Federal Participant will immediately provide written notice to the NHIN Coordinating Committee if it is suspended, proposed for debarment or other exclusion, or otherwise disqualified or declared ineligible from participating in a Federal Program for any reason, or is a party to a legal proceeding that may result in any such action.

## **18. Confidential Participant Information.**

- 18.01. Each Receiving Party shall hold all Confidential Participant Information in confidence and agrees that it shall not, during the term or after the termination of this Agreement, redisclose to any person or entity, nor use for its own business or benefit, any information obtained by it in connection with this Agreement, unless such use or redisclosure is permitted by the terms of this Agreement.
- 18.02. Confidential Participant Information may be redisclosed under operation of law, provided that the Receiving Party immediately notifies the Discloser of the existence, terms and circumstances surrounding such operation of law to allow the Discloser its rights to object to such disclosure. If after Discloser's objection, the Receiving Party is still required by law to redisclose Discloser's Confidential Participant Information, it shall do so only to the minimum extent necessary to comply with the operation of the law and shall request that the Confidential Participant Information be treated as such.

## **19. Disclaimers.**

- 19.01. **Reliance on a System.** Each Participant acknowledges and agrees that: (i) the Message Content provided by, or through, its System is drawn from numerous sources, and (ii) it can only confirm that, at the time Message Content is transmitted by the Responding Participant, the information and Message Content transmitted are an accurate representation of data contained in, or available through, its System. Nothing in this Agreement shall be deemed to impose responsibility or liability on a Participant related to the clinical accuracy, content or completeness of any Message Content provided pursuant to this Agreement. The Participants acknowledge that other Participants' Digital Credentials may be activated, suspended or revoked at any time or the Participant may suspend its participation; therefore, Participants may not rely upon the availability of a particular Participant's Message Content.

- 19.02. **Incomplete Medical Record.** Each Participant acknowledges that Message Content received in response to a Message may not include the individual's full and complete medical record or history. Such Message Content will only include that data which is the subject of the Message and available for exchange among Participants in the NHIN.
- 19.03. **Patient Care.** Message Content obtained through a Message is not a substitute for any Participant or Participant User, if that person/entity is a health care provider, obtaining whatever information he/she/it deems necessary, in his/her professional judgment, for the proper treatment of a patient. The Participant or Participant User, if he/she/it is a health care provider, shall be 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 the NHIN or the Message Content made available thereby. None of the Participants, by virtue of executing this Agreement, assume any role in the care of any patient.
- 19.04. **Carrier lines.** All Participants acknowledge that the exchange of Message Content between Participants is to be provided over various facilities and communications lines, and information shall be transmitted over local exchange and Internet backbone carrier lines and through routers, switches, and other devices (collectively, "carrier lines") owned, maintained, and serviced by third-party carriers, utilities, and Internet service providers, all of which may be beyond the Participants' control. Provided a Participant uses reasonable security measures, no less stringent than those directives, instructions, and specifications contained in this Agreement, the NHIN Performance and Service Specifications, and the NHIN Operating Policies and Procedures, the Participants assume no liability for or relating to the integrity, privacy, security, confidentiality, or use of any information while it is transmitted over those carrier lines, which are beyond the Participants' control, or any delay, failure, interruption, interception, loss, transmission, or corruption of any Message Content or other information attributable to transmission over those carrier lines which are beyond the Participants' control. Use of the carrier lines is solely at the Participants' risk and is subject to all Applicable Law.
- 19.05. **No Warranties.** EXCEPT AS REPRESENTED IN SECTION 17.08, THE MESSAGE CONTENT OBTAINED BY A RECIPIENT ARE PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT ANY WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. IT IS EXPRESSLY AGREED THAT IN NO EVENT SHALL THE PARTICIPANT BE LIABLE FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, OR EXEMPLARY DAMAGES, INCLUDING BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUES, LOSS OF USE, OR LOSS OF INFORMATION OR DATA, WHETHER A CLAIM FOR ANY SUCH LIABILITY OR DAMAGES IS PREMISED UPON BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER THEORIES OF LIABILITY, EVEN IF THE PARTICIPANT

HAS BEEN APPRISED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES OCCURRING. THE PARTICIPANT DISCLAIMS ANY AND ALL LIABILITY FOR ERRONEOUS TRANSMISSIONS AND LOSS OF SERVICE RESULTING FROM COMMUNICATION FAILURES BY TELECOMMUNICATION SERVICE PROVIDERS OR OTHER THIRD PARTIES.

- 19.06. **Performance of the NHIN.** The Participant makes no representation, express or implied, as to the performance of the NHIN. This disclaimer is not intended to diminish or limit in any way the other representations and warranties that the Participant is making in this Agreement. It is intended to recognize that the overall performance of the NHIN is beyond the power of any individual Participant to control.

## **20. Liability.**

- 20.01. **Participant Liability.** As between Participants to this Agreement: Each Participant shall be responsible for its acts and omissions and not for the acts or omissions of any other Participant. In circumstances involving harm to other Participants caused by the acts or omissions of individuals who access the NHIN, Message Content or Confidential Participant Information through the Participant or by use of any password, identifier, or log-on received or obtained directly or indirectly, lawfully or unlawfully, from the Participant or any of the Participant Users, each Participant will be responsible for such harm to the extent that the individual's access was caused by the Participant's breach of the Agreement or its negligent conduct for which there is a civil remedy under Applicable Law. Notwithstanding any provision in this Agreement to the contrary, Participant shall not be liable for any act or omission if a cause of action for such act or omission is otherwise prohibited by Applicable Law. This section shall not be construed as a hold harmless or indemnification provision.
- 20.02. **Effect of Agreement.** Except as provided in Section 19.05 (“No Warranties”) and Article 23 (“Dispute Resolution”), nothing in this Agreement shall be construed to restrict a Participant’s right to pursue all remedies available under law for damages or other relief arising from acts or omissions of other Participants related to the NHIN or this Agreement, or to limit any rights, immunities or defenses to which a Participant or Participant User may be entitled under Applicable Law.
- 20.03. **Coordinating Committee and Technical Committee Liability.** Each Participant has agreed to comply with this Agreement. Accordingly, the Participants shall not hold the NHIN Coordinating Committee or NHIN Technical Committee liable for or relating to any impairment of the privacy, security, confidentiality, integrity, availability, or restricted use of any information on a Participant’s System resulting from any Participant’s actions or failures to act, except to the extent such action or failure to act was directed by the NHIN Coordinating Committee or the NHIN Technical Committee.

## **21. Term, Suspension and Termination.**

21.01. **Term.** The initial term of this Agreement shall be for a period of one year commencing on the Effective Date. Upon the expiration of the initial term, this Agreement shall automatically renew for successive one-year terms unless terminated pursuant to this Section 21.

21.02. **Suspension or Termination by Participant.**

- a. A Participant may voluntarily suspend its own participation in the NHIN for a valid purpose, as determined by the NHIN Coordinating Committee, by giving the NHIN Coordinating Committee at least twenty-four (24) hours prior written notice. Once proper notice is given, the NHIN Coordinating Committee shall be empowered to suspend the Participant's Digital Credentials as of the date of suspension specified in the notice. Once the NHIN Coordinating Committee suspends the Participant's Digital Credentials, the NHIN Coordinating Committee shall provide notice of such voluntary suspension to all other Participants. During the suspension, neither the Participant, nor its Participant Users, shall access the NHIN or be responsible for complying with the terms of this Agreement except those terms that survive termination of this Agreement in accordance with Section 25.05. Any voluntary suspension shall be for no longer than five (5) consecutive calendar days or for more than twenty (20) calendar days during any twelve (12) month period, unless a longer period is agreed to by the NHIN Coordinating Committee.
- b. A Participant may terminate its participation in the NHIN by terminating this Agreement, with or without cause, by giving the NHIN Coordinating Committee at least five (5) business days prior written notice. Once proper notice is given, the NHIN Coordinating Committee shall be empowered to revoke the Participant's Digital Credentials as of the date of termination specified in the notice. Once the NHIN Coordinating Committee revokes the Participant's Digital Credentials, the NHIN Coordinating Committee shall provide notice of such revocation to the remaining Participants.

21.03. **Suspension by Coordinating Committee.** Upon the Coordinating Committee completing a preliminary investigation and determining that there is a substantial likelihood that a Participant's acts or omissions create an immediate threat or will cause irreparable harm to another party including, but not limited to, a Participant, a Participant User, the NHIN, or an individual whose Message Content is exchanged through the NHIN, the Participants hereby grant to the Coordinating Committee the power to summarily suspend, to the extent necessary to address the threat posed by the Participant, a Participant's Digital Credentials, pending the submission and approval of a corrective action plan, as provided in this Section. Upon suspension, the Coordinating Committee shall immediately suspend the Participant's Digital Credentials and within twelve (12) hours of suspending a Participant's right to participate in the NHIN (i) provide notice of such suspension to all Participants; and (ii) provide to the suspended Participant a written summary of the reasons for the suspension. The Participant shall use reasonable efforts to respond to the suspension notice with a detailed plan of correction or an objection to the suspension within three

(3) business days or, if such submission is not reasonably feasible within three (3) business days, then at the earliest practicable time. If the Participant submits a plan of correction, the Coordinating Committee will within five (5) business days review and either accept or reject the plan of correction. If the plan of correction is accepted, the Coordinating Committee will, upon completion of the plan of correction, reinstate the Participant's Digital Credentials and provide notice to all Participants of such reinstatement. If the plan of correction is rejected, the Participant's suspension will continue, during which time the NHIN Coordinating Committee and the Participant shall work in good faith to develop a plan of correction that is acceptable to both the Participant and the NHIN Coordinating Committee. At any time after the NHIN Coordinating Committee rejects a Participant's plan of correction, either the Participant or the NHIN Coordinating Committee may submit a Dispute to the Dispute Resolution Process described in Section 23. If the Coordinating Committee and the Participant cannot reach agreement on a plan of correction through the Dispute Resolution Process, the Coordinating Committee may terminate the Participant in accordance with Section 21.04.

**21.04. Termination by Coordinating Committee.** The Participants hereby grant to the Coordinating Committee the power to terminate a Participant's participation in the NHIN as follows:

- a. After taking a suspension action in accordance with Section 21.03 when there is a substantial likelihood that the Participant's acts or omissions create an immediate threat or will cause irreparable harm to another party including, but not limited to, a Participant, a Participant User, the NHIN, or an individual whose Message Content is exchanged through the NHIN; or
- b. In the event a Participant is in material default of the performance of a duty or obligation imposed upon it by this Agreement and such default has not been substantially cured within thirty (30) days following receipt by the defaulting Participant of written notice thereof from the Coordinating Committee.

A Participant whose Digital Credentials are revoked by virtue of termination may appeal such revocation through the Dispute Resolution Process. However, during the pendency of any such appeal, the Participant's Digital Credentials may continue to be revoked at the discretion of the NHIN Coordinating Committee.

**21.05. Effect of Termination.** Upon any termination of this Agreement for any reason, the terminated party shall cease to be a Participant and thereupon and thereafter neither that party nor its Participant Users shall have any rights to use the NHIN (unless such Participant Users have an independent right to access the NHIN through another Participant). The Coordinating Committee shall revoke a terminated Participant's Digital Credentials, which will terminate Participant's ability to access the NHIN. Once the Coordinating Committee revokes the Participant's Digital Credentials, the Coordinating Committee shall provide notice of such revocation to the remaining Participants. In the event that any Participant(s) are terminated, this Agreement will remain in full force and effect with respect to all other Participants. Certain provisions

of this Agreement survive termination, as more fully described in Section 25.05 (Survival Provisions).

21.06. **Confidential Participant Information.** All information used, provided, or created in accordance with this Section 21, except for Message Content, shall be labeled as “Confidential Participant Information” and shall be treated as such in accordance with Section 18.

21.07. **Disposition of Message Content on Termination.** At the time of termination, Recipient may, at its election, retain Message Content on Recipient’s System in accordance with the Recipient’s document and data retention policies and procedures, Applicable Law, and the terms and conditions of this Agreement, including Section 6.02.

**22. Cooperation.** Each Participant understands and acknowledges that numerous activities with respect to the NHIN shall likely involve another Participant’s employees, agents, and third party contractors, vendors, or consultants. To the extent not legally prohibited, each Participant shall: (a) cooperate fully with the NHIN Coordinating Committee, each other Participant, and any such third parties with respect to such activities as they relate to this Agreement; (b) provide such information to the NHIN Coordinating Committee, each other Participant, or such third parties as they may reasonably request for purposes of performing activities related to this Agreement; (c) devote such time as may reasonably be requested by the NHIN Coordinating Committee to review information, meet with, respond to, and advise the NHIN Coordinating Committee or other Participants with respect to activities as they relate to this Agreement; (d) provide such reasonable assistance as may be requested by the NHIN Coordinating Committee when performing activities as they relate to this Agreement; and (e) subject to a Participant’s right to restrict or condition its cooperation or disclosure of information in the interest of preserving privileges in any foreseeable dispute or litigation or protecting a Participant’s Confidential Participant Information, provide information and assistance to the NHIN Coordinating Committee or other Participants in the investigation of Breaches and Disputes. In no case shall a Participant be required to disclose PHI in violation of Applicable Law. In seeking another Participant’s cooperation, each Participant shall make all reasonable efforts to accommodate the other Participant’s schedules and operational concerns. A Participant shall promptly report, in writing, to any other Participant and the NHIN Coordinating Committee, any problems or issues that arise in working with the other Participant’s employees, agents, or subcontractors that threaten to delay or otherwise adversely impact a Participant’s ability to fulfill its responsibilities under this Agreement. This writing shall set forth in detail and with clarity the problems that the Participant has identified.

## **23. Dispute Resolution.**

23.01. **General.** The Participants acknowledge that it may be in their best interest to resolve Disputes through an alternative dispute resolution process rather than through civil litigation. The Participants have reached this conclusion based upon the fact that the legal and factual issues involved in this Agreement are unique, novel, and complex and limited case law exists which addresses the legal issues that could arise from this

Agreement. Therefore, the Participants shall submit Disputes related to this Agreement to the non-binding Dispute Resolution Process attached hereto as Attachment 6 and incorporated herein. Except in accordance with Section 23.02(a), if a Participant refuses to participate in the Dispute Resolution Process, such refusal shall constitute a material breach of this Agreement and may be grounds for termination in accordance with Section 21.04(b).

**23.02. Immediate Injunctive Relief.**

- a. Notwithstanding Section 23.01, a Participant may be relieved of its obligation to participate in the Dispute Resolution Process if such Participant (i) believes that another Participant's acts or omissions create an immediate threat to the confidentiality, privacy or security of Message Content exchanged through the NHIN or will cause irreparable harm to another party (Participant, Participant User, NHIN or consumer) and (ii) pursues immediate injunctive relief against such other Participant in a court of competent jurisdiction. The Participant pursuing immediate injunctive relief must notify the NHIN Coordinating Committee of such action within 24 hours of filing for the injunctive relief and of the result of the action within 24 hours of learning of same.
- b. If the injunctive relief sought in Section 23.02(a) is not granted and the Participant seeking such relief chooses to pursue the Dispute, the Participants must then submit to the Dispute Resolution Process in accordance with Section 23.01.

**23.03. Activities during Dispute Resolution Process.** Pending resolution of any Dispute under this Agreement, the Participants agree to fulfill their responsibilities in accordance with this Agreement, unless the Participant voluntarily suspends its participation in the NHIN in accordance with Section 21.02(a), is suspended in accordance with Section 21.03, or exercises its right to cease exchanging Message Content in accordance with Section 13.01(b).

**23.04. Implementation of Agreed Upon Resolution.** If, at any point during the Dispute Resolution Process, all of the Participants to the Dispute accept a proposed resolution of the Dispute, the Participants agree to implement the terms of the resolution in the agreed upon timeframe.

**23.05. Reservation of Rights.** If, following the Dispute Resolution Process, in the opinion of any involved Participant, the mandatory Dispute Resolution Process failed to adequately resolve the Dispute, the Participant(s) may pursue any remedies available to it in a court of competent jurisdiction.

**24. Notices.** All notices to be made under this Agreement shall be given in writing to the appropriate Participant's representative at the address listed in Attachment 4 or the NHIN Coordinating Committee, and shall be deemed given: (i) upon delivery, if personally delivered; (ii) upon the date indicated on the return receipt, when sent by the United States Postal Service Certified Mail, return receipt requested; and (iii) if by facsimile telecommunication or other form of electronic transmission, upon receipt when the notice is

directed to a facsimile telecommunication number or electronic mail address listed on Attachment 4 and the sending facsimile machine or electronic mail address receives confirmation of receipt by the receiving facsimile machine or electronic mail address.

## **25. Miscellaneous/General.**

- 25.01. **Governing Law.** In the event of a Dispute between or among the Participants arising out of this Agreement, the applicable Federal and State conflicts of law provisions that govern the operations of the Participants involved in the Dispute shall determine governing law.
- 25.02. **Amendment.** This Agreement may be amended in accordance with the Change Process described in Section 12.03. However, if the change is required for the NHIN, the NHIN Coordinating Committee, or Participants to comply with Applicable Law, the NHIN Coordinating Committee may implement the change with approval of at least a majority of non-governmental Participants and at least a majority of Governmental Participants and within a time period the NHIN Coordinating Committee determines is appropriate under the circumstances. All Participants shall be required to sign an amendment adopted in accordance with the provisions of this Section or terminate participation in the NHIN in accordance with Section 21.02.
- 25.03. **Additional Participants.** Upon the NHIN Coordinating Committee's acceptance of new participant in the NHIN, the NHIN Coordinating Committee shall have the new participant execute and become bound by this Agreement. To accomplish this, the new participant will enter into a Joinder Agreement, the form of which is attached hereto as Attachment 7, pursuant to which the new participant agrees to be bound by this Agreement. The Participants agree that upon execution of the Joinder Agreement by a duly authorized representative of the NHIN Coordinating Committee, all then-current Participants shall be deemed to be signatories to the Joinder Agreement with the result being that current Participants and the new participant are all bound by this Agreement. The new participant shall not be granted the right to participate in the NHIN until both it and the NHIN Coordinating Committee execute the Joinder Agreement.
- 25.04. **Assignment.** No Party shall assign or transfer this Agreement, or any part thereof, without the express written consent of the NHIN Coordinating Committee. Any assignment that does not comply with the requirements of this Section 25.04 shall be void and have no binding effect.
- 25.05. **Survival.** The provisions of Sections 6.02, 6.03, 16, 17.10, 18, 20, 21.06, 21.07, 22 and 23 shall survive the termination of this Agreement for any reason.
- 25.06. **Waiver.** No failure or delay by any Participant in exercising its rights under this Agreement shall operate as a waiver of such rights, and no waiver of any right shall constitute a waiver of any prior, concurrent, or subsequent right.
- 25.07. **Entire Agreement.** This Agreement, together with all Attachments, sets forth the entire and only Agreement among the Participants relative to the subject matter

hereof. Any representation, promise, or condition, whether oral or written, not incorporated herein, shall not be binding upon any Participant.

- 25.08. **Validity of Provisions.** In the event that a court of competent jurisdiction shall hold any Section, or any part or portion of any Section of this Agreement, invalid, void or otherwise unenforceable, each and every remaining Section or part or portion thereof shall remain in full force and effect.
- 25.09. **Priority.** In the event of any conflict or inconsistency between a provision in the body of this Agreement and any attachment hereto, the terms contained in the body of this Agreement shall prevail.
- 25.10. **Headings.** The headings throughout this Agreement are for reference purposes only, and the words contained therein may in no way be held to explain, modify, amplify, or aid in the interpretation or construction of meaning of the provisions of this Agreement. All references in this instrument to designated “Sections” and other subdivisions are to the designated Sections and other subdivisions of this Agreement. The words “herein,” “hereof,” “hereunder,” and other words of similar import refer to this Agreement as a whole and not to any particular Section or other subdivision.
- 25.11. **Relationship of the Participants.** The Participants are independent contracting entities. Nothing in this Agreement shall be construed to create a partnership, agency relationship, or joint venture among the Parties. Neither the NHIN Coordinating Committee nor any Participant shall have any authority to bind or make commitments on behalf of another Participant for any purpose, nor shall any such Party hold itself out as having such authority. No Participant shall be held liable for the acts or omissions of another Participant.
- 25.12. **Counterparts.** With respect to the first two Participants to this Agreement, the Effective Date shall be the date on which the second Participant executes this Agreement. For all Participants thereafter, the Effective Date shall be the date that the Participant executes this Agreement or the Joinder Agreement, in accordance with Section 25.03. This Agreement or the Joinder Agreement may be executed in any number of counterparts, each of which shall be deemed an original as against the Participant whose signature appears thereon, but all of which taken together shall constitute but one and the same instrument.
- 25.13. **Third-Party Beneficiaries.** With the exception of the Participants to this Agreement, there shall exist no right of any person to claim a beneficial interest in this Agreement or any rights occurring by virtue of this Agreement.
- 25.14. **Force Majeure.** A Participant shall not be deemed in violation of any provision of this Agreement if it is prevented from performing any of its obligations by reason of: (a) severe weather and storms; (b) earthquakes or other disruptive natural occurrences; (c) strikes or other labor unrest; (d) power failures; (e) nuclear or other civil or military emergencies; (f) terrorist attacks; (g) acts of legislative, judicial, executive, or administrative authorities; or (h) any other circumstances that are not

within its reasonable control. This Section 25.14 shall not apply to obligations imposed under Applicable Law.

25.15. **Time Periods.** Any of the time periods specified in this Agreement may be changed pursuant to the mutual written consent of the NHIN Coordinating Committee and the affected Participant(s).

This Agreement has been entered into and executed by officials duly authorized to bind their respective parties.

**[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]**

This Agreement has been entered into and executed by officials duly authorized to bind their respective parties.

Name:

Date:

Title:

Organization:

Name:

Date:

Title:

Organization:

## **Attachment 1 - NHIN Specifications**

Accessible on the NHIN Resources Page:

[http://healthit.hhs.gov/portal/server.pt?open=512&objID=1194&parentname=CommunityPage&parentid=18&mode=2&in\\_hi\\_userid=10882&cached=true](http://healthit.hhs.gov/portal/server.pt?open=512&objID=1194&parentname=CommunityPage&parentid=18&mode=2&in_hi_userid=10882&cached=true)

## **Attachment 2 - NHIN Test Approach and Test Materials**

Accessible on the NHIN Resources Page:

[http://healthit.hhs.gov/portal/server.pt/gateway/PTARGS\\_0\\_10731\\_848165\\_0\\_0\\_18/NHIN%20Trial%20Implementation%20Test%20Approach%20and%20Test%20Materials%20V2.0%2012.12.08%20FINAL-3.pdf](http://healthit.hhs.gov/portal/server.pt/gateway/PTARGS_0_10731_848165_0_0_18/NHIN%20Trial%20Implementation%20Test%20Approach%20and%20Test%20Materials%20V2.0%2012.12.08%20FINAL-3.pdf)

### **Attachment 3 - NHIN Operating Policies and Procedures**

Accessible on the NHIN Resources Page:

[http://healthit.hhs.gov/portal/server.pt?open=512&objID=1194&parentname=CommunityPage&parentid=6&mode=2&in\\_hi\\_userid=10882&cached=true](http://healthit.hhs.gov/portal/server.pt?open=512&objID=1194&parentname=CommunityPage&parentid=6&mode=2&in_hi_userid=10882&cached=true)

## **Attachment 4 - Participant Addresses for Notice**

### **Primary Contact**

Name:

Title:

Address:

City, State Zip:

Phone:

E-mail:

Fax:

### **Alternate Contact**

Name:

Title:

Address:

City, State Zip:

Phone:

E-mail:

Fax:

## **Attachment 5 – Applicable HIPAA provisions for Participants that are neither Covered Entities, Business Associates nor Governmental Participants**

Pursuant to Section 16.01(d), the following HIPAA provisions are applicable to Participants that are neither Covered Entities, Business Associates nor Governmental Participants as if they were acting in the capacity of a Covered Entity. Definitions contained in the various provisions of 45 C.F.R. Parts 160 through 164 apply to the provisions listed in this Attachment 1 to the extent they are used in said sections.

- 45 C.F.R. § 164.306 (Security Rule – General rules) [*This is not required of BAs by the HITECH Act, but it nevertheless appears to be appropriate to include here, e.g., “Covered entities must ... Ensure the confidentiality, integrity, and availability of all electronic [PHI] the covered entity creates, receives, maintains, or transmits.”* ]
- 45 C.F.R. § 164.308 (Security Rule – Administrative Safeguards)
- 45 C.F.R. § 164.310 (Security Rule – Physical Safeguards)
- 45 C.F.R. § 164.312 (Security Rule – Technical Safeguards)
- 45 C.F.R. § 164.314 (Security Rule – Organizational requirements)
- 45 C.F.R. § 164.316 (Security Rule – Policies and procedures and documentation requirements)
- 45 C.F.R. § 164.502, other than paragraphs (h), and (i) (Privacy Rule – Uses and disclosures of PHI: general rules) [*see notes below for descriptions of excluded subsections*]
- 45 C.F.R. § 164.504 (Privacy Rule – Uses and disclosures: Organizational requirements)
- 45 C.F.R. § 164.506 (Privacy Rule – Uses and disclosures to carry out treatment, payment, or health care operations)
- 45 C.F.R. § 164.508 (Privacy Rule – Uses and disclosures for which an authorization is required)
- 45 C.F.R. § 164.510 (Privacy Rule – Uses and disclosures requiring an opportunity to agree or to object)
- 45 C.F.R. § 164.512 (Privacy Rule – Uses and disclosures for which an authorization or opportunity to agree or object is not required)
- 45 C.F.R. § 164.514 (Privacy Rule – Other requirements relating to uses and disclosures of PHI)
- 45 C.F.R. § 164.520 (Privacy Rule – Notice of privacy practices for PHI)
- 45 C.F.R. § 164.522 (Privacy Rule – Rights to request privacy protection for PHI)
- 45 C.F.R. § 164.524 (Privacy Rule – Access of individuals to PHI)
- 45 C.F.R. § 164.528 (Privacy Rule – Accounting of disclosures of PHI)
- The following provisions of 45 C.F.R. § 160.530, but only to the extent that they relate to the above provisions. For example, with respect to 45 C.F.R. § 164.530(b), the Participant must

provide training with respect to the above provisions, such as § 164.506, but not with respect to other provisions of the HIPAA Regulations, such as § 164.522.

- 45 C.F.R. § 164.530(b) (Privacy Rule – Administrative Requirements, Training)
- 45 C.F.R. § 164.530(c) (Privacy Rule – Administrative Requirements, Safeguards)
- 45 C.F.R. § 164.530(d) (Privacy Rule – Administrative Requirements, Complaints to the Covered Entity)
- 45 C.F.R. § 164.530(e) (Privacy Rule – Administrative Requirements, Sanctions)
- 45 C.F.R. § 164.530(f) (Privacy Rule – Administrative Requirements, Mitigation)
- 45 C.F.R. § 164.530(g) (Privacy Rule – Administrative Requirements, Refraining from intimidating or retaliatory acts)
- 45 C.F.R. § 164.530(h) (Privacy Rule – Administrative Requirements, Waiver of rights)
- 45 C.F.R. § 164.530(i) (Privacy Rule – Administrative Requirements, Policies and procedures)
- 45 C.F.R. § 164.530(j) (Privacy Rule – Administrative Requirements, Documentation)

Notes:

The following requirements have not been included:

- 45 C.F.R. § 164.302 (Security Rule – Applicability)
- 45 C.F.R. § 164.304 (Security Rule – Definitions)
- 45 C.F.R. § 164.500 (Privacy Rule – Applicability)
- 45 C.F.R. § 164.501 (Privacy Rule – Definitions)
- 45 C.F.R. § 164.502(h) (Confidential communications), and (i) (Uses and disclosures consistent with notice)
- 45 C.F.R. § 164.526 (Privacy Rule – Amendment of PHI)
- 45 C.F.R. § 164.530(a) (Privacy Rule – Administrative Requirements, Personnel designations)
- 45 C.F.R. § 164.530(k) (Privacy Rule – Administrative Requirements, Group health plans)  
45 C.F.R. § 164.532 (Privacy Rule – Transition provisions)

## Attachment 6 - Dispute Resolution Process

- When a Dispute arises, a Participant will send written notice, in accordance with the notice provision in the DURSA, to the other Participant(s) involved in the Dispute. The notice must contain a summary of the issue as well as a recommendation for resolution. The Participant must send a copy of the notice to the Dispute Resolution Subcommittee (see below) for informational purposes.
- Within thirty (30) calendar days of receiving the notice, the Participants are obligated to meet and confer with each other, at least once in good faith and at a mutually agreeable location (or by telephone), to try to reach resolution (the "Informal Conference"). If the Participants reach a resolution at the Informal Conference, they will provide notification to that effect to the Dispute Resolution Committee.
- If the Participants are unable to participate in an Informal Conference during the thirty (30) day period or to reach resolution at the Informal Conference, they have ten (10) business days following the end of the thirty (30) day period or the Informal Conference, respectively, in which to escalate the Dispute to the Dispute Resolution Committee in writing.
  - The Dispute Resolution Subcommittee (the "Subcommittee") will be a five (5) member standing subcommittee of the NHIN Coordinating Committee. The NHIN Coordinating Committee will appoint each member of the Subcommittee for a definite term. The members must be representative of the Participants, have diverse skill sets, and be able to help facilitate and reach resolution on conflicts between the Participants. The Subcommittee must have access to legal counsel to advise it on the law relevant to matters before it.
  - In addition to appointing the five (5) members of the Subcommittee, the NHIN Coordinating Committee must also appoint three (3) to five (5) alternates for the Subcommittee. Alternates will serve on the Subcommittee should any of the members have a conflict on a particular Dispute or in the event that member(s) are unavailable. Subcommittee members are required to declare any conflicts in accordance with the NHIN Coordinating Committee's conflict of interest policy. Once a Subcommittee member declares a conflict, the remaining Subcommittee members will decide amongst themselves whether such member must withdraw from the Subcommittee for the dispute in question.
  - The Subcommittee must also have access to panels of subject matter experts, as identified by the NHIN Coordinating Committee, for a variety of topics that may be implicated by a Dispute. Each subject matter expert panel must have at least three (3) experts on it who will rotate as advisors to the Subcommittee.
- Once a Participant escalates a Dispute to the Subcommittee, the Subcommittee will have thirty (30) calendar days in which to convene a meeting of the involved Participants ("Committee Meeting"). During this meeting, each Participant will be able to present its version of the Dispute and any information that it believes is pertinent to the Subcommittee's decision.

- The Subcommittee will have the ability to request additional information from the Participants to help it make its determination. The Subcommittee, however, will not have the authority to compel a response or the production of testimony or documents by the Participants. To the extent that the Participants do respond to requests of the Subcommittee by producing documents, Participants will have the ability to mark the documents produced as “Confidential Participant Information” and the Subcommittee will treat those documents in accordance with Section 18 of the DURSA.
- The Subcommittee is encouraged to develop an appropriate and equitable resolution of each submitted Dispute, considering all available evidence, the goals of the NHIN and other relevant considerations. The Subcommittee must also have the authority to recommend sanctions for the breaching Participant. These sanctions include developing corrective action plans, suspension of participation rights, and termination of participation rights. The type of sanction will depend on the nature and severity of the breach.
- Within fifteen (15) calendar days of the Subcommittee Meeting, the Subcommittee will issue a written recommendation for resolution, including an explanation of the basis and rationale of its recommendation. If either Participant is dissatisfied with the Subcommittee’s recommendation for resolution, it will have five (5) business days in which to escalate the Dispute to the NHIN Coordinating Committee.
- Within twenty (20) calendar days of receiving notice of escalation from a Participant, the NHIN Coordinating Committee will review the Subcommittee’s recommendation along with the information on which such recommendation was based and issue a final resolution. The NHIN Coordinating Committee may seek additional information from the Participants to aid its resolution of the Dispute.
- Within seven (7) calendar days of receiving the final resolution from the NHIN Coordinating Committee, the Participants will determine whether to accept or reject the resolution and so notify the NHIN Coordinating Committee.
- The NHIN Coordinating Committee will send a written summary of the resolution of the Dispute to all NHIN Participants. The summary will not identify the Participants involved, but will contain sufficient detail about the resolution to serve as an instructive resource for other Participants.
- In no case shall a Participant be required to disclose PHI in violation of Applicable Law as part of its participation in the Dispute Resolution Process. The decision to not disclose PHI shall not be held against a Participant in the Dispute Resolution Process.

**Attachment 7 – Joinder Agreement**

**THIS JOINDER AGREEMENT** (this “Joinder”), made as of \_\_\_\_\_, 20\_\_, by and between \_\_\_\_\_ (the “NHIN Coordinating Committee”) and \_\_\_\_\_ (the “New Participant”) makes New Participant a party to that certain Data Use and Reciprocal Support Agreement dated \_\_\_\_\_ among the participants in the Nationwide Health Information Network (“NHIN”), as amended through the date hereof (the “DURSA”).

**RECITALS:**

A. The New Participant desires to become a participant in the NHIN.

B. The NHIN Coordinating Committee has accepted and approved the New Participant’s application to participate in the NHIN, with the condition precedent that the New Participant executes this Joinder.

**AGREEMENT:**

NOW, THEREFORE, in consideration of good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby agree as follows:

1. **JOINDER.** The New Participant is hereby made a party to the DURSA, and agrees to be bound by, and shall comply with, the terms thereof. From the date hereof, the New Participant shall be a “Participant” as that term is defined in the DURSA and shall be subject to all of the duties and obligations and entitled to the rights and benefits of a “Participant” as provided therein.

2. **ACKNOWLEDGEMENT.** The New Participant hereby acknowledges that it has received and reviewed a copy of the DURSA.

4. **REAFFIRMATION.** The terms and provisions of the DURSA remain in full force and effect in all respects.

5. **COUNTERPARTS.** This Joinder may be executed in any number of counterparts, each of which will be an original, but all of which taken together will constitute one and the same instrument.

**IN WITNESS WHEREOF**, the undersigned have caused this Joinder to be executed, all as of the day and year first written above.

**NHIN COORDINATING COMMITTEE**

**NEW PARTICIPANT**

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

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