



DRAFT

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

Developed by:
**NHIN Cooperative DURSA
Workgroup**

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Introduction

As part of the Nationwide Health Information Network (NHIN) Trial Implementations, a workgroup 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 report presents the workgroup's final deliverable for the 2007 – 2008 contract year – a draft Data Use and Reciprocal Support Agreement or DURSA. We have prepared FAQs 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 modifications before it is ready for signature. As indicated in Questions 8 – 10, there are still a few open issues in the DURSA that must be resolved. Additionally, the federal agencies that will be participating in the NHIN are continuing to provide input on various sections of the DURSA. During Option Year 1 (2009), these issues will be addressed and the DURSA will continue to be revised so that it can be executed by NHIEs and support an operational NHIN.

Draft DURSA FAQs

1. What is the DURSA?

The Data Use and Reciprocal Support Agreement (DURSA) is a comprehensive, multi-party trust agreement that will be signed by all NHIN Health Information Exchanges (NHIEs), both public and private, wishing to participate in the Nationwide Health Information Network. The DURSA provides the legal framework governing participation in the NHIN by requiring the signatories to abide by a common set of terms and conditions. These common terms and conditions support the secure, interoperable exchange of health data between and among numerous NHIEs across the country.

2. Why is the DURSA being developed?

The DURSA is being developed as a vehicle for creating trust relationships among the NHIEs participating in the NHIN. It memorializes the expectations for NHIEs in a “network of networks” with respect to the behavior and activities of other NHIEs. Since it is a multi-party agreement, it avoids the need for each NHIE to enter into “point-to-point” agreements with each other NHIE, which becomes exceedingly difficult, costly and inefficient as the number of NHIEs increases.

3. Who developed it?

The NHIN Cooperative DURSA Workgroup developed the Draft DURSA. The DURSA Workgroup included business and legal representatives from each of the NHIEs that participated in the 2008 Trial Implementations.

4. How should it be used?

Once finalized, the DURSA should be executed by each NHIE participating in the Production NHIN. This includes federal and state government agencies, state and regional health information exchanges, personally controlled health records, integrated delivery systems and all other exchange organizations that are admitted into the NHIN.

5. How does the DURSA relate to an NHIE's other agreements?

The DURSA expressly assumes that each NHIE already has in place trust agreements with its end users. In fact, the DURSA requires that the NHIE have user agreements in place that address, at a minimum, compliance with applicable law, cooperation with other NHIEs, requirements to use the NHIN only for "permitted purposes," limitations on the future use of data received through the NHIN and security measures regarding password protection.

6. Does the DURSA replace an NHIE's other agreements?

No. The DURSA does not replace an NHIE's other agreements with its users. The DURSA requires that an NHIE have these agreements in place. See Question 5.

7. Can I use the DURSA as an agreement between parties who want to exchange data outside of the NHIN?

The DURSA should not be adopted wholesale for use with other data exchange networks. While it may provide a good starting point for groups looking to create a multi-party trust agreement, there are numerous provisions that are specific to the NHIN and not translatable to other networks. These provisions will have to be customized for other data exchange networks through a representative, multi-stakeholder engagement process.

8. There are a lot of references to a "governing authority" in the draft DURSA. What is the "governing authority"?

While the exact nature of NHIN governance is still being developed, the DURSA Workgroup recognized the importance of considering the role of the governing authority in the draft DURSA now instead of waiting for the structure to be finalized. There will be governance to support the operations of the NHIN and provide the support necessary to maintain and continue the development of the NHIN. The references to the "governing authority" in this draft version of the DURSA are placeholders which will be refined as the governing authority takes shape.

9. Why does Section 10 have an Option A and an Option B?

Section 10 outlines a proposed process for creating or revising Interface Specifications and NHIN Policies and Procedures. Because new or revised Interface Specifications and NHIN Policies and Procedures could potentially have a significant impact on the Participants, the

Workgroup felt it was important to ensure that the NHIEs played a role in these processes. Options A and B are two different ways that the NHIEs could participate in the creation or revision of these documents. The Workgroup did not select an option at this point because such a choice should be informed by the governing authority, which is still under development.

10. How does the DURSA address the liability of NHIEs in the NHIN?

The basic premise agreed upon by the DURSA Workgroup is that each NHIE is responsible for its own acts or omissions and is financially and legally protected from damages caused by another NHIE's breach of the DURSA. The language memorializing this basic premise is continuing to be refined to reflect this concept in a way that is palatable to the NHIEs.

11. Why don't the NHIEs indemnify each other?

The NHIN will include NHIEs that are federal and state government agencies, and other government instrumentalities. In almost all cases, these government agencies or instrumentalities are prohibited by law from indemnifying third parties. The DURSA Workgroup agreed that it was inherently unfair to ask non-governmental NHIEs to agree to indemnification provisions when governmental NHIEs could not.

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Data Use and Reciprocal Support Agreement

This Data Use and Reciprocal Support Agreement is made and entered into on the date set forth below by and between the undersigned (hereinafter referred to individually as “Participant” and collectively as “Participants”) and [____], a [____] (hereinafter referred to as the “Governing Authority”)(the “DURSA” or the “Agreement”).

WITNESSETH:

WHEREAS, the Participants are either Health Information Exchanges that have each individually been accepted by the Governing Authority for participation in the Nationwide Health Information Network (“NHIN”) (“HIE Participants”), Personal Health Records that have each individually been accepted by the Governing Authority for participation in the NHIN (“PHR Participants”), Integrated Delivery Systems that have each individually been accepted by the Governing Authority for participation in the NHIN (“IDS Participants”), or Federal Agencies that have each individually been accepted by the Governing Authority for participation in the NHIN (“Federal Participants”);

WHEREAS, some Participants are actual providers of health care services to patients. These Participants generally have a direct relationship with the individual whose records are available within or through their respective Systems;

WHEREAS, some Participants are not actual providers of health care services to patients, but do have a direct relationship with the individual whose records are available within or through their respective Systems;

WHEREAS, some Participants are not actual providers of health care services, but do have a direct relationship with the individual whose records they request through the NHIN;

WHEREAS, some Participants are not actual providers of health care services to patients and do not have a direct relationship of any kind (treatment, contractual, business or otherwise) with the individual whose records are available within or through their respective Systems;

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.** The following terms shall have the meaning ascribed to them below.
 - a. **Applicable Law** shall mean: (i) for the HIE, IDS and PHR Participants, all relevant laws of the state(s) or jurisdiction(s) in which the HIE, IDS or PHR

operates, as well as all relevant federal laws; (ii) for the Federal Participants, all relevant federal laws.

- b. **Audit** shall mean a review and examination of records (including logs), and/or activities to ensure compliance with this Agreement and NHIN Performance and Service Specifications. This review can be manual, automated or a combination of both.
- c. **Authorization** shall meet the requirements and have the meaning set forth at 45 CFR § 164.508(b) of the HIPAA Regulations.
- 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 a Participant, the Governing Authority or any other natural or unnatural person with sufficient rights to grant such a designation.
- e. **Confidential Information** shall mean proprietary or confidential materials or information of a Discloser in any medium or format including but not limited to: (i) the Discloser's designs, drawings, procedures, trade secrets, processes, specifications, source code, System architecture, processes and security measures, Data schema, 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; (iii) information or reports provided by a Discloser to a Receiving Party pursuant to this Agreement; and (iv) all other non-public information designated by either party in writing as confidential or proprietary. Confidential Information does not include Data.
- f. **Consent** shall be understood in the context of 45 C.F.R. § 164.506 of the HIPAA Regulations.
- g. **Data** 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, PHI, de-identified data, pseudonymized data and metadata.
- h. **Discloser** shall mean a Participant that discloses Confidential Information to a Receiving Party.
- i. **Dispute** shall mean any controversy, dispute, or disagreement arising out of or relating to this Agreement or the breach of this Agreement when such controversy, dispute or disagreement has not been resolved through other available processes and mechanisms provided by the Governing Authority.
- j. **Effective Date** shall mean the date on which a Participant executes this Agreement or the Joinder Agreement, which shall be indicated next to the signature of the authorized representative of the Participant on the execution page of this Agreement or the Joinder Agreement.
- k. **Governing Authority** shall mean [_____], which is responsible for administering the NHIN and fulfilling the roles and responsibilities described

herein or any interim governing authority given responsibilities pursuant to this Agreement.

- l. **Health Care Operations** shall have the meaning set forth at 45 C.F.R. § 164.501 of the HIPAA Regulations.
- m. **Health Information Exchange or HIE** shall mean an organization that oversees and governs the exchange of health-related information among organizations according to nationally recognized standards.
- 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. **HSP or Health Information Service Provider** shall mean a company or other organization that will support one or more Participants by providing them with operational and technical health exchange services.
- p. **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.
- q. **Material** shall mean, for the purposes of Section 10.03/10.04 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 a majority of Participants; (ii) require a majority of Participants to materially modify their existing agreements with Participant Users or third parties; or (iii) require an amendment to this Agreement.
- r. **Message** shall mean a mechanism for exchanging Data between Participants through the NHIN, which complies with the NHIN Performance and Service Specifications. Messages include, but are not limited to, query, retrieve, and publish-subscribe.
- s. **Monitor** shall mean a review and examination of records (including logs), and/or activities to evaluate the utilization levels, efficiency and technical capabilities of the NHIN. This review can be manual, automated or a combination of both.
- t. **Nationwide Health Information Network (NHIN)** shall mean a secure, nationwide, interoperable health information infrastructure that allows for the exchange of Data between and among Participants in support of the provision of health and healthcare services.

- u. **NHIN Performance and Service Specifications** shall refer to the NHIN Test Approach, the NHIN Interface Specifications and the NHIN Policies and Procedures.
- v. **NHIN Test Approach** shall mean the document attached hereto as Attachment 1, which provides the framework for Testing and demonstrations for parties applying to participate in the NHIN, as amended from time to time.
- w. **NHIN Interface Specifications** shall mean the specifications adopted by the Governing Authority to specify the data content, technical and security requirements necessary to support the NHIN. The NHIN Interface Specifications are attached hereto as Attachment 2, as amended from time to time.
- x. **NHIN Policies and Procedures** shall mean the policies and procedures adopted by the Governing Authority that describe management, operation and participation in the NHIN, attached hereto as Attachment 3 and as amended from time to time.
- y. **Notice or notify** shall mean a notice in writing sent to the appropriate Participant's representative at the address listed in Attachment 5 or the Governing Authority in accordance with Section 22.
- z. **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.
- aa. **Participant** shall mean any organization that is a signatory to this Agreement or a Joinder Agreement, except for the Governing Authority.
- bb. **Participant Users** shall mean those persons, including, but not limited to, health care providers and individuals whose health information is contained within, or available through, a Participant's System and who have been authorized to access Data in connection with the NHIN through the Participant's System and in a manner defined by the respective Participant.
- cc. **Payment** shall have the meaning set forth at 45 C.F.R. § 164.501 of the HIPAA Regulations.
- dd. **Permitted Purposes** shall mean the following reasons for which Participant Users may legitimately exchange Data through the NHIN:
 - Treatment of the individual who is the subject of the Message by the requesting Participant User or Recipient;
 - Payment and Health Care Operations of the Requesting Participant User, provided that the Requesting Participant User has an established Treatment relationship with the individual who is the subject of the Message;
 - HIPAA permitted uses and disclosures under 45 C.F.R. § 164.512(a) – (d), (h), and (j) – (l), related to (i) an individual who is the subject of the Message and with whom the Requesting Participant User has an established Treatment relationship, or (ii) a public health initiative; and

- Uses and disclosures premised on an Authorization provided by the individual who is the subject of the Message.
- ee. **Personal Health Record** shall mean an electronic record of health-related information on an individual that conforms to nationally recognized interoperability standards, including but not limited to those that have been recognized by HHS, and that can be drawn from multiple sources while being managed, shared, and controlled by the individual or his or her authorized proxy.
 - ff. **Protected Health Information or PHI** shall have the meaning set forth at 45 C.F.R. § 160.103 of the HIPAA Regulations.
 - gg. **Receiving Party** shall mean a Participant that receives Confidential Information from a Discloser.
 - hh. **Recipient** shall mean the Requesting Participant that receives Data for Permitted Purposes, a Participant User who receives Data for Permitted Purposes, or other persons who use Data for Permitted Purposes, including, but not limited to, public health officials and emergency medical services.
 - ii. **Requesting Participant** shall mean the Participant that submits a Message that initiates an exchange of Data.
 - jj. **Responding Participant** shall mean the Participant that receives or responds to a Message from a Requesting Participant.
 - kk. **Security Incident** shall have the meaning set forth at 45 C.F.R. §164.304 of the HIPAA Regulations but shall be limited to only those Security Incidents which effect or are reasonably anticipated to effect the NHIN.
 - ll. **Service Registry** shall mean the catalogue describing the functionality and services supported by each Participant.
 - mm. **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.
 - nn. **Testing** shall mean the tests and demonstrations of a Participant's System and processes used for interoperable health information exchange, which conform to the NHIN Interface Specifications and NHIN Test Approach.
 - oo. **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 and Scope of the DURSA.** The purpose of this Agreement is to provide a legal framework that will enable Participants to exchange Data through the NHIN.

4. **Governance of the NHIN.** [TO BE DEVELOPED.]

5. **Use of Data.**

5.01. **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.

5.02. **Permitted Future Uses.** Subject to this Section 5.02 and Section 19.06, Recipients may retain Data received in response to a Message in accordance with the Recipient's record retention policies and procedures. As a result, Recipients may use and re-disclose Data received in response to a Message, in accordance with all Applicable Law and the agreements between a Participant and its Participant Users. Notwithstanding the preceding sentence, a Recipient may not use or re-disclose Data received in response to a Message based on an Authorization beyond the uses and disclosures allowed by the Authorization, except as required or permitted by law or by a subsequent Authorization provided by the individual.

5.03. **Management Uses.** The Governing Authority may request information, including PHI and de-identified data, from Participants, and Participants shall provide requested information, for the following purposes: system administration, testing, problem identification and resolution, management of the System, and otherwise as the Governing Authority determines is necessary and appropriate to comply with and carry out its obligations under all Applicable Law and this Agreement. Any such information provided by a Participant to the Governing Authority shall be treated as Confidential Information pursuant to Section 16 of this Agreement.

6. **System Access Policies.** Pursuant to Section 11.02 (Common Policies and Procedures), 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. For the purposes of this Agreement, the Participants agree that they shall allow a Requesting Participant to follow its Participant Access Policies for Participant Users even if they allow greater access to a Participant's System than the policies and practices of the Responding Participant would allow. Notwithstanding the preceding sentence, the Participants agree that each Participant shall comply with the Applicable Law. Each Participant shall provide its Participant Access Policies to any other Participant upon reasonable request.

7. **Enterprise Security.**

7.01. **General.** Each Participant shall be responsible for maintaining a secure environment that supports the operation and continued development of the NHIN. Until the Governing Authority adopts NHIN Interface Specifications or NHIN Policies and Procedures that define expectations for Participants with respect to enterprise security or the Governing Authority otherwise sets forth a policy regarding enterprise security, Participants shall use appropriate safeguards to prevent use or disclosure of Data otherwise than as permitted by this Agreement, including appropriate administrative, physical, and technical safeguards that protect the confidentiality, integrity, and

availability of that Data. Appropriate safeguards for HIE, PHR and IDS Participants shall be those identified in the HIPAA Security Rule as “required” and, to the extent that implementation is reasonable, those that are identified as “addressable.” Appropriate safeguards for Federal Participants shall be those required to comply with applicable Federal law and regulations related to information security. Each Participant shall have appropriate written privacy and security policies in place no later than the Participant’s respective Effective Date.

7.02. **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 Data being transmitted and any method of transmitting such information and Data will not introduce any viruses, worms, unauthorized cookies, trojans, malicious software or “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.

8. **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.

9. **Auditing.**

9.01. **Participant Auditing and Monitoring.** 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 and Sections 9.02 and 20.

9.02. **Governing Authority Auditing and Monitoring.**

- a. Participants agree that the Governing Authority shall have the right, but not the obligation, to Monitor or Audit the operations of the NHIN. The Governing Authority shall also have the right to Audit a specific Participant’s activities related to the NHIN, but only when the Governing Authority has reasonable cause to believe that the audited Participant is in material breach of its obligations under this Agreement or is otherwise compromising the security or stability of the NHIN. Such Audits may include requests for documents and information from a Participant concerning its activities in connection with the NHIN.

- b. Participants shall fully cooperate with any such Monitoring or Auditing activities by providing information requested by the Governing Authority within fourteen (14) days of receiving a written request from the Governing Authority, provided that a Participant may withhold information and records relating to its System and data security programs and processes or other sensitive Confidential Information which is not normally disclosed to third parties.
- c. A Participant's failure to cooperate with Monitoring or to comply with the Governing Authority's efforts to Audit a Participant's compliance with this Agreement or the NHIN Performance and Service Specifications may constitute a material breach of this Agreement and serve as grounds for termination in accordance with Section 19.04, including the notice and cure provisions therein.
- d. All information provided in accordance with this Section 9.02 shall be treated as "Confidential Information" and shall be so labeled.

10. Performance and Service Specifications.

10.01. **General Compliance.** Each Participant shall comply with: (i) the NHIN Interface Specifications; (ii) the NHIN Test Approach; and (iii) the NHIN Operating Policies and Procedures (collectively, the "NHIN Performance and Service Specifications").

10.02. **Development of the NHIN Performance and Service Specifications.** The Participants hereby grant the Governing Authority the power to develop the NHIN Performance and Service Specifications, and to amend, or repeal and replace, the NHIN Performance and Service Specifications at any time through the NHIN Performance and Service Specification Change Process described in Section 10.03/10.04.

10.03. OPTION A: NHIN Performance and Service Specification Change Process.

- a. **Development and Amendment of the NHIN Performance and Service Specifications.** The Governing Authority is responsible for the development of the NHIN Performance and Service Specifications, and may implement any new NHIN Performance and Service Specifications, 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, which includes the rationale and specific changes or additions to such Specifications.
- b. **Participant Right to Object.** If the implementation of a new NHIN Performance and Service Specification, or change to any existing NHIN Performance and Service Specification, is Material, each Participant shall have the right to object to the change in writing to the Governing Authority within thirty (30) days following the Governing Authority's notice of the change to Participant. Such objection shall contain a summary of the reasons for the objection. If the Governing Authority receives objections from a majority of Participants, within thirty (30) days, the Governing Authority shall review the proposed change in light of the objections and make a determination as to whether to proceed with the change as is or modify it. The determination must

be conveyed in writing to Participants within ten (10) business days of becoming final.

- c. **Change Required to Comply with Applicable Law or the Stability of the NHIN.** Notwithstanding Sections 10.03(a) and (b), if the change is required for the NHIN or Participants to comply with Applicable Law or to maintain the stability of the NHIN, the Governing Authority may implement the change without allowing for objection and within such period of time as the Governing Authority determines appropriate under the circumstances. Any change required to comply with Applicable Law may not take effect any earlier than the legally required effective date of the change to Applicable Law. The Governing Authority shall notify Participants immediately in the event of a change required to comply with Applicable Law or to maintain the stability of the NHIN.
- d. **Participant Duty to Terminate Participation.** If, as a result of a change made by the Governing Authority in accordance with this Section 10.03, 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 19.02.

10.04. **OPTION B: NHIN Performance and Service Specification Change Process.**

- a. **Non-Material Changes to NHIN Performance and Service Specifications.** The Governing Authority 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 Governing Authority delay implementation of the change based on unforeseen complications or other good cause. The Governing Authority shall respond to a request to delay implementation within seven (7) days of receiving the request.
- b. **Material Changes to NHIN Performance and Service Specifications.** If the implementation of a new NHIN Performance and Service Specifications, or change to any existing NHIN Performance and Service Specification, is Material, the Governing Authority shall notify Participants of the proposed Material change and allow Participants thirty (30) days to submit written comments to the Governing Authority regarding the proposed Material change. Within sixty (60) days of issuing notice of the proposed Material change, the Governing Authority shall convene a meeting at which the Participants will be allowed to present information on the proposed Material change to the Governing Authority. Within ninety (90) days of issuing the proposed Material change, the Governing Authority 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 which shall go

into effect no less than thirty (30) days after the final notice is provided. Participants shall be given up to ninety (90) additional days after the Governing Authority provides the final notice to comply with the Material change.

- c. **Change Required to Comply with Applicable Law or the Stability of the NHIN.** Notwithstanding Sections 10.04(a) and (b), if the change is required for the NHIN or Participants to comply with Applicable Law or to maintain the stability of the NHIN, the Governing Authority may implement the change without seeking comment from Participants and within such period of time as the Governing Authority determines appropriate under the circumstances. Any change required to comply with Applicable Law may not take effect any earlier than the legally required effective date of the change to the Applicable Law. The Governing Authority shall notify Participants immediately in the event of a change required to comply with Applicable Law or to maintain the stability of the NHIN.
- d. **Participant Duty to Terminate Participation.** If, as a result of a change made by the Governing Authority in accordance with this Section 10, 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 19.02.

11. Expectations of Participants.

11.01. Minimum Requirement for All Participants.

- a. All Participants shall be required to provide a response that complies with NHIN Performance and Service Specifications, this Agreement and Applicable Law to a Message that seeks Data for Treatment. Participants may, but are not required to, respond to Messages that seek Data for Permitted Purposes other than Treatment.
- b. Each Participant shall exchange Data with all other Participants for Treatment. If a Participant desires to stop exchanging Data 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 Data with such Participant, to the extent necessary to address the Participant's concerns, and shall notify the Governing Authority of such cessation and the reasons supporting the cessation. The Participants are strongly encouraged to resolve any issues which lead to the cessation through the Dispute Resolution Process in Section 21.

11.02. **Common Policies and Procedures.** Each Participant shall adopt and implement the common policies and procedures that are incorporated herein and set forth in Attachment 4.

11.03. **Participant Users and HSPs.** 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 Data. 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 Data, in accordance with Participant's employee disciplinary policies and procedures and its contractor and vendor policies and contracts, respectively.

11.04. **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 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.

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

- 12.01. Submitting each Message to the NHIN in compliance with the NHIN Performance and Service Specifications, including representing that the Message is: (i) for a Permitted Purpose; (ii) supported by appropriate legal authority for obtaining the Data; and (iii) submitted by a Participant User with the ability to make such a request;
- 12.02. Authenticating that Recipient is an authorized Participant User within the Participant's System and that Recipient has represented that he has requested the Data for a Permitted Purpose in accordance with the NHIN Performance and Service Specifications;
- 12.03. Stating the Permitted Purpose in the Message; and
- 12.04. If the Message is not based on the Permitted Purposes related to Treatment, Health Care Operations, Payment, or HIPAA permitted uses and disclosures under 45 C.F.R. § 164.512, transmitting a copy of the Authorization on which the Message is based.

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

- 13.01. Authenticating requests for Data, meaning that the Responding Participant shall confirm and verify that the request was submitted by an appropriate Requesting Participant, in accordance with the NHIN Performance and Service Specifications;
- 13.02. Responding to all authenticated Messages which seek Data for Treatment, in accordance with this Agreement and the NHIN Performance and Service Specifications. The Participant may respond to Messages which seek Data for a Permitted Purpose other than Treatment, in accordance with this Agreement and the NHIN Performance and Service Specifications;

- 13.03. Authenticating its response to a Message by confirming and verifying that it is transmitting the requested Data to the Requesting Participant, in accordance with NHIN Performance and Service Specifications;
- 13.04. Ensuring that Consent or Authorization, if required by the Responding Participant's Applicable Law, has been obtained before making Data available through the NHIN to be transmitted to a Recipient in response to a Message which seeks Data for Treatment;
- 13.05. Granting to the Requesting Participant a perpetual, fully-paid, worldwide, non-exclusive, royalty-free right and license to access and use all Data that is provided by the Responding Participant to the Recipient, in accordance with this Agreement; and
- 13.06. For Federal Participants only, in addition to complying with Sections 13.01 through 13.05, ensuring that Data transmitted adhere to interoperability standards recognized by the Secretary of Health and Human Services, and NIST and FIPS standards, as applicable.

14. **Privacy and Security.**

- 14.01. **Applicability of HIPAA Privacy and Security Rules.** The Data 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 HIPAA. However, the Participants agree that they are not Business Associates of each other. To support the privacy, confidentiality and security of the Data 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 HIPAA to the extent applicable.
 - b. If the Participant is a Business Associate of a Covered Entity, Participant does, and shall at all times, comply with the provisions of its Business Associate Agreements.
 - c. If the Participant is a governmental Participant, it 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 Federal Participant, it shall at all times, at a minimum, comply with the HIPAA Privacy and Security Rules as a standard of performance or such other standards as decided by the Governing Authority.
- 14.02. **Safeguards.** In accordance with Section 7 (Enterprise Security), Participant agrees to use reasonable and appropriate administrative, physical and technological safeguards to prevent use or disclosure of Data other than as permitted by Section 5 of this Agreement.
- 14.03. **Report of Security Incident.**
 - a. Each Participant agrees that within two (2) business days of completing an initial investigation and making a preliminary determination that a Security

Incident may have occurred (a “Potential Security Incident”), Participant will notify the Governing Authority, and any Participant that could reasonably be impacted by the Potential Security Incident, of the Potential Security Incident. The notification to the Governing Authority shall include: (i) a preliminary description of the Potential Security Incident; (ii) a summary of the facts that lead the Participant to conclude that a Potential Security Incident may have occurred; (iii) an action plan for definitively determining whether an actual Security Incident occurred; and (iv) an action plan for responding to the Security Incident if the Participant determines that it did occur. Upon making a final determination regarding a Potential Security Incident, the Participant shall provide a final report to the Governing Authority, which shall include the results of the investigation and the response (if any) to the Security Incident. The Participant shall submit the final report to the Governing Authority within ten (10) business days of the preliminary report unless the Governing Authority grants the Participant additional time. If the Participant submitting the report and the Governing Authority determine that other Participants could reasonably be impacted by the Security Incident and that these impacted Participants need additional information contained in either the preliminary or final reports, the Governing Authority will provide the needed details to such Participants.

- b. All information provided in accordance with this Section 14.03 shall be treated as “Confidential Information” and shall be so labeled.
- c. This Section 14.03 shall not be deemed to supersede a Participant’s obligations (if any) under a security breach notification requirement of Applicable Law.

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

15.01. **Application to Participate.** Each Participant has submitted a complete application using the forms provided by the Governing Authority, completed all required Testing in accordance with the Test Approach to the satisfaction of the Governing Authority, and the Governing Authority has accepted and approved each Participant’s application.

15.02. **Accurate Participant Information.** Each Participant has provided, and will continue to provide, the Governing Authority with all information reasonably requested by the Governing Authority and needed by the Governing Authority to discharge its duties under this Agreement or Applicable Law, including during the application process and Dispute Resolution Process. Any information provided by a Participant to the Governing Authority shall be responsive and accurate. Each Participant shall provide notice to the Governing Authority if any information provided by the Participant to the Governing Authority materially changes. Each Participant acknowledges that the Governing Authority 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 Governing Authority in such actions, given reasonable prior notice.

15.03. **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 Governing Authority. The Participant 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 have been properly authorized and empowered to enter into this Agreement.
- 15.04. **Compliance with this Agreement.** 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 Data, 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 Participant.
- 15.05. **Agreements with Participant Users.** Each HIE 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 other Participants to this Agreement on issues related to the NHIN, under the direction of the Participant; (iii) submit a Message through the NHIN only for Permitted Purposes; (iv) use Data received through the NHIN in accordance with the terms and conditions of this Agreement; and (v) 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 15.05 may be satisfied through written policies and procedures so long as the Participant can document that there is a written requirement that the Participant User must comply with the policies and procedures.
- 15.06. **Agreements with Technology Partners.** Each HIE Participant 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 Data to which it has access; and (iii) reasonably cooperate with the other Participants to this Agreement on issues related to the NHIN, under the direction of the Participant.
- 15.07. **Compliance with Specifications.** Each Participant shall fully comply with the NHIN Performance and Service Specifications as more fully discussed in Section 10.01 of this Agreement.
- 15.08. **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.
- 15.09. **Accuracy of Data.** When acting as a Responding Participant, each Participant hereby represents that at the time of transmission, the Data 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 Data being transmitted are intended to be free from malicious software in accordance with Section 7.02, and (c) provided in a timely manner and in

accordance with the NHIN Performance and Service Specifications. Other than those representations in Sections 15.06, 15.07, 15.08, 15.09 and 15.10, the Responding Participant makes no other representation, express or implied, about the Data.

- 15.10. **Express Warranty of Authority to Transmit Data.** To the extent each Participant is a Responding Participant and is providing Data to a Recipient, each Participant represents and warrants that it has sufficient rights in and to all Data that it provides or makes available to Recipient to grant the rights set out in this Agreement.
- 15.11. **Use of Data.** Each Participant hereby represents and warrants that it shall use the Data only in accordance with the provisions of this Agreement.
- 15.12. **Compliance with Laws.** Each Participant will, at all times, fully comply with all Applicable Law relating to this Agreement, the exchange of Data for Permitted Purposes and the use of Data.
- 15.13. **Absence of Investigations.** Each Participant hereby represents and warrants that it is not currently under a final order issued by any federal, state, local or international regulatory or law enforcement organization finding a violation of Applicable Law related to the privacy or security of PHI. Each Participant shall inform the Governing Authority if at any point during its participation in the NHIN it comes under such an order or any order that will materially impact the Participant's ability to fulfill its obligations under this Agreement.

16. Confidential Information.

- 16.01. Each Receiving Party shall hold all Confidential Information in confidence and agrees that it shall not, during the term or after the termination of this Agreement, disclose to anyone, nor use for its own business or benefit, any information obtained by it in connection with this Agreement unless such use or disclosure is permitted by the terms of this Agreement.
- 16.02. Confidential Information does not include any information which is or becomes known publicly through no fault of a Receiving Party; is learned 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; is independently developed by Receiving Party without reference to, reliance on or use of Discloser's Confidential Information; or, because of the passage of time, has become obsolete and lost all value in the market.
- 16.03. Confidential Information may be disclosed under operation of law, provided that the Receiving Party immediately notify 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 disclose Discloser's Confidential 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 Information be treated as such.

17. Disclaimers.

- 17.01. **Reliance on a System.** Each Participant acknowledges and agrees that: (i) the Data provided by, or through, its System is drawn from numerous sources, and (ii) it can

- only confirm that, at the time Data is transmitted by the Responding Participant the information and Data transmitted are an accurate representation of the data that is 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 Data provided pursuant to this Agreement. The Participants acknowledge that other Participants may be added or terminated as participants in the NHIN at any time; therefore, Participants may not rely upon the availability of a particular Participant's Data.
- 17.02. **Incomplete Data.** Each Participant acknowledges that Data received in response to a Message will not include the individual's full and complete medical record or history. Such Data will only include that Data which is the subject of the Message and available for exchange through the NHIN.
- 17.03. **Patient Care.** Data obtained through a Message is not a substitute for any Participant, if the Participant is a health care provider, or any Participant User obtaining whatever information he deems necessary for the proper treatment of a patient. The Participant, if the Participant is a health care provider, or the Participant Users shall be solely responsible for all decisions and actions taken or not taken involving patient care, utilization management, and quality management for their respective patients and clients resulting from, or in any way related to, the use of the NHIN or the Data made available thereby. None of the Participants, by virtue of executing this Agreement, assume any role in the care of any patient.
- 17.04. **Carrier lines.** All Participants acknowledge that the exchange of Data 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 and the NHIN Performance and Service Specifications, 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 Data 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.
- 17.05. **No Warranties.** EXCEPT AS REPRESENTED IN SECTION 15.09, THE DATA 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.

- 17.06. **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.

18. **Liability.**

- 18.01. **Participant Liability.** As between Participants to this Agreement, each Participant shall be responsible for all acts and omissions of the Participant or the Participant Users. Each Participant shall also be responsible for other individuals who access the NHIN, Data or Confidential 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, to the extent caused by the Participant's breach of the Agreement or its negligent or willful misconduct. Nothing herein shall be construed to (a) limit the Participant's ability to contractually allocate liability as between the Participant and Participant Users or (b) waive any rights or defenses available under Applicable Law in any action that may arise in connection with this Agreement.
- 18.02. **Effect of Agreement.** Except as provided in Section 17.05, 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 or defenses to which a Participant may be entitled under Applicable Law.
- 18.03. **Governing Authority Liability.** Each Participant has agreed to comply with this Agreement; however, the actions of such Participants are beyond the control of the Governing Authority. Accordingly, the Participants shall not hold the Governing Authority 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 Governing Authority.

19. **Term, Suspension and Termination.**

- 19.01. **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 19.

- 19.02. **Termination by Participant.** A Participant may terminate its participation in the NHIN by terminating this Agreement with or without cause by giving the Governing Authority five (5) business days prior written notice. Once proper notice is given, the Governing Authority shall be empowered to remove Participant from the Service Registry and terminate Participant's ability to access the NHIN after five (5) business days without any further action by the Participant. Once the Governing Authority removes the Participant from the Service Registry, the Governing Authority shall provide notice of such removal to the remaining Participants.
- 19.03. **Suspension by Governing Authority.** Upon the Governing Authority completing a preliminary investigation and determining that there is a reasonable 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 Data is exchanged through the NHIN, the Participants hereby grant to the Governing Authority the power to summarily suspend, to the extent necessary to address the threat posed by the Participant, a Participant's right to participate in the NHIN, pending the submission and approval of a corrective action plan, as provided in this Section. Upon suspension, the Governing Authority shall within twelve (12) hours of suspending a Participant's right to participate in the NHIN (i) amend the Service Registry to reflect the Participant's suspension; (ii) provide notice of such suspension to all Participants; and (iii) 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 business days or, if such submission is not reasonably feasible within three business days, then at the earliest practicable time. If the Participant submits a plan of correction, the Governing Authority will have two (2) business days to review and either accept or reject the plan of correction. If the plan of correction is accepted, the Governing Authority will reinstate the Participant's right to participate upon completion of the plan of correction, update the Service Registry accordingly 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 Governing Authority and the Participant will negotiate an acceptable plan of correction. If the Governing Authority and the Participant cannot reach agreement on a plan of correction within thirty (30) business days of the date of the notice of suspension, the Governing Authority may terminate the Participant. If the Participant objects to the suspension, the Participant and the Governing Authority are encouraged to avail themselves of the Dispute Resolution Process described in Section 21. If the suspension is the result of a Potential Security Incident, the Participant and Governing Authority shall comply with both this Section 19.03 and Section 14.03.
- 19.04. **Termination by Governing Authority.** The Participants hereby grant to the Governing Authority the power to terminate a Participant's participation in the NHIN as follows:

- a. After taking a suspension action in accordance with Section 19.03 when there is a reasonable 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 Data 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 Governing Authority.

19.05. **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 Governing Authority shall remove a terminated Participant from the Service Registry and terminate Participant's ability to access the NHIN. Once the Governing Authority removes the Participant from the Service Registry, the Governing Authority shall provide notice of such removal 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 23.05 (Survival Provisions).

19.06. **Disposition of Data on Termination.** To the extent a Responding Participant has provided Data to a Recipient, such Data may be entangled with the Recipient's System such that returning or destroying the Data at the termination of this Agreement is infeasible. In addition, the Recipients may need to retain such Data to maintain the integrity of a patient's medical record and for legal defense or risk management purposes. At the time of termination, therefore, Data may remain on Recipient's System in accordance with the Recipient's document and data retention policies and procedures and in accordance with the terms and conditions of this Agreement, including Section 5.02.

20. **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 Governing Authority, 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 Governing Authority, 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 Governing Authority to review information, meet with, respond to, and advise the Governing Authority or other Participants with respect to activities as they relate to this Agreement; (d) provide such reasonable assistance as may be requested by the Governing Authority 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 Information, provide information and assistance to the Governing Authority or other Participants in the

investigation of Security Incidents and unauthorized or improper uses of the NHIN, Participant's System or the Systems of the Participants. 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 Governing Authority any problems or issues that arise in working with the other Participant's employees, agents or subcontractors which 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.

21. **Dispute Resolution.**

21.01. **General.** The Participants acknowledge that it is 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 as of 2008, limited case law exists which addresses the legal issues that could arise from this Agreement. Therefore, the Participants are strongly encouraged to resolve Disputes related to this Agreement through the Dispute Resolution Process attached hereto as Attachment 6 and incorporated herein, although use of the Dispute Resolution Process is not mandatory.

21.02. **Activities during Dispute Resolution Process.** Pending resolution of any Dispute under this Agreement, subject to Sections 11.01 and 19.03, the Participants agree to fulfill their responsibilities in accordance with this Agreement and shall not delay the progress toward the fulfillment of those responsibilities.

21.03. **Reservation of Rights.** If a Dispute is submitted to the Dispute Resolution Process and is resolved through the issuance of a decision, the Participants agree to implement the decision provided, however, that the Participants may pursue other remedies available to them under law. The Participants also reserve the right to obtain relief from any determination resulting from the Dispute Resolution Process in a court of competent jurisdiction. When such determinations result in sanctions, the sanctions will remain in full force and effect during such legal action unless vacated by the court.

22. **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 5 or the Governing Authority, and shall be deemed given: (i) upon delivery, if personally delivered; (ii) five (5) business days after deposit in the United States mail, if sent 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 5 and the sending facsimile machine or electronic mail address receives confirmation of receipt by the receiving facsimile machine or electronic mail address.

23. **Miscellaneous/General.**

23.01. **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.

- 23.02. **Amendment.** This Agreement may be amended in accordance with the Change Process described in Section 10. However, if the change is required for the NHIN, the Governing Authority or Participants to comply with Applicable Law, the Governing Authority may implement the change without [allowing for objection/seeking comment] and within a time period the Governing Authority 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 19.02.
- 23.03. **Additional Participants.** Upon admission of a new party as a participant in the NHIN, all current Participants desire to 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 Governing Authority, 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 Governing Authority execute the Joinder Agreement.
- 23.04. **Assignment.** No Party shall assign or transfer this Agreement, or any part thereof, except in accordance with Section 23.02. Any assignment that does not comply with the requirements of Section 23.02 shall be void and have no binding effect.
- 23.05. **Survival.** The provisions of Sections 5.02, 5.03, 9.02, 14, 15.11, 16, 18, 19.06 20, and 21 shall survive the termination of this Agreement for any reason.
- 23.06. **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 breach shall constitute a waiver of any prior, concurrent, or subsequent breach.
- 23.07. **Entire Agreement.** This Agreement 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.
- 23.08. **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.
- 23.09. **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.
- 23.10. **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.

- 23.11. **Relationship of the Participants.** The Parties 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 Governing Authority 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.
- 23.12. **Counterparts.** This Agreement shall become binding when any one or more counterparts hereof, individually or taken together, bears the signatures of each of the Participants hereto. This 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.
- 23.13. **Third-Party Beneficiaries.** With the exception of (1) the Participants to this Agreement and (2) the Governing Authority, 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.
- 23.14. **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 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 23.14 shall not apply to obligations imposed under Applicable Law.
- 23.15. **Time Periods.** Any of the time periods specified in this Agreement may be changed pursuant to the mutual written consent of the Governing Authority and the affected Participant(s).

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

Attachment 1 - NHIN Test Approach

Attachment 2 - NHIN Interface Specifications

Attachment 3 - NHIN Policies and Procedures

Attachment 4 - Common Policies and Procedures

Attachment 5 - Participant Addresses for Notice

Attachment 6 - Dispute Resolution Process

- When a Dispute arises, a Participant is strongly encouraged to send written notice, in accordance with the notice provision in the DURSA, to the other Participant(s) involved in the Dispute. The notice should contain a summary of the issue as well as a recommendation for resolution. The Participant should send a copy of the notice to the Dispute Resolution Committee (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 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.
 - A Participant may bypass the Informal Conference if it believes that another Participant's actions create an immediate threat or will cause irreparable harm to another party (Participant, Participant User, NHIN).
- If the Participants are unable to reach resolution at the Informal Conference, they have five (5) business days in which to escalate the Dispute to the Dispute Resolution Committee in writing.
 - The Dispute Resolution Committee will be a five (5) member standing subcommittee of the Governing Authority. The Governing Authority will appoint each member of the Committee for a definite term. The members should be representative of the Participants, have diverse skill sets and be able to help facilitate and reach resolution on conflicts between the Participants. The Dispute Resolution Committee should 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 Committee, the Governing Authority should also appoint three (3) to five (5) alternates for the Committee. Alternates will serve on the Committee should any of the members have a conflict on a particular Dispute. Committee members are required to declare any conflicts in accordance with the Governing Authority's conflict of interest policy. Once a Committee member declares a conflict, the remaining Committee members will decide amongst themselves whether such member should withdraw from the Committee for the dispute in question.
 - The Committee should also have access to panels of subject matter experts for a variety of topics that may be implicated by a Dispute. Each subject matter expert panel should have at least three (3) experts on it who will rotate as advisors to the Committee.
- Once a Participant escalates a Dispute to the Dispute Resolution Committee, the Committee 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 Committee's decision.

- The Committee will have the ability to request additional information from the Participants to help it make its determination. The Committee, 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 Committee by producing documents, Participants will have the ability to mark the documents produced as “Confidential Information” and the Committee will treat those documents in accordance with Section 16 of the DURSA. The Subcommittee wants to confirm that if governmental Participants are involved in the Dispute Resolution Process, documents produced and marked “confidential” will not be subject to either state or federal FOIA laws.
- The Committee 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 Committee should 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. The Workgroup has not yet reached full consensus on the extent or scope of these sanctions.
- Within 15 calendar days of the Committee Meeting, the Committee 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 Committee’s recommendation for resolution, it will have five (5) business days in which to escalate the Dispute to the Governing Authority.
- Since the operation of the Governing Authority is unclear (e.g. how often it meets, whether it can convene special meetings), the Workgroup cannot suggest a timeline for resolution of an escalated issue. The Subcommittee does, however, suggest that any timeline that is developed reflect the Participants’ desire to resolve Disputes quickly and fairly.
- The Committee or the Governing Authority 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.

Attachment 7 – Joinder Agreement

THIS JOINDER AGREEMENT (this “Joinder”), made as of _____, 20__, by and between _____ (the “Governing Authority”) and _____ (the “New Participant”) makes New Participant a party to that certain Data Use and Reciprocal Support Agreement dated _____ among the participants in the National 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 Governing Authority 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.

GOVERNING AUTHORITY

NEW PARTICIPANT

By: _____
Name: _____

By: _____
Name: _____