**eMOLST Participation Agreement**

This eMOLST Participant Agreement (the “Agreement”) is effective  between Excellus Health Plan, Inc., with offices at 165 Court Street, Rochester, New York 14647("EHP"); and      , with offices at       ("Participant").

**Section 1 – Recitals**

**1.1** The eMOLST application is a web-based version of the paper-based New York State Department of Health-5003 Medical Order for Life Sustaining Treatment (MOLST) form. EHP hosts and maintains the eMOLST application.

**1.2** EHP desires to grant Participant a non-exclusive, revocable, nontransferable right to use

and access the eMOLST application in accordance with this Agreement and the terms of the Program Manual for the duration of this Agreement.

**1.3** Participant desires to grant access to individuals within its organization (each a “User” and collectively “Users”) to the eMOLST application so that they may access the eMOLST application to complete the MOLST form for Participant’s patients in an electronic format.

**1.4** This Agreement will set forth the terms and conditions under which EHP will offer the eMOLST application and under which Participant will be able to access the eMOLST application.

**Section 2 – Program Manual**

**2.1**  EHP will maintain the eMOLST application in accordance with the standards set forth in the Program Manual which is incorporated into and made a part of this Agreement.

**2.2** From time to time, EHP may modify the Program Manual. EHP will notify Participant in writing of any modification to the Program Manual 30 days prior to the effective date of such modification. Any modification will become incorporated into and made a part of the Program Manual, and thus this Agreement, as of the modification’s effective date.

**Section 3 – Participant Responsibilities**

**3.1** Participant agrees to fulfill its duties and obligations with respect to accessing and using the eMOLST application as set forth within the Program Manual, including, but not limited to, complying with all of the applicable security policies and protocols detailed therein.

**3.2** Participant agrees to notify EHP within five (5) days of becoming aware of any instance in which Participant, or any of its Users, employees, agents or subcontractors violates any provision of this Agreement or the Program Manual.

**Section 4 – Data Use**

**4.1**

a.By executing this Agreement, Participant agrees that EHP may use any or all of the data contained in the eMOLST application for research purposes so long as such data is de-identified in accordance with the Health Insurance Portability and Accountability Act of 1996 privacy regulations.

b. EHP grants to Participant the right to use only de-identified data, as that term is described in the Health Insurance Portability and Accountability Act of 1996 privacy regulations, for Participant’s own quality improvement activities. Participant may not sell or otherwise profit from any data contained in the eMOLST application whether or not such data has been de-identified.

c. Completed eMOLST forms will be made available for viewing through regional health information organizations (“RHIOs”) in accordance with applicable laws, regulations and policy guidance.

**Section 5 – Compliance with Laws and Regulations**

**5.1** Each party agrees that it will comply with all applicable laws and regulations pertaining to the eMOLST application including but not limited to in the case of Participant, obtaining any necessary patient authorizations that may be required in order to use the eMOLST application.

**Section 6 – Confidentiality**

**6.1** For purposes of this Agreement, the term “Trade Secrets” shall mean the proprietary,

confidential information and materials of either party. Each party acknowledges that the other’s Trade Secrets are valuable property rights and are entitled to any and all protection afforded trade secrets and confidential information under applicable law. The following provisions shall apply to Trade Secrets.

a. Grant of Usage for Particular Purpose. Each party grants to the other the right to use their Trade Secrets only in connection with the implementation of this Agreement and the eMOLST application. Each party shall take all reasonable steps to ensure that neither it, nor any of its subsidiaries, divisions, employees, affiliates, agents, or representatives, uses a Trade Secret of the other party for any other purpose, either during or after the term of this Agreement or any renewal term.

b. Nondisclosure. Neither party shall disseminate or disclose any Trade Secret of the other party to any person or organization without the express written consent of the owner of the Trade Secret, except: (A) to employees, agents, or representatives with a reasonable need to have access to the Trade Secret; or (B) to a third party, if required by law, order, decree, subpoena, or other judicial process issued by a court, governmental agency, body, or tribunal. In the event that a party is required to disclose the other party’s Trade Secret pursuant to (B) above, the disclosing party shall notify the other party prior to making the disclosure. Each party shall provide the same level of protection for the other party’s Trade Secrets as it would for its own Trade Secrets. This means, at a minimum, that each party shall take all reasonable steps to protect the confidentiality of the other party’s Trade Secrets.

c. Injunction as Remedy for Breach. Each party acknowledges that the other party may be irreparably injured upon the occurrence of a breach of this paragraph 6 of this Agreement. In the event of a breach or threatened breach of paragraph 6. of this Agreement, the owner of the Trade Secret that is the subject of the breach or threatened breach shall be entitled to a temporary injunction or restraining order prohibiting the other party from committing or continuing to commit the breach, without proof of actual damage by the owner of the Trade Secret.

**Section 7 – Right of Title**

**7.1** EHP represents and warrants that it is the sole owner of the eMOLST program and that it

has the full power and authority to grant the rights described herein. If the eMOLST application is held by a court of competent jurisdiction to constitute infringement, and its use is enjoined, EHP shall, at its option, either promptly procure the right for continued use of the eMOLST application by Participant or, if the performance thereof will not be materially adversely affected, promptly replace or modify the eMOLST application such that it becomes noninfringing. The foregoing is Participant’s sole remedy and EHP’s sole liability for breach of this Section 8.

**Section 8 – Limitation of Liability**

**8.1** Except with respect to the confidentiality obligations set forth in Section 7 and the limitations in Section 7, in no event shall a party, its successors, assigns, officers or directors be liable, whether in contract, tort, negligence, or by statute or otherwise, to the other for any direct, indirect, special, incidental consequential, exemplary or punitive loss, damages or expenses (including without limitation lost profits and/or savings).

**Section 9 – Disclaimer of Warranty**

**9.1** Except as expressly provided in this Agreement, EHP shall not be deemed to make or have made any representations or warranties of any kind or nature, either directly or indirectly or express or implied, either in fact or by operation of law, and EHP expressly disclaims all warranties of merchantability, design, non-infringement, operation or fitness for a particular purpose and all warranties arising from conduct, course of dealing or usage in trade.

**Section 10 – Unauthorized Access; Loss of Data; Inaccurate Data**

**10.1** Access to the eMOLST application by Users will be set up, administered and maintained by Participant’s Site Administrator, who will be designated as such in writing to EHP. The Site Administrator will be responsible for ensuring that only appropriate medical doctors are granted access to the eMOLST application to enable the signing of the eMOLST form.

**10.2** Participant shall be solely responsible for ensuring the accuracy of the data it or its Users inputs into the eMOLST application. EHP shall have no obligation to ensure the accuracy, completeness, content or currency of the data in the eMOLST application.

**10.3** EHP shall not be responsible for any unauthorized access to any data in the eMOLST

Application other than any unauthorized access obtained as a result of a deficiency in EHP’s electronic data security protections. EHP shall not be responsible for any data which is lost through or by the use of the eMOLST application.

**Section 11 – Term and Termination**

**11.1** This Agreement shall commence as of the effective date set forth at the beginning, shall

remain in effect for an initial 12 month term until 12:00 midnight on the anniversary of the effective date, and shall automatically renew on each anniversary of the effective date for consecutive additional 12 month renewal terms, unless sooner terminated as provided below.

**11.2** Either party may terminate this Agreement upon 60 days prior written notice to the other.

**Section 12 – Indemnification**

**12.1** Each party shall defend with competent counsel, indemnify, and hold harmless the other and its directors, officers, employees, agents, successors, and assigns from and against any and all liability, loss, expense (including reasonable attorneys’ fees), or claims for injury or damages arising out of the negligence, intentional act or omission, or willful misconduct of the indemnifying party, its directors, officers, employees, agents, or assigns under this Agreement.

**Section 13 -- General Provisions**

**13.1** This Agreement sets forth the entire understanding of the parties with respect to its subject matter and supersedes all prior agreements existing between the parties. All modifications to this Agreement shall be null and void unless made in writing and signed by the parties.

**13.2** This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to principles of conflicts of law. The parties agree and consent to personal jurisdiction, personal service, and venue in any state or federal court within the County of Monroe***,*** New York having subject matter jurisdiction, for the purpose of any proceeding to enforce, or arising out of or relating to this Agreement.

**13.3** Nothing in this Agreement is intended to create, or will be deemed or construed to create, any rights or remedies in any third party including, without limitation, Participant’s patients.

**13.4** EHP will not be liable for its failure to perform any obligation under this Agreement because of contingencies beyond its reasonable control, including but not limited to strikes (other than strikes within such party’s own labor force), riots, war, fire, acts of God, disruption or failure of electronic or mechanical equipment or communication lines, telephone or other interconnections, unauthorized access, theft, or acts in compliance with any law or government regulation.

**13.5** All notices required or permitted under this Agreement shall be in writing and shall be

personally delivered or sent by certified mail, return receipt requested, or overnight courier, and addressed as follows:

To: Excellus Health Plan, Inc.

165 Court Street

Rochester, New York 14647

Attention: General Counsel

To: Participant’s Name:

Participant’s Address:

Participant’s City State & Zip:

Attention:

**13.6** If any provision of this Agreement is held by a court or government agency of competent

jurisdiction to be illegal or unenforceable, the remaining provisions of this Agreement shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular provision held to be invalid, except to the extent to do so would contravene the present valid and legal intent of the parties.

**13.7** Participant may not assign this Agreement without the prior written consent of EHP, and any purported assignment without such consent shall be null, void, and unenforceable. The services or other obligations to be performed by EHP under this Agreement may, at its discretion, be performed directly by a related entity, or under a contract with an organization of EHP’s choosing, but EHP shall remain liable for the services or obligations under this Agreement.

**13.8** EHP and Participant are independent parties. Nothing in this Agreement will be construed to make either party an agent, employee, joint venturer, partner or legal representative of the other party. Neither party shall represent itself to have any authority to bind the other party to any obligation.

**13.9** Waiver of any breach of any provision of this Agreement shall be in writing and shall not be deemed a waiver of any other breach of the same or a different provision.

**13.10** This Agreement shall bind and benefit the parties and their successors and any permitted assigns.

The parties’ assent to the terms of this Agreement is confirmed by the following signatures.

|  |  |
| --- | --- |
| Insert Participant's Name | Excellus Health Plan, Inc. |
| By: | By: |
| Name: | Name: |
| Title: | Title: |
| Date: | Date: |

**Business Associate Agreement**

This Business Associate Agreement (“BAA”), effective       , is between Insert Participant Name, with offices atInsert Participant Address **(“Participant”),** and Excellus Health Plan, Inc., with offices at 165 Court Street, Rochester, New York 14647 **(“Business Associate”)**.

Participant and Business Associate are parties to an eMOLST Participant Agreement pursuant to which Business Associate has agreed to provide certain services on Participant’s behalf (“Agreement”).

Participant and Business Associate execute this BAA to comply with 45 Code of Federal Regulations (“C.F.R.”) Parts 160-164 for the Administrative Simplification provisions of Title II, Subtitle F of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), and the requirements of the Health Information Technology for Economic and Clinical Health Act, as incorporated in the American Recovery and Reinvestment Act of 2009 (the “HITECH Act”), that are applicable to business associates, along with any guidance and/or regulations issued to date by the Department of Health and Human Services (“DHHS”). Participant and Business Associate agree to incorporate into this BAA any regulations issued with respect to the HITEH Act that relate to the obligations of business associates. Business Associate recognizes and agrees that it is obligated by law to meet the applicable provisions of the HITECH Act.

### Privacy of Protected Health Information.

* 1. **Permitted Uses and Disclosures.** Business Associate is permitted to use and disclose Protected Health Information that it creates or receives on Participant’s behalf or receives from Participant (or another business associate of Participant) and to request Protected Health Information on Participant’s behalf (collectively, “Participant’s Protected Health Information”) only as follows:

**i) Functions and Activities on Participant’s Behalf.** To perform functions, activities, services, and operations on behalf of Participant, consistent with the Privacy Rule and the HITECH Act, as specified in Agreement.

1. **Business Associate’s Operations.** For Business Associate’s proper

Management and administration, to provide Data Aggregation services, or to carry out Business Associate’s legal responsibilities, provided that, with respect to disclosure of Participant’s Protected Health Information, either:

* + - 1. The disclosure is Required by Law; or
      2. Business Associate obtains reasonable assurance, evidenced by written contract, from any person or entity to which Business Associate will disclose Participant’s Protected Health Information that the person or entity will:
         1. Hold Participant’s Protected Health Information in confidence and use or further disclose Participant’s Protected Health Information only for the purpose for which Business Associate disclosed Participant’s Protected Health Information to the person or entity or as Required by Law; and
         2. Promptly notify Business Associate (who will in turn notify Participant in accordance with this BAA) of any instance of which the person or entity becomes aware in which the confidentiality of Participant’s Protected Health Information was breached.
  1. **Minimum Necessary and Limited Data Set.** Business Associate’s use, disclosure or request of Protected Health Information shall utilize a Limited Data Set if practicable. Otherwise, Business Associate will, in its performance of the functions, activities, services, and operations specified in Section 1(a) above, make reasonable efforts to use, to disclose, and to request of a Covered Entity only the minimum amount of Participant’s Protected Health Information reasonably necessary to accomplish the intended purpose of the use, disclosure or request, except that Business Associate will not be obligated to comply with this minimum necessary limitation with respect to:
     1. Disclosure to or request by a health care provider for Treatment;
     2. Use for or disclosure to an individual who is the subject of Participant’s Protected Health Information, or that individual’s personal representative;
     3. Use or disclosure made pursuant to an authorization compliant with 45 C.F.R. § 164.508 that is signed by an individual who is the subject of Participant’s Protected Health Information to be used or disclosed, or by that individual’s personal representative;
     4. Disclosure to DHHS in accordance with this BAA;
     5. Use or disclosure that is Required by Law; or
     6. Any other use or disclosure that is excepted from the minimum necessary limitation as specified in 45 C.F.R. § 164.502(b)(2).
  2. **Prohibition on Unauthorized Use or Disclosure.** Business Associate will neither use nor disclose Participant’s Protected Health Information, except as permitted or required by this BAA or in writing by Participant or as Required or permitted by Law. This BAA does not authorize Business Associate to use or disclose Participant’s Protected Health Information in a manner that will violate the 45 C.F.R. Part 164, Subpart E “Privacy of Individually Identifiable Health Information” (“Privacy Rule”) if done by Participant, except as set forth in Section 1(a)(ii) of this BAA.
  3. **Information Safeguards.**
     1. **Privacy of Participant’s Protected Health Information.** Business Associate will develop, implement, maintain, and use appropriate administrative, technical, and physical safeguards to protect the privacy of Participant’s Protected Health Information. The safeguards must reasonably protect Participant’s Protected Health Information from any intentional or unintentional use or disclosure in violation of the Privacy Rule, 45 C.F.R. Part 164, Subpart E and this BAA, and limit incidental uses or disclosures made pursuant to a use or disclosure otherwise permitted by this BAA.
     2. **Security of Participant’s Electronic Protected Health Information**. Business Associate will develop, implement, maintain, and use administrative, technical, and physical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of Electronic Protected Health Information that Business Associate creates, receives, maintains, or transmits on Participant’s behalf as required by the Security Rule, 45 C.F.R. Part 164, Subpart C and as required by the HITECH Act. Business Associate also shall develop and implement policies and procedures and meet the Security Rule documentation requirements as required by the HITECH Act.
  4. **Subcontractors and Agents.** Business Associate will require any of its subcontractors and agents, to which Business Associate is permitted by this BAA or in writing by Participant to disclose Participant’s Protected Health Information, to provide reasonable assurance,evidenced by written contract, that such subcontractor or agent will comply with the same or substantially similar privacy and security safeguard obligations with respect to Participant’s Protected Health Information that are applicable to Business Associate under this BAA.

### Individual Rights.

* 1. **Access.** Business Associate will, within 10 calendardays following Participant’s request, make available to Participant or, at Participant’s direction, to an individual (or the individual’s personal representative) for inspection and obtaining copies of Participant’s Protected Health Information about the individual that is in Business Associate’s custody or control, so that Participant may meet its access obligations under 45 C.F.R. § 164.524 and, where applicable, the HITECH Act. Business Associate shall make such information available in an electronic format where directed by Participant.
  2. **Amendment.** Business Associate will, upon receipt of written notice from Participant, promptly amend or permit Participant access to amend any portion of Participant’s Protected Health Information, so that Participant may meet its amendment obligations under 45 C.F.R. § 164.526.
  3. **Disclosure Accounting.** So that Participant may meet its disclosure accounting obligations under 45 C.F.R. § 164.528:
     1. **Disclosures Subject to Accounting.** Business Associate will record the information specified in Section 2(c)(iii) below (“Disclosure Information”) for each disclosure of Participant’s Protected Health Information, not excepted from disclosure accounting as specified in Section 2(c)(ii) below, that Business Associate makes to Participant or to a third party.
     2. **Disclosures Not Subject to Accounting.** Business Associate will not be obligated to record Disclosure Information or otherwise account for the following disclosures of Participant’s Protected Health Information:
        1. That occurred before April 14, 2003;
        2. For Treatment, Payment or Health Care Operations activities (except where such recording or accounting is required by the HITECH Act, and as of the effective dates for this provision of the HITECH Act);
        3. To an individual who is the subject of Participant’s Protected Health Information disclosed, or to that individual’s personal representative;
        4. Pursuant to an authorization compliant with 45 C.F.R. § 164.508 that is signed by an individual who is the subject of Participant’s Protected Health Information disclosed, or by that individual’s personal representative;
        5. For notification of and to persons involved in the care or payment related to the health care of an individual who is the subject of Participant’s Protected Health Information disclosed and for disaster relief;
        6. To law enforcement officials or correctional institutions in accordance with 45 C.F.R. § 164.512(k)(5);
        7. For national security or intelligence purposes in accordance with 45 C.F.R. § 164.512(k)(2);
        8. In a Limited Data Set;
        9. Incident to a use or disclosure that Business Associate is otherwise permitted to make by this BAA; and
        10. Otherwise excepted from disclosure accounting as specified in 45 C.F.R. § 164.528.
     3. **Disclosure Information.** With respect to any disclosure by Business Associate of Participant’s Protected Health Information that is not excepted from disclosure accounting by Section 2(c)(ii) above, Business Associate will record the following Disclosure Information as applicable to the type of accountable disclosure made:
        1. **Disclosure Information Generally.** Except for repetitive disclosures of Participant’s Protected Health Information as specified in Section 2(c)(iii)(B) below and for disclosures for large Research studies as specified in Section 2(c)(iii)(C) below, the Disclosure Information that Business Associate must record for each accountable disclosure is (i) the disclosure date, (ii) the name and (if known) address of the entity to which Business Associate made the disclosure, (iii) a brief description of Participant’s Protected Health Information disclosed, and (iv) a brief statement of the purpose of the disclosure. Business Associate further shall provide any additional information to the extent required by the HITECH Act and any accompanying regulations.
        2. **Disclosure Information for Repetitive Disclosures.** For repetitive disclosures of Participant’s Protected Health Information that Business Associate makes for a single purpose to the same person or entity (including Participant), the Disclosure Information that Business Associate must record is either the Disclosure Information specified in Section 2(c)(iii)(A) above for each accountable disclosure, or (i) the Disclosure Information specified in Section 2(c)(iii)(A) above for the first of the repetitive accountable disclosures, (ii) the frequency, periodicity, or number of the repetitive accountable disclosures, and (iii) the date of the last of the repetitive accountable disclosures.
        3. **Disclosure Information for Large Research Activities.** For disclosures of Participant’s Protected Health Information that Business Associate makes for particular Research involving 50 or more individuals and for which an Institutional Review Board or Privacy Board has waived authorization during the period covered by an individual’s disclosure accounting request, the Disclosure Information that Business Associate must record is (i) the name of the Research protocol or activity, (ii) a plain language description of the Research protocol or activity, including its purpose and criteria for selecting particular records, (iii) a brief description of the type of Participant’s Protected Health Information disclosed for the Research, (iv) the dates or periods during which Business Associate made or may have made these disclosures, including the date of the last disclosure that Business Associate made during the period covered by an individual’s disclosure accounting request, (v) the name, address, and telephone number of the Research sponsor and of the researcher to whom Business Associate made these disclosures, and (vi) a statement that Participant’s Protected Health Information relating to an individual requesting the disclosure accounting may or may not have been disclosed for a particular Research protocol or activity.
     4. **Availability of Disclosure Information.** Unless otherwise provided under the HITECH Act, Business Associate will maintain the Disclosure Information for at least 6 years following the date of the accountable disclosure to which the Disclosure Information relates.

Business Associate will make the Disclosure Information available to Participant within 10 days following Participant’s request for such Disclosure Information to comply with an individual’s request for disclosure accounting.

In addition, where Business Associate is contacted directly by an individual based on information provided to the individual by Participant and where so required by the HITECH Act and/or any accompanying regulations, Business Associate shall make such Disclosure Information available directly to the individual.

* 1. **Restriction Agreements and Confidential Communications.** Business Associate will comply with any agreement that Participant makes that either (i) restricts use or disclosure of Participant’s Protected Health Information pursuant to 45 C.F.R. § 164.522(a), or (ii) requires confidential communication about Participant’s Protected Health Information pursuant to 45 C.F.R. § 164.522(b), provided that Participant notifies Business Associate in writing of the restriction or confidential communication obligations that Business Associate must follow. Participant will promptly notify Business Associate in writing of the termination or alteration of any such restriction agreement or confidential communication requirement.

### Privacy Obligation Breach and Security Incidents.

* 1. **Reporting.**
     1. **Privacy Breach.** Business Associate will report to Participant any use or disclosure of Participant’s Protected Health Information not permitted by this BAA or in writing by Participant. In addition, Business Associate will report, following discovery and without unreasonable delay, but in no event later than 5 days following discovery, any "Breach" of "Unsecured Protected Health Information" as these terms are defined by the HITECH Act and any implementing regulations. This obligation to report shall include any unauthorized acquisition, access, use, or disclosure, even where Business Associate has determined that such unauthorized acquisition, access, use, or disclosure does not compromise the security or privacy of such information, unless such acquisition, access, use or disclosure is excluded from the definition of breach in 45 C.F.R. 164. 402(2). Business Associate shall cooperate with Participant in investigating the Breach and in meeting the Participant’s obligations under the HITECH Act and any other security breach notification laws.
     2. Any such report shall include the identification (if known) of each individual whose Unsecured Protected Health Information has been, or is reasonably believed by Business Associate to have been accessed, acquired, or disclosed during such Breach. Business Associate will make the report to Participant’s Privacy Officernot more than 5 business days after Business Associate learns of such non-permitted use or disclosure. Business Associate’s report will at least:
        1. Identify the nature of the non-permitted access, use or disclosure, including the date of the Breach and the date of discovery of the Breach;
        2. Identify Participant’s Protected Health Information accessed, used or disclosed as part of the Breach (e.g., full name, social security number, date of birth, etc.);
        3. Identify who made the non-permitted access, use or disclosure and who received the non-permitted disclosure;
        4. Identify what corrective action Business Associate took or will take to prevent further non-permitted access, uses or disclosures;
        5. Identify what Business Associate did or will do to mitigate any deleterious effect of the non-permitted access, use or disclosure; and
        6. Provide such other information, including a written report, as Participant may reasonably request.
     3. **Security Incidents.** Business Associate will report to Participant any attempted or successful (A) unauthorized access, use, disclosure, modification, or destruction of Participant’s Electronic Protected Health Information or (B) interference with Business Associate’s system operations in Business Associate’s information systems, of which Business Associate becomes aware. If any such security incident resulted in a disclosure of Participant’s Protected Health Information not permitted by this BAA, Business Associate will make the report in accordance with Section 3(a)(i) above.
  2. **Termination of Agreement.**
     1. **Right to Terminate for Breach.** Participant may terminate Agreement if it determines, in its sole discretion, that Business Associate has breached any provision of this BAA and upon written notice to Business Associate of the breach, Business Associate fails to cure the breach within 60 days. Participant may exercise this right to terminate Agreement by providing Business Associate written notice of termination, stating the failure to cure the breach of the BAA that provides the basis for the termination. Any such termination will be effective immediately or at such other date specified in Participant’s notice of termination. If for any reason Participant determines that Business Associate has breached the terms of this BAA and such breach has not been cured within 60 days of receiving notice of the breach from Participant, but Participant determines that termination of the Agreement is not feasible, Participant may report such breach to the U.S. Department of Health and Human Services.
     2. Business Associate may terminate Agreement if it determines that Participant has breached any material provision of this BAA (or if Business Associate discovers that any of Participant’s representations in Section 4 are untrue) and upon written notice to Participant of the breach or misrepresentation, Participant fails to cure the breach or misrepresentation within 60 days after receipt of the notice or such additional period of time as the parties mutually agree. Business Associate may exercise this right to terminate Agreement by providing Participant written notice of termination, stating the failure to cure the breach or misrepresentation of the BAA that provides the basis for the termination. Any such termination will be effective upon such reasonable date as the parties mutually agree. If Business Associate reasonably determines that Participant has breached the terms of this BAA and such breach or misrepresentation has not been cured, but Business Associate determines that termination of the Agreement is not feasible, Business Associate may report such breach or misrepresentation to the U.S. Department of Health and Human Services.
     3. **Obligations on Termination.**
        1. **Return or Destruction of Participant’s Protected Health Information as Feasible.** Upon termination or other conclusion of Agreement, Business Associate will, if feasible, return to Participant or destroy all of Participant’s Protected Health Information in whatever form or medium, including all copies thereof and all data, compilations, and other works derived therefrom that allow identification of any individual who is a subject of Participant’s Protected Health Information. Business Associate will require any subcontractor or agent, to which Business Associate has disclosed Participant’s Protected Health Information as permitted by Section 1(e) of this BAA, to, if feasible, return to Business Associate (so that Business Associate may return it to Participant) or destroy all of Participant’s Protected Health Information in whatever form or medium received from Business Associate, including all copies thereof and all data, compilations, and other works derived therefrom that allow identification of any individual who is a subject of Participant’s Protected Health Information, and certify on oath to Business Associate that all such information has been returned or destroyed. Business Associate will complete these obligations as promptly as possible, but not later than 60 days following the effective date of the termination or other conclusion of Agreement.
        2. **Procedure When Return or Destruction Is Not Feasible.** Upon request of Participant, Business Associate will identify any of Participant’s Protected Health Information, including any that Business Associate has disclosed to subcontractors or agents as permitted by Section 1(e) of this BAA, that cannot feasibly be returned to Participant or destroyed and explain why return or destruction is infeasible. Business Associate will limit its further use or disclosure of such information to those purposes that make return or destruction of such information infeasible.
        3. **Continuing Privacy and Security Obligation.** Business Associate’s obligation to protect the privacy and safeguard the security of Participant’s Protected Health Information as specified in this BAA will be continuous and survive termination or other conclusion of Agreement and this BAA.
        4. **Other Obligations and Rights.** Business Associate’s other obligations and rights and Participant’s obligations and rights upon termination or other conclusion of Agreement will be those specified in Agreement.

**c) Indemnity by Business Associate.** Business Associate will indemnify and hold harmless Participant and any Participant affiliate, officer, director, employee or agent from and against any claim, cause of action, liability, damage, cost or expense, including attorneys’ fees and court or proceeding costs as well as notification and credit monitoring costs, arising out of or in connection with any non-permitted use or disclosure of Participant’s Protected Health Information or other breach of this BAA by Business Associate or any subcontractor or agent under Business Associate’s control.

* 1. **Indemnity by Participant.** Participant will indemnify and hold harmless Business Associate and any Business Associate affiliate, officer, director, employee or agent from and against any claim, cause of action, liability, damage, cost or expense, including attorneys’ fees and court or proceeding costs as well as notification and credit monitoring costs, arising out of or in connection with any breach of, or misrepresentations contained in, this BAA by Participant.

### 4. General Provisions.

**a) Inspection of Internal Practices, Books, and Records.** Business Associate will make its internal practices, books, and records relating to its use and disclosure of Participant’s Protected Health Information available to Participant and to DHHS to determine Participant’s compliance with the Privacy Rule, 45 C.F.R. Part 164, Subpart E, and the Security Rule.

**b) Definitions.** The terms “Covered Entity,” “Electronic Protected Health Information,” “Protected Health Information,” “Standard,” “Trading Partner Agreement,” and “Transaction” have the meanings set out in 45 C.F.R. § 160.103. The term “Standard Transaction” has the meaning set out in 45 C.F.R. § 162.103. The term “Required by Law” has the meaning set out in 45 C.F.R. § 164.103. The terms “Health Care Operations,” “Payment,” “Research,” and “Treatment” have the meanings set out in 45 C.F.R. § 164.501. The term “Limited Data Set” has the meaning set out in 45 C.F.R. § 164.514(e). The term “use” means, with respect to Protected Health Information, utilization, employment, examination, analysis or application within Business Associate. The terms “disclose” and “disclosure” mean, with respect to Protected Health Information, release, transfer, providing access to or divulging to a person or entity not within Business Associate. For purposes of this BAA, Participant’s Protected Health Information encompasses Participant’s Electronic Protected Health Information. Any other capitalized terms not identified here shall have the meaning as set forth in 45 Code of Federal Regulations (“C.F.R.”) Parts 160-64 for the Administrative Simplification provisions of Title II, Subtitle F of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), or in the Health Information Technology for Economic and Clinical Health Act, as incorporated in the American Recovery and Reinvestment Act of 2009 (the “HITECH Act”)

**c) Amendment to Agreement.** Upon the compliance date of any final regulation or amendment to final regulation promulgated by DHHS that affects Business Associate’s use or disclosure of Participant’s Protected Health Information or Standard Transactions, the Agreement and this BAA will automatically amend such that the obligations imposed on Business Associate remain in compliance with the final regulation or amendment to final regulation.

Any other amendment or waiver of this Business Associate Agreement shall require a separate writing executed by the parties that expressly modifies or waives a specific provision(s) of this Business Associate Agreement.

**5.** **Conflicts**. The terms and conditions of this BAA will override and control any conflicting term or condition of Agreement. All non-conflicting terms and conditions of Agreement remain in full force and effect.

**6. No Third Party Beneficiaries.** Participant and Business Associate agree that there are no intended third party beneficiaries under, or other parties to, this Business Associate Agreement.

**7. Governing Law; Jurisdiction; Venue.** This Business Associate Agreement will be governed by and construed in accordance with the laws of the State of New York. Any action brought under this Business Associate Agreement will be brought in a court of competent jurisdiction venued in the County of Monroe, State of New York.

**WITNESS WHEREOF,** Participant and Business Associate execute this BAA in multiple originals as of the effective date noted above.

|  |  |
| --- | --- |
| Insert Participant's Name | Excellus Health Plan, Inc. |
| By: | By: |
| Name: | Name: |
| Title: | Title: |
| Date: | Date: |