



## Attachment 1 to Exhibit A United States HIPAA Requirements

This **DOWNSTREAM BUSINESS ASSOCIATE EXHIBIT** (this "Exhibit") is made by and between TIBCO and Contractor and is effective as of INSERT DATE (the "Effective Date"). Capitalized terms used in this Agreement without definition shall have the respective meanings assigned to such terms by the Administrative Simplification section of the Health Insurance Portability and Accountability Act of 1996, the Health Information Technology for Economic and Clinical Health Act and their implementing regulations as amended from time to time (collectively, "HIPAA").

### RECITALS

**WHEREAS**, Company is a Business Associate of one or more HIPAA Covered Entities that contract with Company

(each, a "Covered Entity");

**WHEREAS**, Company by way of Contract has engaged the Contractor to provide certain services (the "Services") related to Company's management, administration, and fulfillment of its legal obligations involving Protected Health Information of one or more Covered Entities;

**WHEREAS**, Contractor is a Subcontractor of Company and is a Business Associate when Contractor receives, accesses, transmits, uses or discloses Protected Health Information on behalf of Company;

**WHEREAS**, Company is obligated to protect and secure any Protected Health Information it receives, transmits, uses or discloses on behalf of the Covered Entities in accordance with HIPAA;

**WHEREAS**, Contractor is obligated to protect and secure any Protected Health Information it receives, accesses, transmits, uses or discloses in providing the Services and

**WHEREAS**, Company and Contractor agree that this Exhibit shall govern Contractor's receipt, use, disclosure and security of Protected Health Information received or created by Contractor in providing the Services.

**NOW THEREFORE**, in consideration of the mutual premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Contractor and Company agree as follows:

### I. GENERAL PROVISIONS

#### AGREEMENT

**Section 1.1. Effect**. The provisions of this Exhibit shall control with respect to Protected Health Information that Contractor receives from or on behalf of Company or the Covered Entities, and the terms and provisions of this Exhibit shall supersede any conflicting or inconsistent terms and provisions of the parties' Contract, including all other exhibits or other attachments thereto and all other documents incorporated therein by reference, to the extent of such conflict or inconsistency.

**Section 1.2. No Third Party Beneficiaries**. The parties have not created and do not intend to create by this Exhibit any third party rights, including, but not limited to, third party rights for Covered Entities' patients.

**Section 1.3. HIPAA Amendments**. The parties acknowledge and agree that the Health Information Technology for Economic and Clinical Health Act and its implementing regulations impose requirements with respect to privacy, security and breach notification applicable to Business Associates (collectively, the "HITECH BA Provisions"). The HITECH BA Provisions and any other future amendments to HIPAA affecting Business Associate agreements are hereby incorporated by reference into this Exhibit as if set forth in this Exhibit in their entirety, effective on the later of the effective date of this Exhibit or such subsequent date as may be specified by HIPAA.

**Section 1.4. Regulatory References**. A reference in this Exhibit to a section in HIPAA means the section as it may be amended from time-to-time.

## II. OBLIGATIONS OF CONTRACTOR

**Section 2.1. Use and Disclosure of Protected Health Information.** Contractor may use and disclose Protected Health Information as permitted or required under the Contract, this Exhibit, or as Required by Law, but shall not otherwise use or disclose any Protected Health Information. Contractor shall not, and shall assure that its employees, other agents and contractors do not use or disclose Protected Health Information received from Company or the Covered Entities in any manner that would constitute a violation of HIPAA if so used or disclosed by Company or the Covered Entities (except as set forth in Sections 2.1(a) or (b) of this Exhibit). To the extent Contractor carries out any of Company's or the Covered Entities' obligations under HIPAA, Contractor shall comply with the requirements of HIPAA that apply to Company or the Covered Entities (as applicable) in the performance of such obligations. Without limiting the generality of the foregoing, Contractor is permitted to use or disclose Protected Health Information as set forth below:

(a) If permitted or required by Contract with Company or Required by Law, Contractor may use Protected Health Information internally for Contractor's proper management and administrative services or to carry out its legal responsibilities.

(b) If the Contract with Company requires or permits Contractor to disclose Protected Health Information to a third party, then Contractor may disclose Protected Health Information to such third party for the Contractor's proper management and administration, provided that (1) the disclosure is Required by Law, (2) Contractor makes the disclosure pursuant to an agreement consistent with Section 2.5 of this Exhibit or (3) Contractor makes the disclosure pursuant to a written confidentiality agreement under which the third party is required to (i) protect the confidentiality of the Protected Health Information, (ii) only use or further disclose the Protected Health Information as Required by Law or for the purpose for which it was disclosed to the third party and (iii) notify Company of any acquisition, access, use, or disclosure of Protected Health Information in a manner not permitted by the confidentiality agreement.

**Section 2.2. Safeguards.** Contractor shall use appropriate safeguards to prevent the use or disclosure of Protected Health Information other than as permitted or required by this Exhibit. In addition, the Contractor shall implement Administrative Safeguards, Physical Safeguards and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of Electronic Protected Health Information that Contractor creates, receives, maintains or transmits on behalf of Company or the Covered Entities. Contractor shall comply with the HIPAA Security Rule with respect to Electronic Protected Health Information.

**Section 2.3. Minimum Necessary Standard.** To the extent required by the "minimum necessary" requirements of HIPAA, Contractor shall only request, use and disclose the minimum amount of Protected Health Information necessary to accomplish the purpose of the request, use or disclosure. Contractor shall comply with the minimum necessary guidance to be issued by the Secretary pursuant to HIPAA and, to the extent practicable, shall not request, use or disclose any Direct Identifiers (as defined in the limited data set standard of HIPAA).

**Section 2.4. Mitigation.** Contractor shall take reasonable steps to mitigate, to the extent practicable, any harmful effect (that is known to Contractor) of a use or disclosure of Protected Health Information by Contractor in violation of this Exhibit or HIPAA.

**Section 2.5. Subcontractors.** Contractor may not subcontract any services that require it to disclose Protected Health Information that it has received from or created on behalf of Company or the Covered Entities unless authorized in the Contract with Company or this Exhibit. In the event Contractor is authorized to disclose such Protected Health Information, prior to any such permitted disclosure Contractor shall enter into a written agreement meeting the requirements of 45 C.F.R. §§ 164.504(e) and 164.314(a)(2) with each Subcontractor (including, without limitation, a Subcontractor that is an agent under applicable law) that will create, receive, maintain or transmit Protected Health Information. Contractor shall ensure that the written agreement with each Subcontractor obligates the Subcontractor to comply with restrictions and conditions that are at least as restrictive as the restrictions and conditions that apply to Contractor under this Exhibit.

**Section 2.6. Reporting Requirements.**

(a) Contractor shall, without unreasonable delay, but in no event later than five (5) business days after becoming aware of any acquisition, access, use, or disclosure of Protected Health Information in violation of this Exhibit by Contractor, its employees, other agents or contractors or by a third party to which Contractor disclosed Protected Health Information (each, an "Unauthorized Use or Disclosure"), report such Unauthorized Use or Disclosure to Company.

(b) Contractor shall, without unreasonable delay, but in no event later than five (5) business days after becoming aware of any Security Incident, report it to Company.

(c) Contractor shall, without unreasonable delay, but in no event later than five (5) business days after discovery of a Breach of Protected Health Information (whether secure or unsecured), report such Breach to Company in accordance with 45 C.F.R. § 164.410.

**Section 2.7. Access to Information.** Within five (5) business days of a request by Company for access to Protected Health Information about an Individual contained in any Designated Record Set maintained by Contractor, Contractor shall make available to Company such Protected Health Information for so long as Contractor maintains such information in the Designated Record Set. If Contractor receives a request for access to Protected Health Information directly from an Individual,

Contractor shall forward such request to Company within five (5) business days.

**Section 2.8. Availability of Protected Health Information for Amendment.** Within five (5) business days of receipt of a request from Company for the amendment of an Individual's Protected Health Information contained in any Designated Record Set maintained by Contractor, Contractor shall provide such information to Company for amendment and incorporate any such amendments in the Protected Health Information (for so long as Contractor maintains such information in the Designated Record Set) as required by 45 C.F.R. §164.526. If Contractor receives a request for amendment to Protected Health Information directly from an Individual, Contractor shall forward such request to Company within five (5) business days.

**Section 2.9. Accounting of Disclosures.** Within five (5) business days of notice by Company to Contractor that it has received a request for an accounting of disclosures of Protected Health Information (other than disclosures to which an exception to the accounting requirement applies), Contractor shall make available to Company such information as is in Contractor's possession and is required for Company and Covered Entities to make the accounting required by 45 C.F.R. §164.528.

**Section 2.10. Availability of Books and Records.** Contractor shall make its internal practices, books and records relating to the use and disclosure of Protected Health Information received from, or created or received by Contractor on behalf of, Company or the Covered Entities available to Company and/or the Secretary for purposes of determining Company's compliance with HIPAA.

**Section 2.11. Restrictions; Limitations in Notice of Privacy Practices.** Contractor shall comply with any reasonable limitation in a Covered Entity's notice of privacy practices to the extent that such limitation may affect Contractor's use or disclosure of Protected Health Information and Contractor is made aware of such limitation. Contractor shall comply with any reasonable restriction on the use or disclosure of Protected Health Information that Company or any Covered Entity has agreed to or is required to abide by under 45 CFR § 164.522, to the extent that such restriction may affect Contractor's use or disclosure of Protected Health Information.

**Section 2.12. Indemnification.** Contractor shall reimburse, indemnify and hold harmless Company for all costs, expenses (including reasonable attorneys' fees), damages and other losses resulting from any breach of this BA Exhibit, Unauthorized Use or Disclosure, Security Incident or Breach of Protected Health Information maintained by Contractor or Contractor's agent or subcontractor, including, without limitation: fines or settlement amounts owed to a state or federal government agency; the cost of any notifications to Individuals or government agencies; credit monitoring for affected Individuals; or other mitigation steps taken by Company to comply with HIPAA or state law. This Section 2.12 shall survive the expiration or earlier termination of this Exhibit.

### III. Obligations of Company

**Section 3.1.** Company shall notify Business Associate of any limitation(s) in a notice of privacy practices of a Covered Entity in accordance with 45 C.F.R. § 164.520, to the extent that such limitation may affect Business Associate's use or disclosure of Protected Health Information.

**Section 3.2.** Company shall notify Business Associate of any changes in, or revocation of, permission by Individual to use or disclose Protected Health Information, to the extent that such changes may affect Business Associate's use or disclosure of Protected Health Information.

**Section 3.3.** Company shall notify Business Associate of any reasonable restriction to the use or disclosure of Protected Health Information that a Covered Entity has agreed to in accordance with 45 C.F.R. § 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of Protected Health Information.

**Section 3.4.** To the extent such limitation is possible, Company shall only disclose the minimum amount of Protected Health Information necessary for Business Associate to perform the Services under the Contract and in accordance with the HIPAA minimum necessary standards.

### IV. Permissible Requests by Company

Company shall not request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under the Privacy Rule if done by Company or a Covered Entity, except as permitted by Sections 2.1 above.

### V. Definitions

Terms used, but not otherwise defined in this Exhibit or the Contract shall have the same meaning as those terms in HIPAA. *ARRA*. "ARRA" shall mean the American Recovery and Reinvestment Act of 2009.

**Business Associate** may mean Contractor, but only to the extent Contractor is acting as a Business Associate (as defined under HIPAA) while performing Services under the Contract. Contractor does not, simply by signing this Exhibit, become a Business Associate.

**Contract** shall mean the contract between TIBCO and Contractor for the performance of services, which may include services that require accessing ePHI in TIBCO's possession.

**ePHI.** shall have the same meaning as the term "electronic protected health information," in 45 C.F.R. § 160.103, limited to the information created, received or

maintained by Business Associate from or on behalf of Company or a Covered Entity.

**HITECH** shall mean the Health Information Technology for Economic and Clinical Health Act, which is at Section 13400, et. seq. of ARRA, 42 U.S.C. § 17921, et. seq., and guidance promulgated thereunder.

**Individual** shall have the same meaning as the term "individual" in 45 C.F.R. § 164.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. § 164.502(g).

**Limited Data Set** excludes names, street addresses, social security numbers and other identifiers but is not fully "de-identified" in accordance with HIPAA standards.

**Privacy Rule** shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. part 160 and part 164, subparts A and E.

**Protected Health Information** shall have the same meaning as the term "protected health information" in 45 C.F.R. § 164.103, limited to the information created or received by Business Associate from or on behalf of Company or a Covered Entity.

**Required By Law** shall have the same meaning as the term "required by law" in 45 C.F.R. § 164.103. **Secretary** shall mean the Secretary of the Department of Health and Human Services or his designee. **Security Incident** shall have the same meaning as the term "security incident" in 45 C.F.R. § 164.304.

**Security Rule** shall mean the Standards for Security of ePHI at 45 C.F.R. Parts 160 and 164, subparts A and C.

**Workforce** shall have the same meaning as the term "workforce" in 45 C.F.R. § 160.103.

## VI. TERMINATION

**Section 6.1. Termination Upon Breach.** Any other provision of the parties' Contract notwithstanding, Company may terminate the Contract and this Exhibit upon thirty (30) days advance written notice to Contractor in the event that Contractor breaches this Exhibit in any material respect and such breach is not cured to the reasonable satisfaction of Company within such thirty (30) day period; provided, however, that in the event that termination of this Exhibit is not feasible, in Company's sole discretion, Company may report the breach to the Secretary. If the Contract expires or otherwise terminates for any reason, this Exhibit will terminate after Contractor confirms in writing that it has returned or destroyed any Protected Health Information that Contractor received, transmitted, used or disclosed on behalf of Company or any of the Covered Entities.

**Section 6.2. Return of Protected Health Information upon Termination.** Upon expiration or earlier termination of this Exhibit or the Contract, Contractor shall return to Company all Protected Health Information received from or on behalf of Company or the Covered Entities or created by Contractor on behalf of Company or the Covered Entities that Contractor still maintains in any form. Notwithstanding the foregoing, to the extent that Contractor and Company mutually agree (acting reasonably) that it is not feasible for Contractor to return such Protected Health Information, the terms and provisions of this Exhibit shall survive termination and such Protected Health Information shall be used or disclosed solely for such purpose or purposes which prevented the return of such Protected Health Information.

## VII. MISCELLANEOUS

**Section 7.1. Amendments; Waiver.** Other than as contemplated by Section 1.3, this Exhibit may not be modified, nor shall any provision hereof be waived or amended, except in a writing duly signed by authorized representatives of each of the parties. A waiver with respect to one event shall not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events.

**Section 7.2. Enforcement Costs.** If any legal action or other proceeding is brought for the enforcement or interpretation of this Exhibit, or because of an alleged dispute, breach, default or misrepresentation in connection with any provision of this Exhibit, the substantially prevailing party shall be entitled to recover reasonable attorneys' fees, court costs and all expenses incurred in that action or proceeding and at all levels of trial and appeal, in addition to any other relief to which such party may be entitled. This Section 7.2 shall survive the expiration or earlier termination of this Exhibit.

**Section 7.3. Counterparts.** This Exhibit may be executed in two counterparts, each of which shall be deemed an original but both of which together shall constitute one and the same instrument. Copies of signatures sent by facsimile transmission or scanned and sent by email are deemed to be originals for purposes of execution and proof of this Exhibit.

(Applies to United States Contractors or Services being performed in the United States)

**1. DISCLOSURE OF INFORMATION** -- If Contractor, its agents, officers, or employees might reasonably be expected to have access to information within the purview of Section 1106 of the Social Security Act, as amended, and regulations prescribed pursuant thereto, Contractor agrees to establish and maintain procedures and controls so that no information contained in its records or obtained under this Agreement or from others in carrying out the terms of this Agreement shall be used by or disclosed by Contractor, its agents, officers, or employees, except as provided in Section 1106 of the Social Security Act, as amended, and Regulations prescribed thereunder.

**2. PROHIBITION AGAINST USE OF DEPARTMENT OF HEALTH AND HUMAN SERVICES FUNDS TO INFLUENCE LEGISLATION OR APPROPRIATIONS** -- No part of any funds paid under this Agreement shall be used to pay the salary or expenses of Contractor to engage in any activity designed to influence legislation or appropriations pending before Congress.

**3. FEES OR KICKBACKS BY SUBCONTRACTORS** -- (a) Public Law 86-695, September 2, 1960 (41 U.S.C.

51-54), among other things, prohibits the payment, directly or indirectly, by or on behalf of a subcontractor in any tier under any Government negotiated contract of any fees, gift, or gratuity to the prime contractor or any higher tier subcontractor or any officer, agent, partner or employee thereof, as an inducement or acknowledgment for the award or a subcontract or order. (b) The provisions of Public Law 86-695, are set in more detail in Section 1-1.320 of the Federal Procurement Regulations (41 CFR 1-1.32) and are applicable to this Agreement and any subcontracts entered into under this Agreement.

**4. PRIVACY ACT** -- The Privacy Act of 1974, Public Law 93-579, and the Regulations and General Instructions issued by the Secretary pursuant thereto, are applicable to this Agreement, and to all subcontracts thereunder to the extent that the design, development, operation or maintenance of a system of records as defined in the Privacy Act is involved.

**5. AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS** -- The following provisions are applicable to the subcontract if the cost to Medicare exceeds \$2,500: (a) Contractor will not discriminate against any employee or applicant for employment because of a physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified and Contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices, such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or to other forms of compensation, and selection for training, including apprenticeships. (b) Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to Section 503 or the Rehabilitation Act of 1973. (c) In the event of Contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with rules, regulations and relevant orders of the Secretary of Labor issued pursuant to Section 503 of the Rehabilitation Act of 1973. (d) Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor, provided by or through the Secretary. Such notices shall state Contractor's obligation under the law to take affirmative actions for employment, and the rights of the applicants and employees. (e) Contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding that Contractor is bound by the terms of Section 503 of the Rehabilitation act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals. (f) Contractor will include the provisions of this clause in every subcontract or purchase order if the cost to Medicare is \$2,500 or more, unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 503 of the Rehabilitation act of 1973, so that such provisions will be binding upon each subcontractor or vendor of Contractor, and Contractor will take action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Program may lawfully direct to enforce such provisions, including action for noncompliance, as specified in 41 Federal Register No. 75, Section 60-741.28 at page 16153.

**6. UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS** -- (a) It is the policy of the United States that small businesses concerns and small business concerns owned and controlled by socially and disadvantaged individuals shall have the maximum practicable opportunity to participate in performance of contracts let by any Federal Agency. (b) Contractor agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this Agreement, and Contractor further agrees to cooperate in any studies or surveys that may be conducted by the Small Business Administration or the Secretary which may be necessary to determine the extent of Contractor's compliance with this clause. (c) (1) The term "small business concern" shall mean a small business as defined pursuant to Section 3 of the Small Business Act and in relevant regulations promulgated pursuant thereto; (2) the term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern (i) which is at least fifty-one percent (51%) owned by one or more socially and economically disadvantaged individuals, or, in the case of a publicly-owned business, at least fifty-one percent (51%) of the stock thereof is owned by one or more socially and economically disadvantaged individuals, and (ii) whose management and daily business operations are controlled by one or more of such individuals (Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, and other minorities, or any other individual found to be disadvantaged by the Small Business Administration pursuant to Section (a) of the Small Business Act). (d) Contractor, acting in good faith, may rely on written representations by its subcontractors that they are either small business concerns or small business concerns owned and controlled by socially and economically disadvantaged individuals.

