



# HEALTHeNET™

**TERMS AND CONDITIONS  
FOR  
DATA RECIPIENT  
SERVICES AND DATA USE AGREEMENT**

**Dated:** \_\_\_\_\_

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## **TERMS AND CONDITIONS FOR DATA RECIPIENT SERVICES AND DATA USE AGREEMENT**

### **1. DEFINITIONS**

**1.1 “Administrative Data Network” or “Network”** means HEALTHeNET’s systems, devices, mechanisms and infrastructure to facilitate the electronic movement of Patient Data.

**1.2 “Authorized User”** means an individual who has been authorized by a Data Recipient to access data via the Network in accordance with these Terms and Conditions and the Policies and Procedures.

**1.3 “Data Recipient”** means an entity that has signed a Data Use Agreement.

**1.4 “Data Recipient Data”** means, other than Resultant Data, information, data and other content, in any form or medium, that is collected, downloaded or otherwise received, directly or indirectly from Data Recipient or an Authorized User by or through the Network. For the avoidance of doubt, Data Recipient Data does not include information from Data Recipient reflecting the access or use of the Services by or on behalf of Data Recipient or any Authorized User, including but not limited to Resultant Data.

**1.5 “Data Recipient Services and Data Use Agreement” or “Data Use Agreement”** means the agreement made by and between HEALTHeNET and each Data Recipient, which sets forth the terms and conditions governing the operation of the Network and the rights and responsibilities of the Data Recipients and HEALTHeNET with respect to the Network, which incorporates these Terms and Conditions and the Policies and Procedures.

**1.6 “Data Source”** means a (i) Data Supplier, and (ii) any other sources from which data originates, and which is part of the Network.

**1.7 “Data Supplier”** means a payer organization that provides Patient Data to the Network and has signed a Network Agreement.

**1.8 “Data Supplier Services and Network Agreement” or “Network Agreement”** means the agreement made by and between HEALTHeNET and each of its Data Suppliers, which sets forth the terms and conditions governing the operation of the Network and the rights and responsibilities of the Data Suppliers and HEALTHeNET with respect to the Network, which incorporates the Policies and Procedures.

**1.9 “HIPAA”** means the Health Insurance Portability and Accountability Act of 1996, as amended from time to time, and its implementing regulations set forth at 45 CFR Parts 160 and 164.

**1.10 “Patient Data”** means health information that is created or received by a health care provider, payer, employer, or other Covered Entity and relates to the past, present, or future physical or mental health condition of an individual, or the provision of health care to an individual and that identifies the individual, or the past, present, or future payment for the provision of health care to an individual, or with respect to which there is a reasonable basis to believe the information can be used to identify the individual, including such information that is made available for exchange by a Data Supplier or Data Source.

**1.11 “Policies and Procedures”** means HEALTHeNET’s policies and procedures applicable to the operation of the Network, as may exist and be in effect, and as amended, repealed, and/or replaced from time to time pursuant to Section 2.3 (Procedures for Amendments). The Policies and Procedures in effect as of the date hereof are incorporated herein by reference and are available on HEALTHeNET’s website.

**1.12 “Registration”** means the registration, in a form to be determined by HEALTHeNET from time to time, submitted by a person or entity that wishes to enroll as a Data Recipient in the Network before entering into a Data Use Agreement.

**1.13 “Resultant Data”** means information, data and other content that is derived by or through the Services from processing Data Recipient Data and is sufficiently different from such Data Recipient Data that such Data Recipient Data cannot be reverse engineered or otherwise identified from the inspection, analysis or further processing of such information, data or content.

**1.14 “Services”** refers to the services for which the Data Recipient registers and means the services that HEALTHeNET provides on behalf of Data Suppliers, as available from time to time, to enable Data Recipients access to Patient Data via the Network, including:

- (a) Acting as an intermediary between Data Suppliers and Data Recipients seeking to verify enrollee eligibility, claims status, and online referrals;
- (b) Managing access to and use of the Network; and
- (c) Other services furnished by or available through HEALTHeNET from time to time.

**1.15 “Terms and Conditions”** means these Terms and Conditions for the Data Use Agreement, as amended, repealed, and/or replaced from time to time, pursuant to Section 2.3 (Procedures for Amendments).

**1.16 “Unauthorized Use”** means (i) any attempt at or any action that results in circumventing the access controls or access policies of the Network; (ii) use in violation of intellectual property, privacy, publicity, proprietary information rights and policies of others; and/or (iii) use other than in accordance with the express terms of these Terms and Conditions, the Policies and Procedures, or applicable law.

**1.17 “Vendor”** means each third party vendor of software, hardware and/or related services that, together with the software, hardware and/or related services provided by HEALTHeNET or other Vendors, comprise the Network and the Services.

**1.18 “Vendor Agreement”** means each agreement between HEALTHeNET and a Vendor.

## **2. TERMS AND CONDITIONS; POLICIES AND PROCEDURES**

### **2.1 Terms and Conditions**

These Terms and Conditions apply to the use of the Network, the provision of the Services, and the relationships among HEALTHeNET and Data Recipients, and shall be deemed incorporated by reference into the Data Use Agreement.

### **2.2 Policies and Procedures**

The Policies and Procedures set forth the policies and procedures pursuant to which HEALTHeNET shall provide the Services, shall be consistent with these Terms and Conditions, and shall be deemed to be incorporated by reference into these Terms and Conditions. In the event of a conflict between the Policies and Procedures and these Terms and Conditions, these Terms and Conditions shall govern.

### **2.3 Procedures for Amendments**

(a) HEALTHeNET is solely responsible for the development of these Terms and Conditions and the Policies and Procedures, and may amend, repeal, or replace these Terms and Conditions and/or the Policies and Procedures at any time as HEALTHeNET determines is appropriate, and except as provided in Section 2.3(b), all pursuant and subject to Sections 3.2 – 3.8 below.

(b) Notwithstanding anything contained in Section 2.3(a) or Section 3.4 – 3.8 below, if a change to the Terms and Conditions or Policies and Procedures, as the case may be, is required in order for HEALTHeNET and/or Data Recipients to comply with applicable laws or regulations, HEALTHeNET may implement the change and provide notice to Data Recipients within a shorter period of time that HEALTHeNET determines is appropriate under the circumstances.

## **3. REGISTRATION AND DATA USE AGREEMENT**

### **3.1 Registration**

Before a person or entity may enter into a Data Use Agreement, it must submit a written Registration to HEALTHeNET or HEALTHeNET's designee.

### **3.2 Data Use Agreement Required**

Upon receipt of a complete Registration, and prior to accessing the Network or using the Services, the person or entity so approved shall enter into a Data Use Agreement with HEALTHeNET.

### **3.3 Effect of Policies and Procedures Upon Data Recipient**

Upon execution of the Data Use Agreement, Data Recipient agrees to comply with all applicable provisions of the Policies and Procedures in effect from time to time. HEALTHeNET may make exceptions to the Policies and Procedures at HEALTHeNET's sole discretion, as long as any exceptions do not otherwise conflict with the terms of these Terms and Conditions.

### **3.4 Changes to Policies and Procedures and/or Terms and Conditions**

HEALTHeNET may amend, repeal, and/or replace the Policies and Procedures or Terms and Conditions at any time, and from time to time, upon thirty (30) days' prior written notice to the Data Recipients, unless an earlier effective date is required by law. Any change to the Policies and Procedures and/or Terms and Conditions shall be legally binding upon HEALTHeNET and Data Recipients, as of the effective date of the change, which shall not be earlier than thirty (30) days after notice is provided to Data Recipients, unless an earlier effective date is required by law.

### **3.5 Data Recipient's Other Rights to Terminate**

(a) Data Recipient may terminate its Data Use Agreement at any time, with or without cause, by giving not less than ninety (90) days prior notice to HEALTHeNET.

(b) Data Recipient may terminate its Data Use Agreement if HEALTHeNET fails to perform a material responsibility arising out of the Data Use Agreement, and that failure continues uncured for a period of thirty (30) days after Data Recipient has given HEALTHeNET notice of that failure and requested that the HEALTHeNET cure that failure.

### **3.6 HEALTHeNET's Rights to Terminate**

(a) HEALTHeNET may terminate any Data Use Agreement at any time without cause by giving not less than ninety (90) days prior notice to the Data Recipient.

(b) HEALTHeNET may terminate any Data Use Agreement if the Data Recipient fails to perform a material responsibility arising out of the Data Use Agreement, and that failure continues uncured for a period of thirty (30) days after HEALTHeNET has given the Data Recipient notice of that failure and requested that the Data Recipient cure that failure.

### **3.7 Effect of Termination**

Upon any termination of a Data Recipient's Data Use Agreement, that party shall cease to be a Data Recipient and thereafter neither the Data Recipient nor its Authorized Users shall have any rights to use the Network or the Services. All licenses or other rights to use the Network, associated hardware and/or Services granted to the Data Recipient hereunder shall terminate automatically upon the termination of the Data Use Agreement. Certain provisions of these Terms and Conditions shall continue to apply to the former Data Recipient and its Authorized Users following that termination, as described in Section 3.8 (Survival of Provisions).

### **3.8 Survival of Provisions**

The following provisions of these Terms and Conditions shall continue to apply to a former Data Recipient notwithstanding any termination of the former Data Use Agreement: Section 4.4 (Responsibility for Conduct of Data Recipient, its Authorized Users and its Subcontractors); Section 9 (Data Access Rights); Section 11 (Proprietary Information); Section 12.8 (Limitation of Liability); Section 13 (Dispute Resolution); Section 14 (Indemnification); and Section 16.1 (Applicable Law).

## **4. AUTHORIZED USERS**

### **4.1 Identification of Authorized Users**

To enable HEALTHeNET to establish appropriate access for each Authorized User, each Data Recipient shall provide HEALTHeNET with a list in a medium and format approved by HEALTHeNET identifying all of the Data Recipient's Authorized Users, together with the information described in the Policies and Procedures. Thereafter, the Data Recipient shall promptly, whenever an Authorized User is added or removed by reason of termination of employment, change in role or responsibilities, or otherwise, provide notification to HEALTHeNET of such change.

### **4.2 Requirements for Data Recipient's Authorized Users and HEALTHeNET's Personnel**

Data Recipient shall ensure that each of its Authorized Users satisfies all of the requirements for Authorized Users set forth in the Policies and Procedures. HEALTHeNET shall ensure that each person utilizing the Network on behalf of HEALTHeNET satisfies all of the requirements for its personnel set forth in the Policies and Procedures.

### **4.3 No Use by Other than Authorized Users**

Data Recipient shall restrict access to the Network and, if applicable, use of the Services, only to the Authorized Users that a Data Recipient has identified to HEALTHeNET in accordance with Section 4.1 (Identification of Authorized Users). Data Recipient shall ensure Authorized Users do not access Patient Data through the Network while located outside of the United States and its territories without the prior written consent of HEALTHeNET.

### **4.4 Responsibility for Conduct of Data Recipient, its Authorized Users, and its Subcontractors**

The Data Recipient shall be solely responsible for all acts and omissions, including but not limited to any Unauthorized Use, of the Data Recipient and/or its Authorized Users, subcontractors, vendors and all other individuals who access the Network and/or use the Services either through the Data Recipient or by use of any password, identifier or log-on received or obtained from the Data Recipient or any of the Authorized Users, subcontractors, or vendors. The Data Recipient shall be responsible at all times for ensuring the accuracy of all Tax Identification Numbers (TINs) associated with Data Recipient's use of the Network.

#### **4.5 Rights of Authorized Users**

An Authorized User shall have no rights to access the Network, and/or to use the Services or any Patient Data or other information made available therefrom, other than those granted for a Permitted Use to the Authorized User by HEALTHeNET or by the Data Recipient on whose behalf the Authorized User accesses the Network and/or uses the Services or the Patient Data or other information made available therefrom, whether by virtue of the Authorized User's relationship with the Data Recipient or otherwise. Any such rights of an Authorized User shall cease and terminate upon the removal of that Authorized User by HEALTHeNET or the Data Recipient.

#### **4.6 Termination of Authorized Users**

Each Data Recipient shall require that all of its respective Authorized Users use the Network and the Services only in accordance with these Terms and Conditions and the Policies and Procedures, including without limitation the provisions governing the confidentiality, privacy and security of protected health information. The Data Recipient shall discipline and/or sanction appropriately any of its respective Authorized Users who fail to act in accordance with these Terms and Conditions and in accordance with the Data Recipient's policies and procedures.

### **5. DATA RECIPIENTS' RIGHTS AND OBLIGATIONS**

#### **5.1 Authorization by HEALTHeNET**

Subject to and conditioned on Data Recipient's compliance and performance in accordance with all other terms and conditions of this Data Use Agreement, HEALTHeNET authorizes Data Recipient to access and use during the Term, the Services and Network solely for Permitted Uses by and through Authorized Users. This authorization is non-exclusive and non-transferrable. HEALTHeNET retains all other rights to the Network and all the components thereof. No Data Recipient shall obtain any rights to the Network except for the limited rights to use the Network expressly granted in these Terms and Conditions.

#### **5.2 Ownership of Data**

The parties acknowledge that each Data Supplier continues to own its data and that HEALTHeNET transmits the data on behalf of each Data Supplier as a custodian, subject to applicable law and the Network Agreement. As between Data Recipient and HEALTHeNET, Data Recipient is and will remain the sole and exclusive owner of all right, title and interest in and to all Data Recipient Data, including all intellectual property rights relating thereto, subject to the rights and permissions granted in Section 5.6.

#### **5.3 Permitted Uses**

A Data Recipient may use the Network, Services and Patient Data only as follows ("Permitted Uses"):

- (a) Uses for Treatment, Payment and Health Care Operations (as those terms are defined in HIPAA); or
- (b) Any other use that is required under HIPAA, or other applicable law governing the use and disclosure of Patient Data.

#### **5.4 Prohibited Uses**

A Data Recipient shall not use or permit the use of the Network, Services or Patient Data for any purpose or use other than for the Permitted Uses set forth in Section 5.3. Without limiting the generality of the foregoing, a Data Recipient shall not use the Network, Services, or Patient Data for any of the following uses:

- (a) To allow separate access, separate services or sub-license to any third party.
- (b) For any purpose or in any manner that is prohibited by federal laws or regulations or the laws of the State of New York, other applicable law, or the Policies and Procedures.
- (c) For the purpose of competition.

## **5.5 Patient Consent/Authorization**

Prior to accessing Patient Data, Data Recipient shall comply with all applicable laws governing patient consent/authorization to and for the use or disclosure of information.

## **5.6 Consent to Use Data Recipient Data**

Data Recipient irrevocably grants all such rights and permissions in or relating to Data Recipient Data: (a) to HEALTHeNET, or its affiliates' employees, agents, or contractors, as are necessary or useful to perform the Services; and (b) to HEALTHeNET as are necessary or useful to enforce this Data Use Agreement and exercise its rights and perform its obligations under the Data Use Agreement and applicable law.

## **5.7 Software and Hardware Provided by Data Recipient**

Data Recipient shall be responsible for procuring all equipment and software necessary for it to access the Network and use the Services ("Data Recipient's Required Hardware and Software"). Without limiting any other provision of these Terms and Conditions, HEALTHeNET may change such specifications from time to time in its sole discretion upon not less than ninety (90) days prior notice to each Data Recipient affected by the change. As part of the Data Recipient's obligation to provide Data Recipient's Required Hardware and Software, the Data Recipient shall be responsible for ensuring that all the Data Recipient's computers to be used to interface with the Network are properly configured, including but not limited to the operating system, web browser, and Internet connectivity.

## **5.8 Other Resources**

Data Recipient shall be responsible for providing such other resources as may be reasonably necessary for connection with the implementation of the Network, including but not limited to making available such Data Recipient staff members as may be necessary for such purposes.

## **5.9 Unauthorized Use**

Data Recipient shall not engage in any Unauthorized Use of the Network or Services, and shall ensure that its Authorized Users do not engage in any Unauthorized Use of the Network or Services.

# **6. OBLIGATIONS OF THE PARTIES**

## **6.1 Malicious Software, Viruses, and Other Threats**

Each Party shall use reasonable efforts to ensure that its provision of the Network and the Services or connection to and use of the Network, as the case may be, including without limitation the medium containing any data or other information provided to the Network, does not include, and that any method of transmitting such data will not introduce, any program, routine, subroutine, or data (including without limitation malicious software or "malware," viruses, worms, and "Trojan Horses") which will disrupt the proper operation of the Network or any part thereof or any hardware or software used by the Data Recipient 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 the Network or any part thereof or any hardware, software or data used by HEALTHeNET or any Data Recipient in connection therewith, to be destroyed, damaged, or rendered inoperable.

## **6.2 Training of Personnel**

Each Party shall provide appropriate and adequate training to all of its personnel and Authorized Users prior to becoming Authorized Users, as the case may be, in the requirements of applicable laws and regulations governing the confidentiality, privacy, and security of protected health information, including without limitation requirements imposed under HIPAA and the Policies and Procedures. HEALTHeNET may, from time to time, make certain training materials available for the Data Recipient's use.



### **6.3 Compliance with Laws and Regulations and Policies and Procedures**

Without limiting any other provision of these Terms and Conditions relating to the parties' compliance with applicable laws and regulations, each Party shall perform in all respects as contemplated by these Terms and Conditions, in compliance with applicable federal, state, and local laws, ordinances and regulations. The Parties shall comply with the standards for the confidentiality, security, and use of patient health information, including without limitation protected health information as required by HIPAA, and all other state and federal laws and the Policies and Procedures. Each Data Recipient shall comply with such standards regardless of whether or not that Data Recipient is a "covered entity" under HIPAA.

## **7. OTHER RIGHTS AND OBLIGATIONS OF HEALTHeNET**

### **7.1 Compliance with Terms and Conditions**

HEALTHeNET shall require that all Data Recipients enter into a Data Use Agreement or other legally binding agreement to comply with these Terms and Conditions in such form as HEALTHeNET determines is appropriate.

### **7.2 Maintenance of the Network**

Subject to and conditioned on Data Recipient's and its Authorized Users' compliance with Terms and Conditions and Policies and Procedures, HEALTHeNET shall use commercially reasonable efforts to provide to Data Recipient and its Authorized Users the Services, including to host, manage, operate and maintain the Network for use by Data Recipient and its Authorized Users 24 hours per day, seven days per week, except for:

- (a) Downtime due to a Supervening Circumstances, as defined in Section 16.4;
- (b) any other circumstances beyond HEALTHeNET's reasonable control, including Data Recipient's or any Authorized User's use of third party materials, misuse of the Network, or use of the Services other than in compliance with the express terms of these Terms and Conditions and the Policies and Procedures;
- (c) any scheduled downtime for which HEALTHeNET has given Data Recipient reasonable notice;
- (d) any unscheduled downtime due to technical or other difficulties outside of HEALTHeNET's control after commercially reasonable efforts; and
- (e) any suspension or termination of Data Recipient's or any of its Authorized Users access to or use of the Network as permitted by these Terms and Conditions or the Policies and Procedures.

### **7.3 Support**

HEALTHeNET will provide or arrange for assistance in resolving difficulties in accessing and using the Network and the Services, as HEALTHeNET determines appropriate to support the Network and the Services.

### **7.4 Audits, Investigations and Reports**

HEALTHeNET may perform periodic audits upon reasonable notice during normal business hours to the extent reasonably necessary to determine compliance with the Data Use Agreement and may require Data Recipient to perform any follow-up actions.

## **8. SOFTWARE AND HARDWARE PROVIDED BY HEALTHeNET**

### **8.1 Description**

HEALTHeNET shall from time to time enter into agreements with one or more Vendors or affiliates to arrange for the provision of such software, hardware and related services as HEALTHeNET determines is appropriate to arrange for the availability of the Network and the performance of the Services for Data Recipients. Except as expressly provided otherwise in these Terms and Conditions, HEALTHeNET's obligations to provide or arrange for the availability of the Network and the performance of the Services shall be limited to the obligations undertaken by the Vendors pursuant to their respective Vendor Agreements with HEALTHeNET.

### **8.2 Authorization**

Subject to and conditioned on Data Recipient's compliance and performance in accordance with all other terms and conditions of these Terms and Conditions, HEALTHeNET authorizes each Data Recipient and its Authorized Users to access and use the associated software and the associated hardware for access to or use of the Network and Services solely for the Permitted Uses by and through Authorized Users. This authorization is non-exclusive and non-transferable. HEALTHeNET represents to each Data Recipient that HEALTHeNET has the legal right and power to grant the authorization described in this Section 8.2; provided, that the scope of such authorization shall be limited by the terms and conditions of any licenses and other rights to the associated software and associated hardware granted to HEALTHeNET or to HEALTHeNET by a Vendor(s) ("Vendor Terms and Conditions"), if any, and used in the delivery of the Services or operation of the Network. HEALTHeNET shall use reasonable efforts to notify Data Recipient of any such requirements on a timely basis. Nothing in these Terms and Conditions grants Data Recipient any right, title or interest in or to (including any license under) any intellectual property rights in or relating to, the Services or Network.

### **8.3 Modifications; Derivative Works**

The Data Recipient shall not modify, reverse engineer, decompile, disassemble, re-engineer or otherwise create or permit or assist others to create the associated software or the Network, or to create any derivative works from the associated software or the Network. The Data Recipient shall not modify the associated software or the Network, or combine the associated software with any other software or services not provided or approved by HEALTHeNET.

## **9. DATA ACCESS RIGHTS**

Data Recipient acknowledges and agrees that it has rights to access Patient Data for the Permitted Uses set forth in Section 5.3 through the Network as either: (i) a "covered entity", as the term is defined at 45 CFR 160.103; or (ii) a "business associate", as the term is defined at 45 CFR 160.103. HEALTHeNET acknowledges and agrees that it is a "business associate", as the term is defined at 45 CFR 160.103, of Data Suppliers participating in the Network. Accordingly, Data Recipient and HEALTHeNET each acknowledge and agree it has its own legal obligations separate from this Data Use Agreement to secure and protect any Protected Health Information created, received, maintained, or transmitted as a result of use or administration of the Network.

## **10. FEES AND CHARGES**

**[Intentionally Omitted – No fees to Data Recipient Contemplated at this time]**

## **11. PROPRIETARY INFORMATION**

### **11.1 Scope of Proprietary Information**

In the performance of their respective responsibilities pursuant to these Terms and Conditions, HEALTHeNET and Data Recipients may come into possession of certain proprietary information of the other. For the purposes hereof, "Proprietary Information" means all trade secrets, business plans, marketing plans, know-how, data, contracts, documents, scientific and medical concepts, member and customer lists, costs, financial information, profits and billings, and referral sources, existing or future services, products, operations, management, pricing, financial status, goals, strategies, objectives, and agreements of HEALTHeNET and the Data Recipient, whether written or verbal, that are confidential in nature; provided, however, that Proprietary Information shall not include any information that: (a) is in the public domain; (b) is already known or obtained by any other party other than in the course of the other party's performance pursuant to the Data Use Agreement or these Terms and Conditions; (c) is independently developed by any other party; and/or (d) becomes known from an independent source having the right to disclose such information and without similar restrictions as to disclosure and use and without breach of the Data Use Agreement or these Terms and Conditions, or any other confidentiality or nondisclosure agreement by such other party.

### **11.2 Nondisclosure of Proprietary Information**

HEALTHeNET and the Data Recipient each (i) shall keep and maintain in strict confidence all Proprietary Information received from the other, or from any of the other's employees, accountants, attorneys, consultants, or other agents and representatives, in connection with the performance of their respective obligations under these Terms and Conditions; (ii) shall not use, reproduce, distribute or disclose any such Proprietary Information except as permitted by these Terms and Conditions; and (iii) shall prevent its employees, accountants, attorneys, consultants, and other agents and representatives from making any such use, reproduction, distribution, or disclosure.

### **11.3 Equitable Remedies**

All Proprietary Information represents a unique intellectual product of the party disclosing such Proprietary Information (the "Disclosing Party"). The unauthorized disclosure of said Proprietary Information would have a detrimental impact on the Disclosing Party. The damages resulting from said detrimental impact would be difficult to ascertain but would result in irreparable loss. It would require a multiplicity of actions at law and in equity in order to seek redress against the receiving party in the event of such an unauthorized disclosure. The Disclosing Party shall be entitled to seek equitable relief in preventing a breach of this Section 11 and such equitable relief is in addition to any other rights or remedies available to the Disclosing Party.

### **11.4 Notice of Disclosure**

Notwithstanding any other provision hereof, nothing in this Section 11 shall prohibit or be deemed to prohibit a party hereto from disclosing any Proprietary Information (or any other information the disclosure of which is otherwise prohibited hereunder) to the extent that such party becomes legally compelled to make such disclosure by reason of a subpoena or order of a court, administrative agency or other governmental body of competent jurisdiction, and such disclosures are expressly permitted hereunder; provided, however, that a party that has been requested or becomes legally compelled to make a disclosure otherwise prohibited hereunder by reason of a subpoena or order of a court, administrative agency or other governmental body of competent jurisdiction shall provide the other party with notice thereof within five (5) calendar days, or, if sooner, at least three (3) business days before such disclosure will be made (if possible) so that the other party may seek a protective order or other appropriate remedy. If despite the efforts to quash the request or seek a protective order, the party is nevertheless compelled by any legal process to disclose Proprietary Information, such party shall furnish only that portion of the

Proprietary Information legally compelled to be furnished in the opinion of the compelled party's counsel and, on the other party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or government agency or a subdivision thereof that such Proprietary Information will be afforded confidential treatment. Compulsory disclosures made pursuant to this section shall not relieve the compelled party of its confidentiality obligations for all other purposes. In no event shall a party be deemed to be liable hereunder for compliance with any such subpoena or order of any court, administrative agency or other governmental body of competent jurisdiction.

### **11.5 Trademarks**

Data Recipient and HEALTHeNET acknowledge and agree that each retains control of its trademarks, tradenames, and/or servicemarks presently existing or hereinafter established with respect to it, and will not use the trademark of the other party without prior written consent of the other party.

## **12. DISCLAIMERS AND EXCLUSIONS OF WARRANTIES**

### **12.1 Carrier Lines**

Each Data Recipient and HEALTHeNET acknowledges that access to the Network is to be provided over various facilities and communications lines, and information will 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 are beyond HEALTHeNET's and each Data Recipient's control. Neither HEALTHeNET nor any Data Recipient assumes any liability for or relating to the integrity, privacy, security, confidentiality, or use of any information while it is transmitted on the carrier lines. Use of the carrier lines is solely at the Data Recipient's risk and is subject to all applicable local, state, national, and international laws.

### **12.2 No Warranties**

ACCESS TO THE NETWORK, USE OF THE SERVICES, AND THE INFORMATION OBTAINED BY A DATA RECIPIENT PURSUANT TO THE USE OF THOSE SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT ANY WARRANTY OF ANY KIND, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND, EXCEPT AS PROVIDED IN A VENDOR AGREEMENT OR SECTION 14.1, NON-INFRINGEMENT. THE DATA RECIPIENT SHALL BE SOLELY RESPONSIBLE FOR ANY AND ALL ACTS OR OMISSIONS TAKEN OR MADE IN RELIANCE ON THE NETWORK OR THE INFORMATION IN THE NETWORK, INCLUDING BUT NOT LIMITED TO INACCURATE OR INCOMPLETE INFORMATION. HEALTHeNET DISCLAIMS ANY AND ALL LIABILITY FOR ERRONEOUS TRANSMISSIONS AND LOSS OF SERVICE RESULTING FROM COMMUNICATION FAILURES BY TELECOMMUNICATION SERVICE PROVIDERS OR THE NETWORK.

### **12.3 Other Data Recipients**

(a) Data Recipient acknowledges that data, including Patient Data, may also be shared with other Network users. Data Recipient acknowledges that HEALTHeNET shall not be responsible for the acts or omissions of any Data Source, any other Data Recipient, or any others accessing or utilizing the Network.

(b) Data Recipient acknowledges that nothing in the Data Use Agreement or Terms and Conditions guarantees access to any minimum number of Data Sources, even if Data Recipient complies with all of the Terms and Conditions herein.

#### **12.4 Data Recipient's Actions**

Each Data Recipient shall be solely responsible for any damage to a computer system, loss of data, and any damage to the Network to the extent caused by the acts and omissions of the Data Recipient and/or its Authorized Users and all other individuals who access the Network and/or use the Services either through the Data Recipient or by use of any password, identifier or log-on received or obtained from the Data Recipient or any of the Authorized Users in violation of the terms of the Network Agreement and the Policies and Procedures.

#### **12.5 Unauthorized Access; Lost or Corrupt Data**

Except as required for compliance with these Terms and Conditions, HEALTHeNET shall not be responsible for unauthorized access to the Data Recipient's transmission facilities or equipment by individuals or entities using the Network or for unauthorized access to, or alteration, theft, or destruction of the Data Recipient's data files, programs, procedures, or information through the Network, whether by accident, fraudulent means or devices, or any other method. Each Data Recipient shall be solely responsible for validating the accuracy of all output, reports and information, and protecting the Data Recipient's data and programs from loss by implementing appropriate security measures, including routine backup procedures. HEALTHeNET, its Vendors and Data Sources are not responsible for the content of any information transmitted or received through the Network or provision of the Services, except to the extent that the content of such information is distorted or corrupted as a direct result of the intentional acts or omissions or willful misconduct of HEALTHeNET.

#### **12.6 Inaccurate Data**

By using the Network and the Services, each Data Recipient acknowledges that all data to which access is made through the Network and/or the Services originates from Data Sources or Data Recipients and does not originate from HEALTHeNET. All such data is subject to change arising from numerous factors. HEALTHeNET neither initiates the transmission of any data nor monitors the specific content of data being transmitted. Without limiting any other provision of these Terms and Conditions, HEALTHeNET has no responsibility for or liability related to the accuracy, content, currency, completeness, or delivery of any data pursuant to these Terms and Conditions, except to the extent that the content of such information is distorted or corrupted as a direct result of the intentional acts or omissions or willful misconduct of HEALTHeNET.

#### **12.7 Patient Care**

Without limiting any other provision of these Terms and Conditions, each Data Recipient and the Data Recipient's Authorized 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 Network or the Services or the data made available thereby. No Data Recipient or Authorized User shall have any recourse against, and through the Data Use Agreements that apply thereto, each shall waive, any claims against HEALTHeNET, Vendors, Data Sources and other Data Recipients for any loss, damage, claim, or cost relating to or resulting from its own use or misuse of the Network and/or the Services or the data made available thereby.

#### **12.8 Limitation of Liability**

In addition to the limitations of liability set forth in Section 12.2 (No Warranties):

(a) Notwithstanding the foregoing or anything in the Data Use Agreement to the contrary, to the maximum extent permitted by applicable laws, the aggregate liability of HEALTHeNET, its officers, directors, employees or agents, shall be limited to the greater of: (i) the amount of insurance coverage available to HEALTHeNET with respect to such liability plus any amounts for which HEALTHeNET is indemnified by third parties, such as Vendors; or (ii) \$1,000,000.

(b) Notwithstanding the foregoing or anything in these Terms and Conditions to the contrary, to the maximum extent permitted by applicable laws, the aggregate liability of a Data Recipient, its officers, directors, employees or agents, shall be limited to the greater of: (i) the amount of insurance coverage available to that Data Recipient with respect to such liability plus any amounts for which that Data Recipient is indemnified by third parties, such as technology vendors; or (ii) \$1,000,000.

(c) The limitations on liability set forth in Subsections 12.8(a) and 12.8(b) above shall not apply to intentional acts or willful misconduct of HEALTHeNET or Data Recipient, as the case may be.

(d) It is expressly agreed that in no event shall HEALTHeNET be liable for any special, indirect, consequential, or exemplary damages, including but not limited to, loss of profits or revenues, loss of use, loss of information or data, bodily injury, or other third-party liabilities, 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 HEALTHeNET has been apprised of the possibility or likelihood of such damages occurring.

## **13. DISPUTE RESOLUTION**

### **13.1 Scope**

Any controversy, dispute, or disagreement arising out of or relating to the Data Use Agreement, the Terms and Conditions, the Policies and Procedures, or any Data Recipient's Registration (individually and collectively referred to in this Section 13 as "this Agreement"), or the breach of this Agreement, (referred to in this Section 13 as a "dispute") shall be settled according to the procedure set forth in this Section 13.

### **13.2 Informal Conference**

In the event a dispute arises between or among any of the parties concerning their respective duties and obligations under this Agreement, each party shall be obligated to meet and confer with the other(s) in good faith, on reasonable notice, and at a mutually agreeable location. The parties agree that if any party refuses to participate in such a conference, or if such a conference fails to produce a mutually acceptable resolution of the dispute within fifteen (15) calendar days after the parties' receipt of notice of the dispute, the other party or parties may submit the matter to mediation or arbitration pursuant to this Section 13.

### **13.3 Mediation and Legal Action**

In the event a dispute arises between or among the parties that cannot be settled by informal conference as set forth above, the parties may, on mutual agreement, submit the matter to mediation to be conducted in Erie County, New York. The process for selecting the mediator shall be determined by the mutual written consent of the parties. If the parties fail to agree to a process within ten (10) calendar days from a request, and if either party believes in good faith that the procedures described in this Section 13 will have a material adverse impact on such party, then the parties may take any legal action in a court of law or equity to assert or enforce a claim it has against the other party under the Data Use Agreement. The consent of any party to such mediation may be withdrawn at any time, without cause.

## **14. INDEMNIFICATION**

Notwithstanding Section 13 (Dispute Resolution), and subject to Sections 12.2 (No Warranties) and 12.8 (Limitation of Liability), the following Indemnification provisions shall apply:

### **14.1 Infringement Indemnity**

(a) HEALTHeNET Indemnity. (i) HEALTHeNET shall indemnify and hold harmless Data Recipient and defend any action brought against the same with respect to any third-party claim, demand or cause of action, to the extent that it is based upon a claim that the Network or Services, as provided by

HEALTHeNET and used within the scope of this Agreement, infringes or violates any United States patent, copyright, trade secret or other proprietary rights of a third party, provided that the Data Recipient:

(i) notifies HEALTHeNET within five business days of receiving written notification of the claim; (ii) grants HEALTHeNET sole control of the defense and settlement of the claim, provided, however HEALTHeNET may not enter into any settlement that would admit any wrongdoing by or impose any liability on the part of Data Recipient, or impose any obligation on Data Recipient, without Data Recipient's prior written consent; and (iii) provides HEALTHeNET, at Data Recipient's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim.

(ii) HEALTHeNET will have no liability for any infringement or misappropriation claim of any kind to the extent it results from: (i) modification of any Network product or any Services made by any party other than HEALTHeNET, if such a claim would have been avoided if the Network or Services were not so modified; (ii) the combination, operation or use of the Network or Services with software, equipment or devices not supplied by HEALTHeNET, if such a claim would have been avoided if the Network or Services were not used in such combination; or (iii) Data Recipient's failure to use updated or modified Network or Services provided by HEALTHeNET to avoid a claim.

(iii) In the defense or settlement of any infringement or misappropriation claim, HEALTHeNET may, at its sole option and expense:

- (1) procure for Data Recipient a license to continue using the Network or Services under the terms of the Network Agreement;
- (2) replace or modify the allegedly infringing technology to avoid the infringement; or
- (3) terminate this Data Use Agreement with respect to the infringing party of the indemnified technology if neither of the foregoing is commercially reasonable and refund a pro rata portion of the applicable fees, if any, paid by Data Supplier for the infringing technology.

(iv) The foregoing provisions of this Section 14.1 set forth the parties' respective sole and exclusive obligations, Data Recipient's sole and exclusive remedies and HEALTHeNET's sole liability, with respect to the subject matter giving rise to any infringement or misappropriation of intellectual property rights of any kind.

(b) Data Recipient Indemnity. Data Recipient shall indemnify and hold harmless HEALTHeNET and defend any action brought against the same with respect to any third-party claim, demand or cause of action, to the extent that it is based upon a claim that Data Recipient's hardware or software infringes or violates any United States patent, copyright, trade secret or other proprietary rights of a third party, provided that HEALTHeNET: (i) notifies Data Recipient within five business days of receiving written notification of the claim; (ii) grants Data Recipient sole control of the defense and settlement of the claim, provided however, Data Recipient may not entertain any settlement that would admit any wrongdoing by or impose any liability on the part of HEALTHeNET, or impose any obligation on HEALTHeNET, without HEALTHeNET's prior written consent; and (iii) provides Data Recipient, at HEALTHeNET's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim.

## **14.2 Rules for Indemnification**

Any indemnification made pursuant to this Section 14 shall, unless otherwise provided, include payment of all costs associated with defending the claim or cause of action involved, whether or not such claims or causes of action are meritorious, including reasonable attorneys' fees and any settlement by or judgment against the party to be indemnified. In the event that a lawsuit is brought against the party to be indemnified, the party responsible to indemnify that party shall, at its sole cost and expense, defend the

party to be indemnified, if the party to be indemnified demands indemnification by written notice given to the indemnifying party within a period of time wherein the indemnifying party is not prejudiced by lack of notice. The indemnification obligations of the parties shall not, as to third parties, be a waiver of any defense or immunity otherwise available, and the indemnifying party, in indemnifying the indemnified party, shall be entitled to assert in any action every defense or immunity that the indemnified party could assert on its own behalf.

#### **14.3 Indemnification by Certain Data Recipients Operated by Governmental Agencies**

Certain Data Recipients that are operated by the State of New York, by a county thereof, or by a governmental agency thereof (collectively, “Government Data Recipients”), may be subject to laws that limit that Data Recipient’s ability to agree to or perform certain of the obligations of a Data Recipient concerning indemnification described in this Section 14. HEALTHeNET may enter into a Data Use Agreement with a Government Data Recipient that provides for terms and/or conditions concerning indemnification by that Government Data Recipient that are different from those set forth in this Section 14, and which shall apply to that Government Data Recipient notwithstanding anything to the contrary in this Section 14; provided, that HEALTHeNET shall do so only if and to the extent that such Government Data Recipient demonstrates to HEALTHeNET that applicable laws so limit that Government Data Recipient’s ability to agree to or perform such indemnification obligations.

### **15. INSURANCE**

#### **15.1 Required Coverage**

HEALTHeNET shall maintain, throughout the term of the Data Use Agreement, at its sole expense, insurance for “cyber-liability” or similar insurance appropriate to a breach of personal health information, as well as such professional and general liability insurance coverage as it deems reasonable and necessary to insure itself and its officers, directors, and employees against any third party claim or cause of action arising out of the performance of the Data Use Agreement. Each Data Recipient shall maintain, throughout the term of its Data Use Agreement, at its sole expense, such professional, general, and cyber liability insurance coverage, or self-insurance, commensurate with its organizational characteristics, as it deems reasonable and necessary to insure itself and its officers, directors, and employees against any third party claim or cause of action arising out of the performance of its Data Use Agreement. In the event of termination of the Data Use Agreement for any reason, HEALTHeNET and each Data Recipient either shall maintain its insurance coverage called for under this Section 15.1 for a period of not less than three (3) years, or shall provide an equivalent extended reporting endorsement (“tail policy”).

#### **15.2 Evidence of Coverage**

HEALTHeNET and Data Recipient shall provide proof of such required coverage upon request.

#### **15.3 Commercial or Self-Insurance**

The insurance coverage required under these Terms and Conditions may be provided through one or more commercial insurance policies through a self-insurance fund reasonably satisfactory to HEALTHeNET, or through a combination of commercial and self-insurance.

### **16. GENERAL PROVISIONS**

#### **16.1 Applicable Law**

The interpretation of these Terms and Conditions and the resolution of any disputes arising under these Terms and Conditions shall be governed by the laws of the State of New York. If any action or other



proceeding is brought on or in connection with these Terms and Conditions, the venue of such action shall be exclusively in Erie County, in the State of New York.

### **16.2 Non-Assignability**

No rights of the Data Recipient under its Data Use Agreement may be assigned or transferred by the Data Recipient, either voluntarily or by operation of law, without the prior written consent of HEALTHeNET, which it may withhold in its reasonable discretion.

### **16.3 Third-Party Beneficiaries**

Except as provided in Section 14 (Indemnification), there shall be no third-party beneficiaries of any Data Use Agreement.

### **16.4 Supervening Circumstances**

Neither the Data Recipient nor HEALTHeNET shall be deemed in violation of any provision of a Data Use 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) acts of legislative, judicial, executive, or administrative authorities; or (g) any other circumstances that are not within its reasonable control (“Supervening Circumstances”). This Section 16.4 shall not apply to obligations imposed under applicable laws and regulations or obligations to pay money.

### **16.5 Severability**

Any provision of these Terms and Conditions or any Data Use Agreement that shall prove to be invalid, void, or illegal, shall in no way affect, impair, or invalidate any other provision of these Terms and Conditions, the Policies and Procedures, or such Data Use Agreement, and such other provisions shall remain in full force and effect.

### **16.6 Notices**

Any and all notices required or permitted under these Terms and Conditions shall be sent by United States mail, overnight delivery service to the address provided in the Data Use Agreement, or such different address as a party may designate pursuant to this Section 16.6.

### **16.7 Waiver**

No provision of these Terms and Conditions, the Policies and Procedures, or any Data Use Agreement shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented. Any consent by any party to, or waiver of a breach by the other, whether expressed or implied, shall not constitute a consent to, waiver of, or excuse for any other different or subsequent breach.

### **16.8 Complete Understanding**

With respect to any Data Use Agreement, the Registration, the Policies and Procedures, and these Terms and Conditions together contain the entire understanding of the parties, and there are no other written or oral understandings or promises between the parties with respect to the subject matter of any Data Use Agreement other than those contained or referenced in that Data Use Agreement. All modifications or amendments to any Data Use Agreement shall be in writing and signed by all parties.

[End of Terms and Conditions]