

Agreement No. _____

AGREEMENT BETWEEN THE COUNTY OF SAN MATEO AND EDUCATORS BENEFIT CONSULTANTS, LLC D/B/A AVIBEN

This Agreement is entered into this _____ day of _____, 2023, by and between the County of San Mateo, a political subdivision of the state of California, hereinafter called "County," and Educators Benefit Consultants, LLC d/b/a Aviben, hereinafter called "Contractor."

* * *

Whereas, pursuant to Section 31000 of the California Government Code, County may contract with independent contractors for the furnishing of such services to or for County or any Department thereof; and

Whereas, it is necessary and desirable that Contractor be retained for the purpose of Health Reimbursement Arrangement (HRA) administration and recordkeeping for the period of January 1, 2024 through December 31, 2026, with the right of the County, at its sole discretion, to extend the contract term to December 31, 2027 and/or December 31, 2028, by exercising County-reserved options; and

Now, therefore, it is agreed by the parties to this Agreement as follows:

1. Exhibits and Attachments

The following exhibits and attachments are attached to this Agreement and incorporated into this Agreement by this reference:

- Exhibit A— HRA Administrative Services Agreement
- Exhibit B—Payments and Rates
- Exhibit C—Performance Measures
- Exhibit D—Abiven Terms of Use and Privacy Policy
- Attachment H—HIPAA Business Associate Requirements

2. Services to be performed by Contractor

In consideration of the payments set forth in this Agreement and in Exhibit B, Contractor shall perform services for County in accordance with the terms, conditions, and specifications set forth in this Agreement and in Exhibit A and Exhibit C.

3. Payments

In consideration of the services provided by Contractor in accordance with all terms, conditions, and specifications set forth in this Agreement and in Exhibit A, Contractor shall be entitled to receive payments as described in Exhibit B. Contractor is not entitled to payment for work not performed as required by this Agreement.

4. Term

Subject to compliance with all terms and conditions, the term of this Agreement shall be from January 1, 2024, through December 31, 2026, with the County retaining the right to exercise, in its sole discretion, options to extend the Agreement on the same terms and conditions for two additional one-year terms, through December 31, 2027 and then through December 31, 2028.

5. Termination

This Agreement may be terminated by Contractor or by the County Human Resources Director or his/her designee at any time without a requirement of good cause upon thirty (30) days' advance written notice to the other party. Subject to availability of funding, Contractor shall be entitled to receive payment for work/services provided prior to termination of the Agreement. Such payment shall be that prorated portion of the full payment determined by comparing the work/services actually completed to the work/services required by the Agreement.

County may terminate this Agreement or a portion of the services referenced in the Attachments and Exhibits based upon the unavailability of Federal, State, or County funds by providing written notice to Contractor as soon as is reasonably possible after County learns of said unavailability of outside funding.

County may terminate this Agreement for cause. In order to terminate for cause, County must first give Contractor notice of the alleged breach. Contractor shall have five business days after receipt of such notice to respond and a total of ten calendar days after receipt of such notice to cure the alleged breach. If Contractor fails to cure the breach within this period, County may immediately terminate this Agreement without further action. The option available in this paragraph is separate from the ability to terminate without cause with appropriate notice described above. In the event that County provides notice of an alleged breach pursuant to this section, County may, in extreme circumstances, immediately suspend performance of services and payment under this Agreement pending the resolution of the process described in this paragraph. County has sole discretion to determine what constitutes an extreme circumstance for purposes of this paragraph, and County shall use reasonable judgment in making that determination.

6. Contract Materials

At the end of this Agreement, or in the event of termination, all finished or unfinished documents, data, studies, maps, photographs, reports, and other written materials (collectively referred to as "contract materials") prepared by Contractor under this Agreement shall become the property of County and shall be promptly delivered to County. Upon termination, Contractor may make and retain a copy of such contract materials if permitted by law.

7. Relationship of Parties

Contractor agrees and understands that the work/services performed under this Agreement are performed as an independent contractor and not as an employee of County and that neither

Contractor nor its employees acquire any of the rights, privileges, powers, or advantages of County employees.

8. Hold Harmless

a. Mutual Hold Harmless

Contractor shall indemnify and save harmless County and its officers, agents, employees, and servants from all claims, suits, or actions of every name, kind, and description resulting from Contractor's negligence, recklessness, or breach of this Agreement, including any of the following resulting from Contractor's negligence, recklessness, or breach of this Agreement:

(A) injuries to or death of any person, including Contractor or its employees/officers/agents;

(B) damage to any property of any kind whatsoever and to whomsoever belonging;

(C) any sanctions, penalties, or claims of damages resulting from Contractor's failure to comply, if applicable, with the requirements set forth in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and all Federal regulations promulgated thereunder, as amended; or

(D) any other loss or cost, including but not limited to that caused by the concurrent active or passive negligence of County and/or its officers, agents, employees, or servants. However, Contractor's duty to indemnify and save harmless under this Section shall not apply to injuries or damage for which County has been found in a court of competent jurisdiction to be solely liable by reason of its own negligence or willful misconduct.

The duty of Contractor to indemnify and save harmless as set forth by this Section shall include the duty to defend as set forth in Section 2778 of the California Civil Code.

County shall indemnify and hold harmless Contractor and each of its officers, and employees from and against any and all claims, damages or expenses of any kind incurred by Contractor as a result of a third party claim that the County acted in gross negligence, willfully, or in violation of applicable standard of care in breach of its obligations under this Plan.

b. Intellectual Property Indemnification

Contractor hereby certifies that it owns, controls, and/or licenses and retains all right, title, and/or interest in and to any intellectual property it uses in relation to this Agreement, including the design, look, feel, features, source code, content, and/or other technology relating to any part of the services it provides under this Agreement and including all related patents, inventions, trademarks, and copyrights, all applications therefor, and all trade names, service marks, know how, and trade secrets (collectively referred to as "IP Rights") except as otherwise noted by this Agreement.

Contractor warrants that the services it provides under this Agreement do not infringe, violate, trespass, or constitute the unauthorized use or misappropriation of any IP Rights of any third party. Contractor shall defend, indemnify, and hold harmless County from and against all liabilities, costs, damages, losses, and expenses (including reasonable attorney fees) arising out of or related to any claim by a third party that the services provided under this Agreement infringe or violate any third-party's IP Rights provided any such right is enforceable in the United States. Contractor's duty to defend, indemnify, and hold harmless under this Section applies only provided that: (a) County notifies Contractor promptly in writing of any notice of any such third-party claim; (b) County cooperates with Contractor, at Contractor's expense, in all reasonable respects in connection with the investigation and defense of any such third-party claim; (c) Contractor retains sole control of the defense of any action on any such claim and all negotiations for its settlement or compromise (provided Contractor shall not have the right to settle any criminal action, suit, or proceeding without County's prior written consent, not to be unreasonably withheld, and provided further that any settlement permitted under this Section shall not impose any financial or other obligation on County, impair any right of County, or contain any stipulation, admission, or acknowledgement of wrongdoing on the part of County without County's prior written consent, not to be unreasonably withheld); and (d) should services under this Agreement become, or in Contractor's opinion be likely to become, the subject of such a claim, or in the event such a third party claim or threatened claim causes County's reasonable use of the services under this Agreement to be seriously endangered or disrupted, Contractor shall, at Contractor's option and expense, either: (i) procure for County the right to continue using the services without infringement or (ii) replace or modify the services so that they become non-infringing but remain functionally equivalent.

Notwithstanding anything in this Section to the contrary, Contractor will have no obligation or liability to County under this Section to the extent any otherwise covered claim is based upon: (a) any aspects of the services under this Agreement which have been modified by or for County (other than modification performed by, or at the direction of, Contractor) in such a way as to cause the alleged infringement at issue; and/or (b) any aspects of the services under this Agreement which have been used by County in a manner prohibited by this Agreement.

The duty of Contractor to indemnify and save harmless as set forth by this Section shall include the duty to defend as set forth in Section 2778 of the California Civil Code.

9. Assignability and Subcontracting

Contractor shall not assign this Agreement or any portion of it to a third party or subcontract with a third party to provide services required by Contractor under this Agreement without the prior written consent of County. Any such assignment or subcontract without County's prior written consent shall give County the right to automatically and immediately terminate this Agreement without penalty or advance notice.

10. Insurance

a. General Requirements

Contractor shall not commence work or be required to commence work under this Agreement unless and until all insurance required under this Section has been obtained and such insurance has been approved by County’s Risk Management, and Contractor shall use diligence to obtain such insurance and to obtain such approval. Contractor shall furnish County with certificates of insurance evidencing the required coverage, and there shall be a specific contractual liability endorsement extending Contractor’s coverage to include the contractual liability assumed by Contractor pursuant to this Agreement. These certificates shall specify or be endorsed to provide that thirty (30) days’ notice must be given, in writing, to County of any pending change in the limits of liability or of any cancellation or modification of the policy.

b. Workers’ Compensation and Employer’s Liability Insurance

Contractor shall have in effect during the entire term of this Agreement workers’ compensation and employer’s liability insurance providing full statutory coverage. In signing this Agreement, Contractor certifies, as required by Section 1861 of the California Labor Code, that (a) it is aware of the provisions of Section 3700 of the California Labor Code, which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of the Labor Code, and (b) it will comply with such provisions before commencing the performance of work under this Agreement.

c. Liability Insurance

Contractor shall take out and maintain during the term of this Agreement such bodily injury liability and property damage liability insurance as shall protect Contractor and all of its employees/officers/agents while performing work covered by this Agreement from any and all claims for damages for bodily injury, including accidental death, as well as any and all claims for property damage which may arise from Contractor’s operations under this Agreement, whether such operations be by Contractor, any subcontractor, anyone directly or indirectly employed by either of them, or an agent of either of them. Such insurance shall be combined single limit bodily injury and property damage for each occurrence and shall not be less than the amounts specified below:

(a) Comprehensive General Liability.....\$1,000,000

(b) Professional Liability.....\$1,000,000

County and its officers, agents, employees, and servants shall be named as additional insured on any such policies of insurance, which shall also contain a provision that (a) the insurance afforded thereby to County and its officers, agents, employees, and servants shall be primary insurance to the full limits of liability of the policy and (b) if the County or its officers, agents, employees, and servants have other insurance against the loss covered by such a policy, such other insurance shall be excess insurance only.

In the event of the breach of any provision of this Section, or in the event any notice is received which indicates any required insurance coverage will be diminished or canceled, County, at its option, may, notwithstanding any other provision of this Agreement to the contrary, immediately

declare a material breach of this Agreement and suspend all further work and payment pursuant to this Agreement.

11. Compliance With Laws

All services to be performed by Contractor pursuant to this Agreement shall be performed in accordance with all applicable Federal, State, County, and municipal laws, ordinances, regulations, and executive orders, including but not limited to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Federal Regulations promulgated thereunder, as amended (if applicable), the Business Associate requirements set forth in Attachment H (if attached), the Americans with Disabilities Act of 1990, as amended, and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in programs and activities receiving any Federal or County financial assistance, as well as any required economic or other sanctions imposed by the United States government or under state law in effect during the term of the Agreement. Such services shall also be performed in accordance with all applicable ordinances and regulations, including but not limited to appropriate licensure, certification regulations, provisions pertaining to confidentiality of records, and applicable quality assurance regulations. In the event of a conflict between the terms of this Agreement and any applicable State, Federal, County, or municipal law, regulation, or executive order, the requirements of the applicable law, regulation, or executive order will take precedence over the requirements set forth in this Agreement.

Further, Contractor certifies that it and all of its subcontractors will adhere to all applicable provisions of Chapter 4.107 of the San Mateo County Ordinance Code, which regulates the use of disposable food service ware. Accordingly, Contractor shall not use any non-recyclable plastic disposable food service ware when providing prepared food on property owned or leased by the County and instead shall use biodegradable, compostable, reusable, or recyclable plastic food service ware on property owned or leased by the County.

Contractor will timely and accurately complete, sign, and submit all necessary documentation of compliance.

12. Non-Discrimination and Other Requirements

a. General Non-discrimination

No person shall be denied any services provided pursuant to this Agreement (except as limited by the scope of services) on the grounds of race, color, national origin, ancestry, age, disability (physical or mental), sex, sexual orientation, gender identity, marital or domestic partner status, religion, political beliefs or affiliation, familial or parental status (including pregnancy), medical condition (cancer-related), military service, or genetic information.

b. Equal Employment Opportunity

Contractor shall ensure equal employment opportunity based on objective standards of recruitment, classification, selection, promotion, compensation, performance evaluation, and

management relations for all employees under this Agreement. Contractor's equal employment policies shall be made available to County upon request.

c. Section 504 of the Rehabilitation Act of 1973

Contractor shall comply with Section 504 of the Rehabilitation Act of 1973, as amended, which provides that no otherwise qualified individual with a disability shall, solely by reason of a disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in the performance of any services this Agreement. This Section applies only to contractors who are providing services to members of the public under this Agreement.

d. Compliance with County's Equal Benefits Ordinance

Contractor shall comply with all laws relating to the provision of benefits to its employees and their spouses or domestic partners, including, but not limited to, such laws prohibiting discrimination in the provision of such benefits on the basis that the spouse or domestic partner of the Contractor's employee is of the same or opposite sex as the employee.

e. Discrimination Against Individuals with Disabilities

The nondiscrimination requirements of 41 C.F.R. 60-741.5(a) are incorporated into this Agreement as if fully set forth here, and Contractor and any subcontractor shall abide by the requirements of 41 C.F.R. 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

f. History of Discrimination

Contractor certifies that no finding of discrimination has been issued in the past 365 days against Contractor by the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, or any other investigative entity. If any finding(s) of discrimination have been issued against Contractor within the past 365 days by the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, or other investigative entity, Contractor shall provide County with a written explanation of the outcome(s) or remedy for the discrimination prior to execution of this Agreement. Failure to comply with this Section shall constitute a material breach of this Agreement and subjects the Agreement to immediate termination at the sole option of the County.

g. Reporting; Violation of Non-discrimination Provisions

Contractor shall also report to the County the filing by any person in any court any complaint of discrimination or the filing by any person of any and all charges with the Equal Employment Opportunity Commission, the Fair Employment and Housing Commission, or any other entity charged with the investigation of allegations of discrimination within seventy-five (75) days of such filing, provided that within such seventy-five (75) days such entity has not notified contractor that such charges are dismissed or otherwise unfounded. Such notification to County shall include a general description of the allegations and the nature of specific claims being

asserted. Contractor shall provide County with a statement regarding how it responded to the allegations within sixty (60) days of its response and shall update County regarding the nature of the final resolution of such allegations.

Violation of the non-discrimination provisions of this Agreement shall be considered a breach of this Agreement and subject the Contractor to penalties, to be determined by the County Executive Officer, including but not limited to the following:

- i. termination of this Agreement;
- ii. disqualification of the Contractor from being considered for or being awarded a County contract for a period of up to 3 years;
- iii. liquidated damages of \$2,500 per violation; and/or
- iv. imposition of other appropriate contractual and civil remedies and sanctions, as determined by the County Executive Officer.

To effectuate the provisions of this Section, the County Executive Officer shall have the authority to offset all or any portion of the amount described in this Section against amounts due to Contractor under this Agreement or any other agreement between Contractor and County.

h. Compliance with Living Wage Ordinance

As required by Chapter 2.88 of the San Mateo County Ordinance Code, Contractor certifies all contractor(s) and subcontractor(s) obligated under this contract shall fully comply with the provisions of the County of San Mateo Living Wage Ordinance, including, but not limited to, paying all Covered Employees the current Living Wage and providing notice to all Covered Employees and Subcontractors as required under the Ordinance.

i. Compliance with County Employee Jury Service Ordinance

Contractor shall comply with Chapter 2.85 of the County's Ordinance Code, which states that Contractor shall have and adhere to a written policy providing that its employees, to the extent they are full-time employees and live in San Mateo County, shall receive from the Contractor, on an annual basis, no fewer than five days of regular pay for jury service in San Mateo County, with jury pay being provided only for each day of actual jury service. The policy may provide that such employees deposit any fees received for such jury service with Contractor or that the Contractor may deduct from an employee's regular pay the fees received for jury service in San Mateo County. By signing this Agreement, Contractor certifies that it has and adheres to a policy consistent with Chapter 2.85. For purposes of this Section, if Contractor has no employees in San Mateo County, it is sufficient for Contractor to provide the following written statement to County: "For purposes of San Mateo County's jury service ordinance, Contractor certifies that it has no full-time employees who live in San Mateo County. To the extent that it hires any such employees during the term of its Agreement with San Mateo County, Contractor shall adopt a policy that complies with Chapter 2.85 of the County's Ordinance Code." The requirements of Chapter 2.85 do not apply unless this Agreement's total value listed in the Section titled "Payments", exceeds two-hundred thousand dollars (\$200,000); Contractor

acknowledges that Chapter 2.85's requirements will apply if this Agreement is amended such that its total value exceeds that threshold amount.

13. Retention of Records; Right to Monitor and Audit

(a) Contractor shall maintain all required records relating to services provided under this Agreement for three (3) years after County makes final payment and all other pending matters are closed, and Contractor shall be subject to the examination and/or audit by County, a Federal grantor agency, and the State of California.

(b) Contractor shall comply with all program and fiscal reporting requirements set forth by applicable Federal, State, and local agencies and as required by County.

(c) Contractor agrees upon reasonable notice to provide to County, to any Federal or State department having monitoring or review authority, to County's authorized representative, and/or to any of their respective audit agencies access to and the right to examine all records and documents necessary to determine compliance with relevant Federal, State, and local statutes, rules, and regulations, to determine compliance with this Agreement, and to evaluate the quality, appropriateness, and timeliness of services performed.

14. Merger Clause; Amendments

This Agreement, including the Exhibits and Attachments attached to this Agreement and incorporated by reference, constitutes the sole Agreement of the parties to this Agreement and correctly states the rights, duties, and obligations of each party as of this document's date. In the event that any term, condition, provision, requirement, or specification set forth in the body of this Agreement conflicts with or is inconsistent with any term, condition, provision, requirement, or specification in any Exhibit and/or Attachment to this Agreement, the provisions of the body of the Agreement shall prevail. Any prior agreement, promises, negotiations, or representations between the parties not expressly stated in this document are not binding. All subsequent modifications or amendments shall be in writing and signed by the parties.

15. Controlling Law; Venue

The validity of this Agreement and of its terms, the rights and duties of the parties under this Agreement, the interpretation of this Agreement, the performance of this Agreement, and any other dispute of any nature arising out of this Agreement shall be governed by the laws of the State of California without regard to its choice of law or conflict of law rules. Any dispute arising out of this Agreement shall be venued either in the San Mateo County Superior Court or in the United States District Court for the Northern District of California.

16. Notices

Any notice, request, demand, or other communication required or permitted under this Agreement shall be deemed to be properly given when both: (1) transmitted via facsimile to the telephone number listed below or transmitted via email to the email address listed below; and (2) sent to the physical address listed below by either being deposited in the United States mail,

postage prepaid, or deposited for overnight delivery, charges prepaid, with an established overnight courier that provides a tracking number showing confirmation of receipt.

In the case of County, to:

Name/Title: Kim Pearson, Benefits Manager
Address: 455 County Center, 5th Floor
Telephone: 650-363-4656
Email: kpearson@smcgov.org

In the case of Contractor, to:

Name/Title: Trent Pepper, General Counsel
Address: 1995 E. Rum River Dr. S., Cambridge, MN 55008
Telephone: 888-507-6053
Email: legal@aviben.com

17. Electronic Signature

Both County and Contractor wish to permit this Agreement and future documents relating to this Agreement to be digitally signed in accordance with California law and County's Electronic Signature Administrative Memo. Any party to this Agreement may revoke such agreement to permit electronic signatures at any time in relation to all future documents by providing notice pursuant to this Agreement.

This Agreement may be executed in counterparts, each of which so executed shall be construed to be an original, but all of which together shall constitute one agreement binding on all parties. Transmission by facsimile or electronic mail of an executed counterpart of this Agreement shall be deemed to constitute due and sufficient delivery of such counterpart. This Agreement and any amendment or modification may not be denied legal effect or enforceability solely because it is in electronic form, or because an electronic signature or electronic record was used in its formation.

18. Payment of Permits/Licenses

Contractor bears responsibility to obtain any license, permit, or approval required from any agency for work/services to be performed under this Agreement at Contractor's own expense prior to commencement of said work/services. Failure to do so will result in forfeit of any right to compensation under this Agreement.

* * *

In witness of and in agreement with this Agreement's terms, the parties, by their duly authorized representatives, affix their respective signatures:

For Contractor: Educators Benefit Consultants, LLC d/b/a Aviben

DocuSigned by: <i>Trent Pepper</i> <small>552C657000474EE</small>	11/27/2023 1:48 PM PST	Trent Pepper
Contractor Signature	Date	Contractor Name (please print)



COUNTY OF SAN MATEO

By:
President, Board of Supervisors, San Mateo County

Date:

ATTEST:

By:
Clerk of Said Board

Exhibit A

In consideration of the mutual promises and covenants contained herein, and the exhibits and Addenda, if any, attached hereto, including in consideration of the payments set forth in Exhibit B, Contractor shall provide the following services. Further, Contractor agrees to the Performance Measures attached as Exhibit C.

County and Aviben hereby agree as follows:

1. WHAT AVIBEN WILL DO:

- a. Plan Documentation** – Aviben will provide the following documentation for the County’s HRA Plan in accordance with Internal Revenue Codes (IRC) 105, 106, 213(d), 115, 501(a), and the Affordable Care Act (ACA), as applicable. County will be notified of the cost, and the content of the changes required to the following, if relevant:
 - i. Plan Document
 - ii. Adoption Agreement
 - iii. Summary Plan Description
 - iv. Enrollment instructions
 - v. Claim Forms
 - vi. Notice of Privacy Practices (HIPAA requirement)
 - vii. Business Associate Agreement (HIPAA requirement)
- b. Trust Documentation** – Aviben will provide the Adoption Agreement with a section specific to the relevant Trust being utilized (115 Trust) and Aviben will provide the Custodial Agreement specific to 115 Trust requirements.
- c. Administrative Duties: To follow are the daily administrative functions performed by Aviben**
 - i. Process claims
 - ii. Provide employee enrollment materials
 - iii. Reimburse participants via ACH, check, or debit card process
 - iv. Customer service call center
 - v. Reporting as required under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007
 - vi. Provide a secure participant web portal
 - vii. Provide a secure employer web portal
 - viii. Consult with investment advisory firm annually to monitor HRA investment offerings
 - ix. Mail or e-mail statements to participants at least annually
 - x. Reasonable consulting services to employer
 - xi. Provide PCOR participant count report and payment instructions
 - xii. Provide Transitional Reinsurance Fee participant count report and payment instructions

- d. **Plan Amendments** – From time to time a plan may need to be amended during the term of this Agreement either to reflect voluntary changes made by the plan sponsor or to reflect mandatory changes required by law. Voluntary amendments must be requested in writing by the County. Aviben shall provide the County with timely written notice if any mandatory amendments are necessary. Aviben shall provide the following in response to voluntary or mandatory amendments.
 - i. Resolution to Amend (if voluntary change)
 - ii. The Amendment or an Adoption Agreement
 - iii. Summary of Material Modifications (describes changes and impact on plan)

The fee for a voluntary amendment shall be \$200.00

The fee for a mandatory amendment shall be \$0.

e. Other Services

- i. **Discrimination Test (D-Test) Performed Annually.** If elected as an option, Aviben shall perform a discrimination test based on employee information that County submits in accordance with IRC 105(h). If elected, County shall receive D-Test notice early in the Plan year from Aviben. County shall complete and submit via an on-line process. Aviben shall provide written outcome and analysis of the D-Test for County. County understands that if it elects to have Aviben run the annual test County will be invoiced the cost quoted in the Service Agreement Addendum – Fee Schedule. Aviben shall invoice County upon completion of the test.

2. WHAT EMPLOYER AGREES TO DO

The County agrees that as the Employer and Plan Administrator, Aviben can only provide the above services if the County provides the following:

- a. **Timeliness and Accuracy of Data** – Aviben must receive complete, accurate, and timely information. It will rely exclusively on information provided by County, its agents, employees, directors, representatives, or advisors (collectively “Employer”), whether oral or in writing, and will have no responsibility to verify independently the accuracy of that information. Aviben assumes no responsibility to acquire information other than to request it from Employer, and will not be liable for any errors or omissions made because of incomplete or incorrect information that Employer furnishes to Aviben. In the event inaccurate or incomplete materials require that Aviben repeat any compliance work already completed, Employer will be charged an additional fee.
- b. **Annual Compliance** – Aviben may require employee census data and updated information about Employer and/or its plans in order to provide relevant services. Employer agrees to provide this information upon request by Aviben.
- c. **Filing Government Reports** – Aviben will provide certain government reports on the Employer’s behalf. Employer will be responsible for the timely filing of these reports with the appropriate agency.
- d. **Notification of Contacts by Government Agencies** – Employer will notify Aviben of any plan audits, investigations, or examinations by any governmental agency including, without limitation, the Internal Revenue Service or U.S. Department of Labor. If additional services are needed in connection with any such audit, investigation, or examination, Aviben will inform the Employer of the need for additional services outside the scope of this Agreement, along with a proposed Fee Schedule to provide those services.
- e. **Qualified Medical Child Support Order (“QMCSO”) Determination** – Employer is responsible for the determination of whether court orders comply with the QMCSO

requirements of the Code unless consultation is requested by Employer and agreed upon by Aviben in writing. In the event Employer has possession of any QMCSO requiring the separation of any assets of the Plan, Employer must inform Aviben of the required separation.

- f. **Other Plans** - The Plan's operation and tax qualification is affected by other plans sponsored by the Employer (whether currently active or terminated, and whether or not Aviben administers them). Employer is responsible for informing Aviben of other plans.
- g. **Confidentiality** – The Aviben plan design shall not be divulged by the Employer to any third parties, unless written permission is received from Aviben, providing that the Employer may divulge aspects of the Aviben design when acting as a reference to third parties who are considering adoption of the Aviben system. Aviben has Employers permission to provide Plan Documents and Adoption Agreements to entities named in the Adoption Agreement, such as a trustee or investment manager.

3. GENERAL

- a. **Interpretation.** Any ambiguity in this Agreement shall be resolved to permit each party to comply with the Privacy Rule and the Security Rule, if applicable. If any provision of this Agreement or portion of such provision is held invalid for any reason, including specific local, state, or federal laws, the remainder of the Agreement (or the remainder of such provision) and the application thereof to other persons or circumstances shall not be effected thereby.
- b. **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect.
- c. **Headings.** The Headings and captions used in this Agreement are for convenience only and in no way define, limit or otherwise describe the scope or intent of this Agreement, or any provisions hereof.

4. ACCEPTANCE & ACKNOWLEDGMENTS

- a. The County has reviewed and accepted Aviben's Terms of Use and Privacy Policy, attached as Exhibit D.
- b. The terms and conditions of this Service are agreed to and accepted by an Authorized Plan Representative of the County as of the date set forth above.
- c. Any collectively bargained Employees participating in this Plan participate because the collective bargaining agreement provides for coverage under this Plan.
- d. The Plan has been duly adopted or authorized by the County.
- e. The County acknowledges that it has reviewed all relevant plan related documents with appropriate counsel.
- f. This Agreement, and applicable Addendum/Addenda may be executed in any number of counterparts, any of which may be executed and transmitted by facsimile or other electronic means, and each of which will be deemed to be an original of this Agreement, and applicable Addendum/Addenda and all of which, when taken together, will be deemed to constitute one and the same instrument for purposes of execution.

Exhibit B

In consideration of the services provided by Contractor described in Exhibit A and subject to the terms of the Agreement, County authorizes Aviben to deduct fees for these services directly from participant accounts.

1. Fees - For the performance of these services, Aviben will charge the following:

A. Administrative Fees Paid by Participant:

- a. All HRAs in a 115 Trust are subject to asset based fee of 14 bps per quarter pulled quarterly from participant accounts during the term of this Agreement.
- b. Fees may be charged by third party funds based on employees/retirees fund selection

B. Plan Amendments Paid By Employer

- a. Voluntary amendments.....\$200.00
- b. Federally mandated amendments.....\$0.00

2. Optional Fee-based Services Aviben Can Provide upon County request:

- A. **Discrimination Test**\$500.00 (if elected by Employer)

2. EFT/ACH Authorization for Contributions and Reimbursements

Unless otherwise negotiated, County will authorize Aviben to receive information via an electronic transaction from the Plan.

3. BILLING PROCEDURES AND COLLECTIONS

- a. **Statements, Late Charges, Stopping of Work** – County will be billed on an ongoing basis for voluntary Plan amendments performed by Aviben; all other fees will be taken directly from the participants' accounts. Invoices are due upon receipt, and become delinquent and subject to late charges if payment is not received by our office within 30 days. If payment is past due in excess of 30 days, Aviben reserve the right to stop all work until your account is brought current. In addition, balances not paid within 30 days of the invoice date will bear a late charge equal to 1.5% of the outstanding balance for each month or partial month until paid in full. Aviben is not responsible for any late tax filings or penalties, fines, taxes, or other charges that may be assessed.

Exhibit C**County of San Mateo Performance Measures****Effective January 1, 2024**

If a performance measure is not met, Aviben will reduce the next quarterly fees of 14 bps taken from participant accounts by the percentage of quarterly revenue that was placed at risk.

<u>Description</u>	<u>Metric</u>	<u>% of Quarterly Revenue at Risk</u>
Participant Statement Mail Date	Statements are mailed annually by the 15th of the month following year-end	1%
Participant Statement Online Posting Date	Statements are posted quarterly by the 15th of the month following quarter-end	1%
Number of Days After Quarter End for Plan Report	The plan report is available the first day after quarter-end. The employer can pull this report on demand through the employer investment portal. If the employer would like Aviben to provide this report, Aviben can do so by request at any time.	1%
Time to Return Plan Sponsor and Participant Phone Calls	Within 1 business day	1%
Annual Plan Sponsor Training	Aviben will provide plan sponsor training upon request	1%
Contribution Reconciliation	Within 3 business days of receipt	1%
Contribution Posting	Within 5 business days of receiving funds	1%
Claim Reimbursements Paid	45 days if more than \$50. 30 days if total is less than \$50.	1%
Processing of Fund Transfers	Daily	1%

Exhibit D

Aviben Terms of Use and Privacy Policy

Terms of Use

These Terms and Conditions of Use (the “Terms of Use”) apply to the Aviben websites located at <https://www.aviben.com>, <https://www.ebcsolutions.com>, the Aviben app, any Aviben affiliated social media account, including but not limited to Facebook, Instagram, LinkedIn, and Twitter, and any virtual, recorded, or live Aviben presentation, (collectively, the “Aviben Websites”), and all associated sites and email addresses linked to the Aviben Websites by Aviben, its subsidiaries, partners, and affiliates (collectively, the “Site”). The Site is the property of Educators Benefit Consultants, LLC d/b/a Aviben (“Aviben”) and its licensors. **BY USING THE SITE, YOU AGREE TO THESE TERMS OF USE, SO PLEASE READ THEM CAREFULLY; IF YOU DO NOT AGREE, DO NOT USE THE SITE.**

Aviben has the right to change, modify, add or remove any part of the Terms of Use. It is your responsibility to check these Terms of Use periodically for changes. Your continued use of the Site following any changes to the Terms of Use will mean that you accept and agree to the changes. As long as you comply with these Terms of Use, Aviben grants you a non-exclusive, non-transferable, limited privilege to enter and use the Site.

Electronic Communications

By using the Site, or sending e-mails, text messages, comments, and other communications from your desktop or mobile device to Aviben, you may be communicating with us electronically. You consent to receive communications from Aviben electronically, such as e-mails, texts, or notices and messages on this site or through other Aviben Services such as the Consumer and Employer portal. You agree that all agreements, notices, disclosures, and other communications that we provide to you electronically satisfy any legal requirement that such communications be in writing. You agree to the use, authenticity, and binding effect of electronic signatures. Your submission of any Content to Aviben via electronic means constitutes your agreement to the use, authenticity, and binding effect of your electronic signature.

Your Content & Claim Submission

Certain features or services offered on or through the Site allow you to enter and/or upload information or content. You certify, warrant, and promise that the content or information that you upload is true, accurate, and complete and that you have the right or authorization to do so. You acknowledge that Aviben has no duty or obligation to verify the accuracy of the content or information you enter and/or upload. Aviben has the right but not the obligation to monitor and edit any content or information. You agree to indemnify and hold Aviben, its officers, directors, employees, agents, subsidiaries and affiliates, harmless from any demands, loss, liability, claims or expenses (including attorneys’ fees), made against Aviben due to or arising out of or in connection with the information that you enter and/or upload to or through the Site.

You certify that all expenses for which reimbursement is claimed by submission of Your Content were incurred by you or your eligible spouse, or dependent(s). You certify that the medical expenses incurred by you or your dependents are qualifying expenses as defined by the Internal Revenue Service Code and your relevant Plan. If these expenses are not qualified expenses you understand that you will be liable

for payment of all related taxes on all ineligible amounts paid out by the Plan. You certify that the expenses claimed have not been reimbursed or, in the case of a health reimbursement arrangement, cannot be reimbursed under any other health plan coverage.

You certify that all services for which reimbursement or payment is claimed by submission of Your content were provided during a period while you or your dependents were covered under the Company's relevant Plan with respect to such expenses and that the expenses have not been reimbursed or will not be presented for reimbursement through any other coverage plan. You fully understand that you alone are fully responsible for the sufficiency, accuracy, and veracity of all information relating to any claims submitted and/or disbursement requested, and that unless an expense for which payment or reimbursement is claimed is a proper expense under the Plan, you may be liable for payment of all related taxes including federal, state, or city income tax on amounts paid from the Plan which relate to such expense.

Aviben Content

All text, photographs, depictions, artwork, graphics, trademarks, logos, sounds, music, digital downloads, data compilations, software, and computer code (collectively, "Content"), including but not limited to the placement, layout, arrangement, and expression of the Content, contained on the Site is owned, controlled or licensed by or to Aviben, and is protected by various intellectual property rights, including but not limited to trade dress, copyright, patent, trademark, and unfair competition laws.

You may use Content provided by Aviben regarding its products and services that is made available by Aviben for such Use provided that you (1) not remove any proprietary language, logos, and copyright information in all copies of such Content, (2) use this Content only for your personal, non-commercial purposes, (3) make no modifications to any such Content, and (4) not make any additional representations or warranties relating to such Content.

Aviben attempts to be as accurate as possible. However, Aviben does not warrant that any Content on its Site is accurate, complete, reliable, current, or error-free.

Use of the Site

Certain features or services offered on or through the Site may require you to open an account or enter in personal information of yourself or others. You are solely responsible for maintaining the confidentiality of the information you hold for your account, including your password, and for any and all activity that occurs under your account as a result of your failing to keep this information secure and confidential. You agree to notify Aviben immediately of any unauthorized use of your account or password, or any other breach of security. You may be held liable for losses incurred by Aviben or any other user of or visitor to the Site due to someone else using your ID, password or account.

You may not use anyone else's ID, password or account at any time. Aviben cannot and will not be liable for any loss or damage arising from your failure to comply with these obligations. You may not pretend that you are, or that you represent, someone else, or impersonate any other individual or entity.

By using the Site, or sending e-mails, text messages, and other communication, you acknowledge and agree that Internet transmissions are never completely private or secure. You understand that any message or information you send to the Site or to emails listed on the Site may be read or intercepted by others, even if there is a special notice that a particular transmission is encrypted or secure.

You may not attempt to gain unauthorized access to any portion of the Site, or any other systems or networks connected to the Site, or to any of the services offered on or through the Site, by hacking, password "mining" or any other illegitimate means.

You may not probe, scan or test the vulnerability of the Site or any network or server connected to the Site, nor breach the security or authentication measures on the Site or any network or server connected to the Site. You may not reverse look-up, trace or seek to trace any information on any other user of or visitor to the Site, or any other customer of Aviben, including any Aviben account not owned by you, to its source, or exploit the Site or any service or information made available or offered by or through the Site, in any way where the purpose is to reveal any information, including but not limited to personal identification or information, other than your own information, as provided for by the Site.

You agree not to use any device, software or routine to interfere or attempt to interfere with the proper working of the Site or any transaction being conducted on the Site, or with any other person's use of the Site.

You may not use the Site or any Content for any purpose that is unlawful or prohibited by these Terms of Use, or to solicit the performance of any illegal activity or other activity which infringes the rights of Aviben or others.

You may not use any "deep-link", "page-scrape", "robot", "spider" or other automatic device, program, algorithm, or any similar process, to access, acquire, copy or monitor any portion of the Site, or in any way reproduce or circumvent the navigational structure or presentation of the Site, to obtain or attempt to obtain any Content through any means not purposely made available through the Site.

Third Party Links

This Site may contain links to other independent third-party Web sites ("Links"). These Links are not under Aviben's control, and Aviben is not responsible for and does not endorse the content of such Links, including any Content contained on such Links. These Links are provided solely as a convenience for visitors, however, you will need to make your own independent judgment regarding your interaction with these Links.

Disclaimers

AVIBEN DOES NOT WARRANT THAT THE SITE OR ANY CONTENT WILL BE ERROR-FREE OR THAT ANY DEFECTS WILL BE CORRECTED. THE SITE AND ITS CONTENT ARE DELIVERED ON AN "AS-IS" AND "AS-AVAILABLE" BASIS. ALL INFORMATION PROVIDED ON THE SITE IS SUBJECT TO CHANGE WITHOUT NOTICE. AVIBEN CANNOT ENSURE THAT ANY FILES OR OTHER DATA YOU DOWNLOAD FROM THE SITE WILL BE FREE OF VIRUSES OR ERRORS OR DESTRUCTIVE FEATURES. AVIBEN DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF ACCURACY, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. AVIBEN DISCLAIMS ANY AND ALL LIABILITY FOR THE ACTS, OMISSIONS AND CONDUCT OF ANY THIRD PARTIES IN CONNECTION WITH OR RELATED TO YOUR USE OF THE SITE AND/OR ANY AVIBEN SERVICES. YOU ASSUME TOTAL RESPONSIBILITY FOR YOUR USE OF THE SITE AND ANY LINKS. YOUR SOLE REMEDY AGAINST AVIBEN FOR DISSATISFACTION WITH THE SITE OR ANY CONTENT IS TO STOP USING THE SITE OR ANY SUCH CONTENT. THIS LIMITATION OF RELIEF IS A PART OF THE BARGAIN BETWEEN THE PARTIES. V18SEP23

Limitation of Liability

Except where prohibited by law, in no event will Aviben be liable to you for any indirect, consequential, exemplary, incidental or punitive damages, including lost profits, even if Aviben has been advised of the possibility of such damages.

If, notwithstanding the other provisions of these Terms of Use, Aviben is found to be liable to you for any damage or loss which arises out of or is in any way connected with your use of the Site or any Content, Aviben's liability shall in no event exceed the greater of (1) the total of any fees with respect to any service or feature of or on the Site paid in the six months prior to the date of the initial claim made against Aviben, or (2) US\$10.00. Some jurisdictions do not allow limitations of liability, so the foregoing limitation may not apply to you.

Indemnity

You agree to indemnify and hold Aviben, its officers, directors, employees, agents, subsidiaries and affiliates, harmless from any demands, loss, liability, claims or expenses (including attorneys' fees), made against Aviben by any third party due to or arising out of or in connection with your use of the Site.

Severability

If any of the provisions of these Terms of Use are held by a court or other tribunal of competent jurisdiction to be void or unenforceable, such provisions shall be limited or eliminated to the minimum extent necessary and replaced with a valid provision that best embodies the intent of these Terms of Use, so that these Terms of Use shall remain in full force and effect. These Terms of Use constitute the entire agreement between you and Aviben with regard to your use of the Site, and any and all other written or oral agreements or understandings previously existing are hereby superseded and cancelled. Aviben's failure to enforce strict performance of these Terms of Use shall not be construed as a waiver by Aviben of any provision or any right it has to enforce these Terms of Use. Any conduct between Aviben and you or any other party will not be deemed to modify any provision of these Terms of Use. These Terms of Use shall not be interpreted or construed to confer any rights or remedies on any third parties.

Privacy Policy

This Privacy Policy was updated on September 11, 2020.

When you use Aviben's website and services, we understand that you are trusting us with some of your personal and sensitive information. We take this responsibility seriously and work hard to protect your

personal information. We have developed this Privacy Policy to help you understand what personal information we collect, how we collect it, why we collect it, and how we use it. **BY USING AVIBEN'S WEBSITE OR SERVICES YOU ARE CONSENTING TO THE PRACTICES DESCRIBED IN THIS PRIVACY NOTICE SO PLEASE READ THIS CAREFULLY. IF YOU DO NOT CONSENT, DO NOT USE AVIBEN'S WEBSITE OR SERVICES.**

Please review our Privacy Policy and contact us if you have any question.

Changes To This Privacy Policy

Aviben has the discretion to update this privacy policy at any time. We encourage you to frequently check this page for any changes. You acknowledge and agree that it is your responsibility to review this privacy policy periodically and become aware of modifications.

What personal information we collect

Personal information is data that can be used to identify a single person. You may be asked to provide your personal information when you are in contact with Aviben or an affiliate of Aviben. Aviben and its affiliates may share this personal information with each other and use it in accordance with this Privacy Policy. Aviben and its affiliates may use this information to provide and improve our services, content, marketing, and products. You are not required to provide the personal information requested, however, if you choose not to do so, we may not be able to provide you with our services or products or respond to requests that you have.

We may have received your personal information from other persons if that person has listed you as a trusted contact or invited you to participate in an Aviben service.

We automatically collect and store certain types of information about your use of our services and website, including information about when and how you access our services. Like many other websites, we may use "cookies" to enhance user experience. You may choose to set your web browser to refuse cookies, or to alert you when cookies are being sent. If cookies are turned off or refused, some parts of the Site may not function properly.

If you are a potential candidate for employment or a contractor role with Aviben, we may have received your personal information from third parties such as recruiters or external websites. We will use the personal information we receive to contact you about a potential opportunity or in evaluating your candidacy.

When you create a User ID, upload content, connect to any of our services, contact us, or participate in an online survey or benefit program, we may collect a variety of information, including your name, mailing address, email address, phone number, device identifier, IP address, location information, or financial information.

When you share information about others such as a trusted contact, Aviben may collect the information you provide about those people such as name, mailing address, email address, and phone number. Aviben will use this information to respond to your requests, provide relevant services or products, or for anti-fraud purposes.

In certain situations we may ask for a government issued ID or social security number including when setting up a new benefit account or as required by law.

What we do with your personal information

We may use your personal information, such as address or email address, to keep you posted on Aviben's latest services, promotions, or upcoming events. If you do not want to be on our mailing list for these items, you can opt out at anytime by sending us a written request.

We also use personal information to help develop, improve, update, and operate our services, content, and advertising. We may also use personal information internally for things such as data analysis and research to improve Aviben's services, products, and customer communications.

Additionally, we use your personal information for loss prevention, anti-fraud, network security, and account security only when we have assessed that it is strictly necessary to protect our customers or our services.

We may use your personal information to verify identity and to determine appropriate services. For example, we may use date of birth to determine benefit eligibility. As another example, we may validate the information provided by you when creating a User ID with a third party for security and fraud prevention purposes.

We may use your personal information for compliance with Aviben's legal obligations, such as to satisfy a contract to which you are a party, either directly or indirectly, in order to protect your best interests, or when it is necessary for the purposes of the legitimate interests pursued by Aviben or a third party to whom it may be necessary to disclose information.

We may use your personal information to send important disclosures and notices required by law. Because this information is required of Aviben, you may not opt out of receiving these communications. If you apply for a position at Aviben or we receive your information in relation to a potential role at Aviben, we may use your information to evaluate and contact you.

Nonpersonal information collection and uses

We collect certain data in a form that does not, on its own, enable direct association with any specific person. We may collect, use, transfer, and disclose non-personal information for any purpose. For example, we may collect information such as occupation, income, benefit participation, zip code, area code, school district, unique device identifier, referrer URL, location, and time zone where our services or website is accessed so that we can better understand customer behavior and improve our services, products, and advertising.

We may collect information regarding customer activities on our website and aggregate it to analyze which parts of our website, services, and products are of most interest to consumers.

If we do combine non-personal information with personal information the combined information will be treated as personal information for as long as it remains combined.

How we protect your personal information

We use appropriate security measures for data collection, storage and processing in order to protect against unauthorized access, alteration, disclosure or destruction of your personal information, username, password, transaction information and data stored on our Site. Do not send any confidential information to Aviben through unsecured or unencrypted electronic communications and do not share your user name and password with anybody, as we cannot be responsible for identity theft from a User's actions.

We do not sell, trade, or rent your personal information to others. We may share generic aggregated demographic information not linked to any personal identification information regarding visitors and users with our business partners or trusted affiliates for the purposes outlined above. We may use third

party service providers to help us operate our business and the Site or administer activities on our behalf, such as sending out newsletters, packets or surveys. We may share your general information with these third parties for those limited purposes.

Your Acceptance of These Terms

By using Aviben's services or this Site, you signify your acceptance of this policy. If you do not agree to this policy, please do not use our services or Site. Your continued use of the Site following the posting of changes to this policy will be deemed your acceptance of those changes.

Attachment H

Health Insurance Portability and Accountability Act (HIPAA) Business Associate Requirements

DEFINITIONS

Terms used, but not otherwise defined, in this Schedule shall have the same meaning as those terms are defined in 45 Code of Federal Regulations (CFR) sections 160.103, 164.304, and 164.501. All regulatory references in this Schedule are to Title 45 of the Code of Federal Regulations unless otherwise specified.

- a. **Business Associate.** "Business Associate" shall generally have the same meaning as the term "business associate" at 45 CFR 160.103, and in reference to the parties to this agreement shall mean Contractor.
- b. **Covered Entity.** "Covered entity" shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103, and in reference to the party to this agreement shall mean County.
- c. **HIPAA Rules.** "HIPAA rules" shall mean the Privacy, Security, Breach Notification and Enforcement Rules at 45 CFR part 160 and part 164, as amended and supplemented by Subtitle D of the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009.
- d. **Designated Record Set.** "Designated Record Set" shall have the same meaning as the term "designated record set" in Section 164.501.
- e. **Electronic Protected Health Information.** "Electronic Protected Health Information" (EPHI) means individually identifiable health information that is transmitted or maintained in electronic media; it is limited to the information created, received, maintained or transmitted by Business Associate from or on behalf of Covered Entity.
- f. **Individual.** "Individual" shall have the same meaning as the term "individual" in Section 164.501 and shall include a person who qualifies as a personal representative in accordance with Section 164.502(g).
- g. **Privacy Rule.** "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E.
- h. **Protected Health Information.** "Protected Health Information" (PHI) shall have the same meaning as the term "protected health information" in Section 160.103 and is limited to the information created or received by Business Associate from or on behalf of County.
- i. **Required By Law.** "Required by law" shall have the same meaning as the term "required by law" in Section 164.103.
- j. **Secretary.** "Secretary" shall mean the Secretary of the United States Department of Health and Human Services or his or her designee.

- k. **Breach.** The acquisition, access, use, or disclosure of PHI in violation of the Privacy Rule that compromises the security or privacy of the PHI and subject to the exclusions set forth in Section 164.402. Unless an exception applies, an impermissible use or disclosure of PHI *is presumed* to be a breach, unless it can be demonstrated there is a low probability that the PHI has been compromised based upon, at minimum, a four-part risk assessment:
 - 1. Nature and extent of PHI included, identifiers and likelihood of re-identification;
 - 2. Identity of the unauthorized person or to whom impermissible disclosure was made;
 - 3. Whether PHI was actually viewed or only the opportunity to do so existed;
 - 4. The extent to which the risk has been mitigated.
- l. **Security Rule.** "Security Rule" shall mean the Security Standards for the Protection of Electronic Protected Health Information at 45 CFR Part 160 and Part 164, Subparts A and C.
- m. **Unsecured PHI.** "Unsecured PHI" is protected health information that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary in relevant HHS guidance.
- n. **Security Incident.** "Security Incident" shall mean the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with systems operations in an information system. "Security Incident" includes all incidents that constitute breaches of unsecured protected health information.

OBLIGATIONS AND ACTIVITIES OF CONTRACTOR AS BUSINESS ASSOCIATE

- a. Business Associate agrees to not use or further disclose Protected Health Information other than as permitted or required by the Agreement or as required by law.
- b. Business Associate agrees to use appropriate safeguards to comply with Subpart C of 45 CFR part 164 with respect to EPHI and PHI, and to prevent the use or disclosure of the Protected Health Information other than as provided for by this Agreement.
- c. Business Associate agrees to make uses and disclosures requests for Protected Health Information consistent with minimum necessary policy and procedures.
- d. Business Associate may not use or disclose protected health information in a manner that would violate subpart E of 45 CFR part 164.504 if used or disclosed by Covered Entity.
- e. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate in violation of the requirements of this Agreement.
- f. Business Associate agrees to report to County any use or disclosure of Protected Health Information not authorized by this Agreement.
- g. Business Associate agrees to ensure that any agent, including a subcontractor, to whom it provides Protected Health Information received from, or created or received by Business Associate on behalf of County, agrees to adhere to the same restrictions

and conditions that apply through this Agreement to Business Associate with respect to such information.

- h. If Business Associate has Protected Health Information in a Designated Record Set, Business Associate agrees to provide access, at the request of County, and in the time and manner designated by County, to Protected Health Information in a Designated Record Set, to County or, as directed by County, to an Individual in order to meet the requirements under Section 164.524.
- i. If Business Associate has Protected Health Information in a Designated Record Set, Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that the County directs or agrees to make pursuant to Section 164.526 at the request of County or an Individual, and in the time and manner designed by County.
- j. Business Associate agrees to make internal practices, books, and records relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of County, available to the County at the request of County or the Secretary, in a time and manner designated by the County or the Secretary, for purposes of the Secretary determining County's compliance with the Privacy Rule.
- k. Business Associate agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with Section 164.528.
- l. Business Associate agrees to provide to County or an Individual in the time and manner designated by County, information collected in accordance with Section (k) of this Schedule, in order to permit County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with Section 164.528.
- m. Business Associate shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of EPHI that Business Associate creates, receives, maintains, or transmits on behalf of County.
- n. Business Associate shall conform to generally accepted system security principles and the requirements of the final HIPAA rule pertaining to the security of health information.
- o. Business Associate shall ensure that any agent to whom it provides EPHI, including a subcontractor, agrees to implement reasonable and appropriate safeguards to protect such EPHI.
- p. Business Associate shall report to County any Security Incident within three (3) business days of becoming aware of such incident. Business Associate shall also facilitate breach notification(s) to the appropriate governing body (i.e. HHS, OCR, etc.) as required by law. As appropriate and after consulting with County, Business Associate shall also notify affected individuals and the media of a qualifying breach.

- q. Business Associate understands that it is directly liable under the HIPAA rules and subject to civil and, in some cases, criminal penalties for making uses and disclosures of Protected Health Information that are not authorized by this Attachment, the underlying contract as or required by law.

PERMITTED USES AND DISCLOSURES BY CONTRACTOR AS BUSINESS ASSOCIATE

Except as otherwise limited in this Schedule, Business Associate may use or disclose Protected Health Information to perform functions, activities, or services for, or on behalf of, County as specified in the Agreement; provided that such use or disclosure would not violate the Privacy Rule if done by County.

OBLIGATIONS OF COUNTY

- a. County shall provide Business Associate with the notice of privacy practices that County produces in accordance with Section 164.520, as well as any changes to such notice.
- b. County shall provide Business Associate with any changes in, or revocation of, permission by Individual to use or disclose Protected Health Information, if such changes affect Business Associate's permitted or required uses and disclosures.
- c. County shall notify Business Associate of any restriction to the use or disclosure of Protected Health Information that County has agreed to in accordance with Section 164.522.

PERMISSIBLE REQUESTS BY COUNTY

County 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 so requested by County, unless the Business Associate will use or disclose Protected Health Information for, and if the Agreement provides for, data aggregation or management and administrative activities of Business Associate.

DUTIES UPON TERMINATION OF AGREEMENT

- a. Upon termination of the Agreement, for any reason, Business Associate shall return or destroy all Protected Health Information received from County, or created, maintained, or received by Business Associate on behalf of County, that Business Associate still maintains in any form. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Business Associate. Business Associate shall retain no copies of the Protected Health Information.
- b. In the event that Business Associate determines that returning or destroying Protected Health Information is infeasible, Business Associate shall provide to County notification

of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of Protected Health Information is infeasible, Business Associate shall extend the protections of the Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protection Health Information.

MISCELLANEOUS

- a. **Regulatory References.** A reference in this Schedule to a section in the HIPAA Privacy Rule means the section as in effect or as amended, and for which compliance is required.
- b. **Amendment.** The Parties agree to take such action as is necessary to amend this Schedule from time to time as is necessary for County to comply with the requirements of the Privacy Rule and the Health Insurance Portability and Accountability Act, Public Law 104-191.
- c. **Survival.** The respective rights and obligations of Business Associate under this Schedule shall survive the termination of the Agreement.
- d. **Interpretation.** Any ambiguity in this Schedule shall be resolved in favor of a meaning that permits County to comply with the Privacy Rule.
- e. **Reservation of Right to Monitor Activities.** County reserves the right to monitor the security policies and procedures of Business Associate.

Attachment H

Health Insurance Portability and Accountability Act (HIPAA) Business Associate Requirements

DEFINITIONS

Terms used, but not otherwise defined, in this Schedule shall have the same meaning as those terms are defined in 45 Code of Federal Regulations (CFR) sections 160.103, 164.304, and 164.501. All regulatory references in this Schedule are to Title 45 of the Code of Federal Regulations unless otherwise specified.

- a. **Business Associate.** "Business Associate" shall generally have the same meaning as the term "business associate" at 45 CFR 160.103, and in reference to the parties to this agreement shall mean Contractor.
- b. **Covered Entity.** "Covered entity" shall generally have the same meaning as the term "covered entity" at 45 CFR 160.103, and in reference to the party to this agreement shall mean County.
- c. **HIPAA Rules.** "HIPAA rules" shall mean the Privacy, Security, Breach Notification and Enforcement Rules at 45 CFR part 160 and part 164, as amended and supplemented by Subtitle D of the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009.
- d. **Designated Record Set.** "Designated Record Set" shall have the same meaning as the term "designated record set" in Section 164.501.
- e. **Electronic Protected Health Information.** "Electronic Protected Health Information" (EPHI) means individually identifiable health information that is transmitted or maintained in electronic media; it is limited to the information created, received, maintained or transmitted by Business Associate from or on behalf of Covered Entity.
- f. **Individual.** "Individual" shall have the same meaning as the term "individual" in Section 164.501 and shall include a person who qualifies as a personal representative in accordance with Section 164.502(g).
- g. **Privacy Rule.** "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E.
- h. **Protected Health Information.** "Protected Health Information" (PHI) shall have the same meaning as the term "protected health information" in Section 160.103 and is limited to the information created or received by Business Associate from or on behalf of County.
- i. **Required By Law.** "Required by law" shall have the same meaning as the term "required by law" in Section 164.103.
- j. **Secretary.** "Secretary" shall mean the Secretary of the United States Department of Health and Human Services or his or her designee.
- k. **Breach.** The acquisition, access, use, or disclosure of PHI in violation of the Privacy Rule that compromises the security or privacy of the PHI and subject to the exclusions set forth in Section 164.402. Unless an exception applies, an impermissible use or disclosure of PHI *is presumed* to be a breach, unless it can be demonstrated there is a low

probability that the PHI has been compromised based upon, at minimum, a four-part risk assessment:

1. Nature and extent of PHI included, identifiers and likelihood of re-identification;
 2. Identity of the unauthorized person or to whom impermissible disclosure was made;
 3. Whether PHI was actually viewed or only the opportunity to do so existed;
 4. The extent to which the risk has been mitigated.
- l. **Security Rule.** "Security Rule" shall mean the Security Standards for the Protection of Electronic Protected Health Information at 45 CFR Part 160 and Part 164, Subparts A and C.
- m. **Unsecured PHI.** "Unsecured PHI" is protected health information that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary in relevant HHS guidance.
- n. **Security Incident.** "Security Incident" shall mean the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with systems operations in an information system. "Security Incident" includes all incidents that constitute breaches of unsecured protected health information.

OBLIGATIONS AND ACTIVITIES OF CONTRACTOR AS BUSINESS ASSOCIATE

- a. Business Associate agrees to not use or further disclose Protected Health Information other than as permitted or required by the Agreement or as required by law.
- b. Business Associate agrees to use appropriate safeguards to comply with Subpart C of 45 CFR part 164 with respect to EPHI and PHI, and to prevent the use or disclosure of the Protected Health Information other than as provided for by this Agreement.
- c. Business Associate agrees to make uses and disclosures requests for Protected Health Information consistent with minimum necessary policy and procedures.
- d. Business Associate may not use or disclose protected health information in a manner that would violate subpart E of 45 CFR part 164.504 if used or disclosed by Covered Entity.
- e. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate in violation of the requirements of this Agreement.
- f. Business Associate agrees to report to County any use or disclosure of Protected Health Information not authorized by this Agreement.
- g. Business Associate agrees to ensure that any agent, including a subcontractor, to whom it provides Protected Health Information received from, or created or received by Business Associate on behalf of County, agrees to adhere to the same restrictions and conditions that apply through this Agreement to Business Associate with respect to such information.
- h. If Business Associate has Protected Health Information in a Designated Record Set, Business Associate agrees to provide access, at the request of County, and in the time and manner designated by County, to Protected Health Information in a Designated Record Set, to County or, as directed by County, to an Individual in order to meet the requirements under Section 164.524.

- i. If Business Associate has Protected Health Information in a Designated Record Set, Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that the County directs or agrees to make pursuant to Section 164.526 at the request of County or an Individual, and in the time and manner designed by County.
- j. Business Associate agrees to make internal practices, books, and records relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of County, available to the County at the request of County or the Secretary, in a time and manner designated by the County or the Secretary, for purposes of the Secretary determining County's compliance with the Privacy Rule.
- k. Business Associate agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with Section 164.528.
- l. Business Associate agrees to provide to County or an Individual in the time and manner designated by County, information collected in accordance with Section (k) of this Schedule, in order to permit County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with Section 164.528.
- m. Business Associate shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of EPHI that Business Associate creates, receives, maintains, or transmits on behalf of County.
- n. Business Associate shall conform to generally accepted system security principles and the requirements of the final HIPAA rule pertaining to the security of health information.
- o. Business Associate shall ensure that any agent to whom it provides EPHI, including a subcontractor, agrees to implement reasonable and appropriate safeguards to protect such EPHI.
- p. Business Associate shall report to County any Security Incident within three (3) business days of becoming aware of such incident. Business Associate shall also facilitate breach notification(s) to the appropriate governing body (i.e. HHS, OCR, etc.) as required by law. As appropriate and after consulting with County, Business Associate shall also notify affected individuals and the media of a qualifying breach.
- q. Business Associate understands that it is directly liable under the HIPAA rules and subject to civil and, in some cases, criminal penalties for making uses and disclosures of Protected Health Information that are not authorized by this Attachment, the underlying contract as or required by law.

PERMITTED USES AND DISCLOSURES BY CONTRACTOR AS BUSINESS ASSOCIATE

Except as otherwise limited in this Schedule, Business Associate may use or disclose Protected Health Information to perform functions, activities, or services for, or on behalf of, County as specified in the Agreement; provided that such use or disclosure would not violate the Privacy Rule if done by County.

OBLIGATIONS OF COUNTY

- a. County shall provide Business Associate with the notice of privacy practices that County produces in accordance with Section 164.520, as well as any changes to such notice.
- b. County shall provide Business Associate with any changes in, or revocation of, permission by Individual to use or disclose Protected Health Information, if such changes affect Business Associate's permitted or required uses and disclosures.
- c. County shall notify Business Associate of any restriction to the use or disclosure of Protected Health Information that County has agreed to in accordance with Section 164.522.

PERMISSIBLE REQUESTS BY COUNTY

County 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 so requested by County, unless the Business Associate will use or disclose Protected Health Information for, and if the Agreement provides for, data aggregation or management and administrative activities of Business Associate.

DUTIES UPON TERMINATION OF AGREEMENT

- a. Upon termination of the Agreement, for any reason, Business Associate shall return or destroy all Protected Health Information received from County, or created, maintained, or received by Business Associate on behalf of County, that Business Associate still maintains in any form. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Business Associate. Business Associate shall retain no copies of the Protected Health Information.
- b. In the event that Business Associate determines that returning or destroying Protected Health Information is infeasible, Business Associate shall provide to County notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of Protected Health Information is infeasible, Business Associate shall extend the protections of the Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protection Health Information.

MISCELLANEOUS

- a. **Regulatory References.** A reference in this Schedule to a section in the HIPAA Privacy Rule means the section as in effect or as amended, and for which compliance is required.
- b. **Amendment.** The Parties agree to take such action as is necessary to amend this Schedule from time to time as is necessary for County to comply with the requirements of the Privacy Rule and the Health Insurance Portability and Accountability Act, Public Law 104-191.

- c. **Survival.** The respective rights and obligations of Business Associate under this Schedule shall survive the termination of the Agreement.
- d. **Interpretation.** Any ambiguity in this Schedule shall be resolved in favor of a meaning that permits County to comply with the Privacy Rule.
- e. **Reservation of Right to Monitor Activities.** County reserves the right to monitor the security policies and procedures of Business Associate.