

BUSINESS ASSOCIATE AGREEMENT

This Business Associate Agreement (“BAA”) is entered into by and between _____ (“Covered Entity”) and FDS, Inc. (“Business Associate”) as of the ___ day of _____, 20__ (the “Effective Date”).

RECITALS

- A. **WHEREAS**, _____ is a “Covered Entity” as defined under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and its implementing regulations (collectively, “HIPAA”), as amended by the final regulations promulgated pursuant to the Health Information Technology for Economic and Clinical Health (such regulations, “HITECH”) Act (Division A, Title XIII and Division B, Title IV of Pub. L. No. 111-5) (which was part of the American Recovery and Reinvestment Act of 2009), and FDS, Inc. is a “Business Associate” as defined under HIPAA;
- B. **WHEREAS**, in connection with that certain Agreement(s) (as hereinafter defined), between Covered Entity and Business Associate for Business Associate to provide specific services provided under the Agreement for and on behalf of Covered Entity, Covered Entity may provide Business Associate with Protected Health Information (defined below);
- C. **WHEREAS**, Covered Entity is required by HIPAA to obtain satisfactory assurances that Business Associate will appropriately safeguard all Protected Health Information created, received, maintained, or transmitted by Business Associate on behalf of Covered Entity; and
- D. **WHEREAS**, the parties hereto desire to enter into this BAA to memorialize their obligations with respect to Protected Health Information pursuant to the requirements of HIPAA, including the Privacy Rule (defined below), the Security Rule (defined below) and the Breach Notification Rule (defined below).

NOW, THEREFORE, In consideration of the mutual promises below and the exchange of information pursuant to this BAA, the parties agree as follows:

1. DEFINITIONS

- a. “Agreement” shall mean, collectively, whether one or more, any and all contracts, agreements or documented other arrangements now existing, or hereinafter entered into, between Covered Entity and Business Associate, pursuant to which Business Associate has agreed to provide certain products and/or services to Covered Entity, and, in connection with such products and/or services, may be required to access, create, receive, transmit, maintain, use or disclose Protected Health Information for, or on behalf of, Covered Entity.
- b. “Breach” shall have the meaning given to such term in 45 C.F.R. § 164.402.
- c. “Breach Notification Rule” shall mean the rule related to breach notification for Unsecured Protected Health Information codified at 45 C.F.R. Parts 160 and 164, Subpart D.
- d. “Designated Record Set” shall have the meaning given to such term under the Privacy Rule at 45 C.F.R. § 164.501.

e. “Electronic Protected Health Information” or (“EPHI”) shall have the same meaning given to such term under the Security Rule, including, but not limited to, 45 C.F.R. § 160.103, limited to the information created or received by Business Associate from or on behalf of Covered Entity.

f. “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information, codified at 45 C.F.R. Parts 160 and 164, Subparts A and E.

g. “Protected Health Information” or “PHI” shall have the meaning given to such term under the Privacy and Security Rules at 45 C.F.R. § 160.103, limited to the information created or received by Business Associate from or on behalf of Covered Entity.

h. “Security Rule” shall mean the Security Standards for the Protection of Electronic Protected Health Information, codified at 45 C.F.R. Parts 160 and 164, Subparts A and C.

i. Other capitalized terms used, but not otherwise defined in this BAA, shall have the same meaning as those terms in the Privacy, Security or Breach Notification Rules.

2. **PRIVACY RULE PERMITTED USES AND DISCLOSURES OF BUSINESS ASSOCIATE**

a. Permitted Uses and Disclosures of PHI. Except as provided in Paragraphs (b), (c), (d), (e) and (f) below, Business Associate may only use or disclose PHI to perform functions, activities or services for, or on behalf of Covered Entity, as specified in the Agreement.

b. Use for Management and Administration. Except as otherwise limited in this BAA, Business Associate may, consistent with 45 C.F.R. § 164.504(e)(4), use PHI if necessary (i) for the proper management and administration of Business Associate, or (ii) to carry out the legal responsibilities of Business Associate.

c. Disclosure for Management and Administration. Except as otherwise limited in this BAA, Business Associate may, consistent with 45 C.F.R. § 164.504(e)(4), disclose PHI for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate, provided (i) the disclosure is Required by Law, or (ii) Business Associate obtains reasonable assurances from the person to whom the PHI is disclosed (“Person”) that it will be held confidentially and will be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the Person, and that the Person agrees to immediately notify Business Associate in writing of any instances of which it becomes aware in which the confidentiality of the information has been breached or is suspected to have been breached.

d. Data Aggregation. Except as otherwise limited in this BAA, Business Associate may use PHI to provide Data Aggregation services to Covered Entity as permitted by 42 C.F.R. § 164.504(e)(2)(i)(B).

e. De-Identification. Business Associate may de-identify PHI in accordance with 45 C.F.R. § 164.514(b).

f. Reporting Violations. Business Associate may use PHI to report violations of law to appropriate Federal and State authorities, consistent with 45 C.F.R. § 164.502(j)(1).

3. PRIVACY RULE OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

a. Limitations on Disclosure. Business Associate shall not use or disclose PHI other than as permitted or required by this BAA, the Agreement, or as Required by Law. Business Associate shall not use or disclose PHI in a manner that would violate the Privacy Rule if done by Covered Entity, unless expressly permitted to do so pursuant to the Privacy Rule, the Agreement, and this BAA.

b. Appropriate Safeguards. Business Associate shall use appropriate safeguards to prevent use or disclosure of PHI other than as permitted by the Agreement, this BAA, or as Required by Law.

c. Obligations on Behalf of Covered Entity. To the extent Business Associate carries out an obligation for which Covered Entity is responsible under the Privacy Rule, Business Associate must comply with the requirements of the Privacy Rule that apply to Covered Entity in the performance of such obligation.

d. Mitigation. Business Associate shall mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of the requirements of HIPAA, the Agreement, or this BAA.

e. Reporting of Improper Use or Disclosure. Business Associate shall report to Covered Entity in writing any use or disclosure of PHI not permitted by this BAA promptly after becoming aware of such use or disclosure.

f. Business Associate's Subcontractors. Business Associate shall ensure, consistent with 45 C.F.R. § 164.502(e)(1)(ii), that any Subcontractor that creates, receives, maintains, or transmits PHI on behalf of Business Associate agrees in writing to the same restrictions and conditions that apply through this BAA to Business Associate with respect to such PHI.

g. Access to PHI. Business Associate shall provide access, at the request of Covered Entity, and in the time and manner reasonably designated by Covered Entity, to PHI in a Designated Record Set, to Covered Entity in order for Covered Entity to meet the requirements under the Privacy Rule at 45 C.F.R. § 164.524.

h. Amendment of PHI. Business Associate shall make any PHI contained in a Designated Record Set available to Covered Entity for purposes of amendment pursuant to 45 C.F.R. § 164.526. If an Individual requests an amendment of PHI directly from Business Associate, Business Associate shall notify Covered Entity in writing promptly after receiving such request. Any denial of amendment of PHI maintained by Business Associate shall be the responsibility of Covered Entity.

i. Accounting/Documentation of Disclosures. To the extent applicable, Business Associate agrees to document disclosures of PHI and information related to such disclosures as would be required for Covered Entity to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with the Privacy Rule at 45 C.F.R. § 164.528. Business Associate shall provide Covered Entity with such documentation upon the request of Covered Entity; if Business Associate receives a request for an accounting directly from an Individual, Business Associate shall notify Covered Entity of such request and subsequently provide Covered Entity the aforementioned documentation.

j. Governmental Access to Records. Business Associate shall make its internal practices, books and records, including policies and procedures, relating to the use and disclosure of PHI received from, or created or received by Business Associate on behalf of Covered Entity available to the Secretary for purposes of determining Covered Entity's compliance with the Privacy Rule as applicable.

k. Minimum Necessary. Business Associate shall only request, use and disclose the Minimum Necessary amount of PHI necessary to accomplish the purpose of the request, use or disclosure.

4. **SECURITY RULE OBLIGATIONS OF BUSINESS ASSOCIATE**

a. Compliance with the Security Rule. Business Associate agrees to comply with the Security Rule with respect to Electronic Protected Health Information and have in place reasonable and appropriate Administrative, Physical, and Technical Safeguards to protect the Confidentiality, Integrity, and Availability of EPHI and to prevent the use or disclosure of EPHI other than as permitted by the Agreement and this BAA or as Required by Law.

b. Subcontractors. Business Associate shall ensure that any Subcontractor that creates, receives, maintains, or transmits EPHI on behalf of Business Associate agrees in writing to comply with the Security Rule with respect to such EPHI.

c. Security Incident. Business Associate shall report any successful Security Incident promptly upon becoming aware of such incident. Separate from the requirements related to Security Incident reporting, Business Associate shall also make the reports set forth below in Section 5, related to a Breach of Unsecured PHI. For purposes of this BAA, an “unsuccessful” Security Incident is an unsuccessful attempt to breach the security of Business Associate’s systems that Business Associate determines was targeted at Business Associate’s systems storing Covered Entity’s EPHI, and includes general “pinging” or “denial of service” attacks that are not determined to have been directed at such EPHI, and such unsuccessful Security Incidents shall be deemed as having been reported.

5. **BREACH NOTIFICATION RULE OBLIGATIONS OF BUSINESS ASSOCIATE**

a. Notification Requirement. To the extent Business Associate accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses or discloses Unsecured PHI, it will, following the discovery of a Breach of such information, notify Covered Entity of such Breach without unreasonable delay and in no case later than 60 days after discovery of the Breach.

b. Discovery of Breach. For purposes of reporting a Breach to Covered Entity, the discovery of a Breach shall occur on the first day on which such Breach is known to Business Associate or, by exercising reasonable diligence, would have been known to or suspected by the Business Associate. Business Associate will be considered to have had knowledge of a Breach if the Breach is known, or by exercising reasonable diligence would have been known to any person (other than the person committing the Breach) who is an employee, officer or agent of the Business Associate.

c. Contents of Notification. Any notice referenced above in paragraph 5(a) of this BAA will include, to the extent known to the Business Associate, the identification of each individual whose Unsecured PHI has been, or is reasonably believed by Business Associate to have been accessed, acquired, used, or disclosed during such Breach. Business Associate will also provide to Covered Entity other available information that the Covered Entity is required to include in its notification to the individual pursuant to the Breach Notification Rule.

d. Reporting. In the event Covered Entity is required to circulate any notices to the Secretary of HHS, affected individuals, law enforcement, media outlets or otherwise, Covered Entity shall provide Business Associate with a copy of the notice intended for circulation.

6. TERM AND TERMINATION

a. Term. The term of this BAA shall commence as of the Effective Date, and shall terminate when all of the PHI provided by Covered Entity to Business Associate, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity or, if it is infeasible to return or destroy PHI, protections are extended to such information, in accordance with the provisions of this Section 6.

b. Termination for Cause. Upon Covered Entity's knowledge of a material breach of the terms of this BAA by Business Associate, Covered Entity shall:

(i) Provide an opportunity for Business Associate to cure, and, if Business Associate does not cure the breach within forty-five (45) days, Covered Entity may immediately terminate this BAA;

(ii) Immediately terminate this BAA if Covered Entity has determined that (a) Business Associate has breached a material term of this BAA, and (b) cure is not possible; or

(iii) Immediately terminate this BAA if the Agreement has been terminated.

c. Termination by Business Associate. Business Associate shall have the right to terminate the BAA under the same terms and conditions as set forth above with respect to Covered Entity's right to terminate.

d. Effect of Termination.

(i) Except as provided in paragraph (ii) of this Section 6(d), upon termination of this BAA for any reason, Business Associate shall return or destroy all PHI received from Covered Entity, or created or received by Business Associate on behalf of Covered Entity, and shall retain no copies of the PHI except as required by the Agreement.

(ii) In the event that Business Associate determines that returning or destroying the PHI is infeasible, Business Associate shall provide to Covered Entity notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the parties that return or destruction of PHI is infeasible, Business Associate shall extend the protections of this BAA to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such PHI.

7. COVERED ENTITY OBLIGATIONS

a. To the extent that Covered Entity has agreed to further limitations on uses and disclosures of PHI, Covered Entity shall notify Business Associate of such additional restrictions, including any limitation(s) in Covered Entity's notice of privacy practices that are produced in accordance with 45 C.F.R. § 164.520 (as well as any changes to that notice), to the extent that such limitation(s) may affect Business Associate's use or disclosure of PHI.

b. Covered Entity shall promptly provide Business Associate with any changes in, or revocation of, permission by an Individual to use or disclose PHI, to the extent that such changes affect Business Associate's use or disclosure of PHI.

c. Covered Entity shall promptly notify Business Associate of any restriction to the use or disclosure of PHI that Covered Entity has agreed to in accordance with 45 C.F.R. § 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of PHI.

d. Covered Entity shall provide Business Associate only the Minimum Necessary amount of PHI for Business Associate to accomplish the intended purpose of the disclosure.

8. LIMITATION OF LIABILITY

- a. In no event shall either Party or its respective parent, subsidiary, Affiliate, successor or assign be liable for indirect, special, consequential or punitive damages (including loss of profits, loss of data, or damage to business), even if that Party has been advised of the possibility of such damages; and
- b. Liability of Business Associate in any and all categories and for any and all causes arising out of this Agreement or out of any services performed under the Service Agreement shall not in the aggregate exceed the total monthly service charges paid to Business Associate by the specific Covered Entity seeking recovery during the preceding twelve (12) month period.

9. MISCELLANEOUS

a. Regulatory References. A reference in this BAA to a section in the Privacy, Security, or Breach Notification Rule means the section as in effect or as amended, and for which compliance is required.

b. Survival. The respective rights and obligations of Business Associate under Section 6(d) of this BAA shall survive the termination of the BAA.

c. No Third Party Beneficiaries. Nothing express or implied in this BAA is intended to confer, nor shall anything herein confer, upon any person other than Covered Entity, Business Associate and their respective successors or assigns, any rights, remedies, obligations or liabilities whatsoever.

d. Amendment. The parties agree to take such action as is necessary to amend this BAA from time to time as is necessary for the parties to comply with the requirements of the Privacy, Security or Breach Notification Rule and HIPAA.

e. Effect on Agreement. Except as specifically required to implement the purposes of this BAA, or to the extent inconsistent with this BAA, all other terms of the Agreement shall remain in force and effect.

f. Interpretation. The provisions of this BAA shall prevail over any provisions in the Agreement that may conflict or appear inconsistent with any provision in this BAA. Any ambiguity in this BAA shall be resolved to permit the parties to comply with the Privacy, Security, and Breach Notification Rules, and HIPAA.

g. Governing Law. This BAA shall be governed by and construed in accordance with the laws of the State of Texas. The Parties agree that any appropriate state court sitting in Tarrant County, Texas or any Federal Court sitting in the Northern District of Texas, shall have exclusive jurisdiction of any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

h. Assignment. The Parties agree that either may assign this Agreement to any parent, subsidiary, Affiliate or successor in interest (including a successor in interest to substantially all the assets of the assigning Party). Except as noted, neither Party may assign this Agreement, absent written consent of the other Party, which shall not be unreasonably withheld. Any attempted assignment without such consent shall be void.

i. Counterparts. This BAA may be executed in multiple counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Facsimile or electronic (PDF) signatures shall be treated as original signatures. This BAA shall be binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected on this BAA as the signatories thereto.

IN WITNESS WHEREOF, the parties hereto have duly executed this BAA as of the Effective Date.

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| Covered Entity _____ | FDS, Inc. |
| Sign _____ | Sign _____ |
| Print _____ | Print <u>Tracy Ward</u> |
| Title _____ | Title <u>Chief Administrative Officer</u> |
| Date _____ | Date _____ |
| NCPDP _____ | |
| NPI _____ | |
| Phone _____ | |