July 2014

TRANSIT COOPERATIVE RESEARCH PROGRAM
Sponsored by the Federal Transit Administration

Responsible Senior Program Officer: Gwen Chisholm Smith

# Legal Research Digest 46

## HOW THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) AND OTHER PRIVACY LAWS AFFECT PUBLIC TRANSPORTATION OPERATIONS

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, The Thomas Law Firm, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

### The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

### Applications

This research project examines privacy legal issues in public transportation and para-transit services arising from the Health Insurance Portability and Accountability Act (HIPAA) and other privacy laws. Public transportation agencies, including para-transit services, maintain some medical information about their clients. These include application materials filed by clients or their health professionals during the eligibility process; records created during the review of these applications; and databases, updated as service is provided, which record customers' destinations, including clinics, hospitals, doctors' offices, and dialysis centers.

HIPAA includes a privacy rule that provides federal protections for personal health information held by covered entities. According to guidance available from the United States Department of Health and Human Services, a "covered entity" is

- a health care provider that conducts certain transactions in electronic form,
- a health care clearinghouse, or
- a health plan.

On the face of it, transit agencies that provide public transportation, including para-transit services, would not normally be covered entities and the HIPAA privacy rule would not apply to them. However, many transit agencies have been advised by attorneys that HIPAA does apply, at least for certain types of information. Regardless of whether HIPAA itself applies, various state laws or other federal laws also may limit transit agencies' ability to share sensitive health-related information.

Differing understandings of what HIPAA requires have been known to limit the ability to coordinate Medicaid and Americans with Disabilities Act para-transit trips. There is also an issue of whether basic trip information like origin, destination, date, time, and the need for an accessible vehicle is medical information that triggers HIPAA requirements.

This digest should be helpful to attorneys, transit and para-transit providers, medical providers, planners, transit administrators, and the community at large.

TRANSPORTATION RESEARCH BOARD
*OF THE NATIONAL ACADEMIES*

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# HOW THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) AND OTHER PRIVACY LAWS AFFECT PUBLIC TRANSPORTATION OPERATIONS

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## I. INTRODUCTION

This digest analyzes the Health Insurance Portability and Accountability Act of 1996[1] (HIPAA) and other privacy laws as they affect transit agencies that possess health information about their patrons usually to qualify for paratransit services. Paratransit, an alternative to fixed route transit service, includes the specific type of transit required by the Americans with Disabilities Act[2] (ADA), as well as all other demand-responsive transit services described in Section IX of this digest.[3] Whereas fixed route service provides regular service along prescribed routes with designated stops or stations, paratransit service responds to specific calls or requests to transport patrons to their destinations, *i.e*., origin-to-destination transportation service. As defined in title 49 of the Code of Federal Regulations (C.F.R.), paratransit service provides "'comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems.'"[4] The ADA "put all transit operators into the paratransit business" that receive federal financial assistance administered by the Department of Transportation.[5]

In providing paratransit service transit agencies may receive and maintain health information on patrons in connection with applications, certifications by physicians, and requests for service, as well as create databases that include the identity of patrons and their destinations and the purpose of, or reason for, requested service. Moreover, state and local government agencies may contract with a transit agency to serve as a broker to provide coordinated transportation services. Coordinated transportation services typically provide service to ADA-patrons, Medicaid-recipients, and beneficiaries of other federal and state programs. A patron or his or her agent may provide health information directly to a transit agency or authorize a covered entity (*e.g.,* a health care provider) to disclose health information to a transit agency. Of primary concern for this digest is whether the privacy and security rules established by HIPAA apply to transit agencies possessing health information on their patrons.

In brief, this digest concludes that a transit agency is not subject to HIPAA's privacy and security rules because of the need to have health information provided by patrons (or an entity covered by HIPAA that patrons authorize to provide to the agency) to qualify for paratransit services. A transit agency is subject to HIPAA only if the transit agency meets HIPAA's definition of a business associate (or is a subcontractor of a business associate subject to HIPAA) under 45 C.F.R. § 160.103 of the HIPAA rules. A person or entity meeting HIPAA's definition of a business associate of a person or entity covered by HIPAA (*e.g*., a health care provider) must have a business associate agreement in accordance with 45 C.F.R. § 164.504(e)(2) of the HIPAA rules. Even though some transit agencies have business associate and subcontractor agreements that state that HIPAA applies to the agreements, it does not appear that transit agencies meet HIPAA's definitions of a business associate or subcontractor of one. There

[1] Pub. L. No. 104-171, 110 Stat. 1936 (1996).

[2] Pub. L. No. 101-336, 104 Stat. 327 (1990).

[3] Roy Lave & Rosemary Mathias, *State of the Art of Paratransit*, MILLENNIUM PAPERS, Transportation Research Board of the National Academies, Washington, D.C., hereinafter referred to as "Lave & Mathias," available at http://onlinepubs.trb.org/onlinepubs/millennium/00107.pdf.

[4] GOV'T ACCOUNTABILITY OFFICE, GAO-13-17, *ADA Paratransit Services: Demand Has Increased, but Little is Known about Compliance*, at 1 (Nov 15, 2012) (*quoting* 49 C.F.R. § 37.3 in letter, dated Nov. 15, 2012, to the Hon. Tim Johnson and the Hon. Richard C. Shelby, Committee on Banking, Housing, and Urban Affairs, United States Senate), hereinafter referred to as "GAO Paratransit Report," available at http://www.gao.gov/products/GAO-13-17.

[5] Lave & Mathias, *supra* note 3, at 1 (stating that the ADA requires "unconstrained ADA complementary paratransit service for eligible persons with disabilities who cannot use fixed-route transit"); *see* 49 C.F.R. part 27 and § 27.7(a).

are many persons and entities in the United States that receive or have individuals' health information, but are not subject to HIPAA.

Even if HIPAA does not apply to a person or entity that receives health information, some state statutes impose an obligation on a person or entity not to disclose health information without an individual's reauthorization of its disclosure. Even in the absence of a state statute, persons or entities that disclose an individual's health information may be subject to civil claims under state constitutional or statutory provisions or at common law for invasions of privacy and other claims in tort or for breach of contract.

The first seven sections of this digest discuss HIPAA and whether various entities are subject to HIPAA's privacy and security provisions applicable to the protection of protected health information (PHI) as defined by HIPAA. Part II of this digest discusses HIPAA and the most recent amendments to the Act by the Health Information Technology for Economic and Clinical Health Care (HITECH) Act of 2009[6] that was included in the American Recovery and Reinvestment Act of 2009 (ARRA).[7] This digest discusses the most recent final rule (January 2013) issued by the United States Department of Health and Human Services (HHS) on HIPAA in response to HITECH.

This digest explains HIPAA's application to covered entities, business associates of covered entities, subcontractors of business associates, and hybrid entities (Sections III to VI). This digest analyzes how PHI is defined by HIPAA and discusses HIPAA's Privacy Rule and Security Rule as defined by HHS in its most recent final rule (Sections VII and VIII). This digest discusses whether a transit agency is subject to HIPAA either by receiving health information from patrons or by receiving PHI from a covered entity (Section IX).

This digest discusses other important aspects of HIPAA including whether PHI must be produced in response to a subpoena, discovery request, or a request under a freedom of information act (FOIA) or similar law (Section X). Other sections of this digest explain when HIPAA preempts state law (Section XI); the administrative enforcement of HIPAA by HHS (Section XII); and whether judicial claims under the United States Constitution or a federal statute may be brought for a wrongful use or disclosure of PHI (Section XIII). This digest concludes the discussion of HIPAA with a brief literature review of HIPAA (Section IX).

Because the law on the privacy of health information is "highly fragmented,"[8] the remainder of the digest discusses the privacy of health information under other federal and state laws. This digest analyzes the ADA and regulations (Section XV) and other federal laws' applicability to the privacy of health information (Section XV and Appendix A).

This digest highlights state laws that prohibit the disclosure of health information without an individual's reauthorization of disclosure (Sections XVI and XVII) and discusses civil actions that may be brought under state law for the wrongful use or disclosure of one's health information (Section XVII).

This digest also discusses whether HIPAA applies to registries or databases that transit agencies may want to create on patrons and their health requirements for use during emergency operations (Section XVIII).

Finally, to the extent not discussed elsewhere herein, this digest discusses the industry standards and best practices used by transit agencies to protect the privacy of patrons' health information (Section XIX).

A survey was used to determine if transit agencies receive health information from patrons or receive PHI from covered entities or a business associate of a covered entity. The survey was not conducted for the purpose of an empirical study or analysis. Rather, the survey sought to determine if transit agencies have health information on patrons and how they acquire and protect the information. The transit agencies' responses to the survey are discussed throughout this digest and in Section XIX.

Of 48 transit agencies that responded to the survey, 17 agencies reported having health information on individuals for whom the agencies provide transportation to doctors, hospitals, clinics, or other health care providers and locations.[9] As

[6] Pub. L. No. 111-5, tit. XIII, 123 Stat. (2009), 115, 42 U.S.C. § 17921.

[7] Pub. L. No. 111-5, 123 Stat. 115 (2009).

[8] Eric S. Pasternack, *HIPAA in the Age of Electronic Health Records*, 41 RUTGERS L. J. 817, 830 (2010), hereinafter referred to as "Pasternack."

[9] East Bay Paratransit Consortium (EBPC) on behalf of AC Transit, Oakland, CA; Greater Attleboro-Taunton Regional Transit Authority (GATRA), Taunton, MA; Greater New Haven Transit District (New Haven Transit), Hamden, CT; Hillsborough Area Regional Transit Authority (HART), Tampa, FL; Kitsap Transit (Kitsap), Bremerton, WA; Knoxville Area Transit (KAT), Knox-

noted, some transit agencies serve as direct providers or as brokers and business associates or as their subcontractors to provide transportation pursuant to a contract with a state or local agency that coordinates transportation services for persons or entities covered by HIPAA. Follow-up interviews were conducted with several agencies that responded to the survey. Some agencies stated that they are a business associate (or a subcontractor of a business associate) of a covered entity and provided a copy of their business associate or subcontractor agreements that are discussed in this digest and included in Appendix C.

## II. HIPAA, THE HITECH AMENDMENTS TO HIPAA, AND HHS'S FINAL RULE

HIPAA[10] authorized the Secretary of HHS to issue regulations to implement the administrative requirements of HIPAA.[11] On December 28, 2000, HHS published regulations that included HIPAA's Privacy Rule.[12] HHS's regulations are used to determine the responsibilities of covered entities, business associates, and others that are subject to HIPAA under the Privacy Rule, as well as HIPAA's Security Rule[13] discussed in Sections VIII.B. and VIII.C of this digest.[14]

In 2009 Congress enacted HITECH to promote the widespread adoption and interoperability of health information technology. HITECH "relate[s] to health information technology (HIT) and incentives to adopt electronic health record (EHR) systems."[15] In amending HIPAA, however, HITECH made the requirements of HIPAA's Privacy Rule and Security Rule directly applicable to business associates of covered entities and to subcontractors of business associates.[16] HITECH also modified certain provisions of the Social Security Act pertaining to the HIPAA rules and required other modifications to the rules.[17]

On January 25, 2013, HHS issued its final rule entitled "Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; [and] Other Modifications to the HIPAA Rules."[18]

HITECH and HHS's final rule strengthens HIPAA's privacy and security protections for individuals' PHI maintained in electronic health records and other formats;[19] make business associates of covered entities, discussed in Section IV of this digest, directly liable under HIPAA for failure to comply with the HIPAA Privacy and Security

ville, TN; Manchester Transit Authority (MTA), Manchester, NH; Memphis Area Transit Authority (MATA), Memphis, TN; Metro Transit (Metro Transit), Madison, WI; North County Transit District (North County Transit), Oceanside, CA; Pierce County Transportation Benefit Area Authority (Pierce Transit), Lakewood, WA; Riverside Transit Agency (Riverside), Riverside, CA; Salem-Keizer Transit (Salem-Keizer), Salem, OR; Space Coast Area Transit (Space Coast), Cocoa, FL; Utah Transit Authority (Utah Transit), Salt Lake, UT; Votran (Volusia County) (Votran), Daytona Beach, FL; and Whatcom Transportation Authority (Whatcom), Bellingham, WA.

[10] 42 U.S.C. §§ 17921 to 17953.

[11] *See* HIPAA, Pub. L. No. 104-191, §§ 261-264, 110 State 1936, 2024 *et. seq.,* and 42 U.S.C. §§ 1320d-1320d-8 (2013) (Administrative Simplification); *see* 45 C.F.R. part 160 (2013) (General Administrative Requirements); 45 C.F.R. part 162 (2013) (Administrative Requirements); and 45 C.F.R. part 164 (2013) (Security and Privacy).

[12] U.S. DEP'T OF HEALTH AND HUMAN SERVICES SUMMARY OF THE HIPAA PRIVACY RULE, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html.

[13] Stephen K. Phillips, *A Legal Research Guide to HIPAA*, 3 J. HEALTH & LIFE SCI. L. 134 (2010), hereinafter referred to as "Phillips."

[14] The privacy regulations appear in 45 C.F.R. §§ 160 and 164, subparts A (§§ 164.102–164.106) and E (§§ 164.500–164.534). The security regulations appear in 45 C.F.R. §§ 160 and 164, subparts A (§§164.102-164.106) and C (§§ 164.400-164.414).

[15] ARRA, Pub. L. 111-5, Section 13001, 123 Stat. 115 (2009), 42 USC 201. *See also*, Lisa Acevedo & Jennifer L. Rathburn, *Medical Privacy Enforcement and Penalties: HIPAA Gets Teeth*, available at http://www.quarles.com/files/FileControl/c0df14d7-6e02-44e6-8b71-c6080df99f71/7483b893-e478-44a4-8fed-f49aa917d8cf/Presentation/File/Medical_Privacy_Enforcement.pdf, available at *2 (Thomson Reuters, Aspatore, Sep. 1, 2011), hereinafter referred to as "Acevedo & Rathburn."

[16] 42 U.S.C. § 17934 (2013) (application of privacy provisions and penalties to business associates of covered entities); 42 U.S.C. § 17931 (2013); 78 Fed. Reg. 5566, 5568 (Jan. 25, 2013) (HIPAA final rule).

[17] 78 Fed. Reg. 5567.

[18] *Id.* at 5566.

[19] *Id.*

Rules;[20] and modify the rules for giving notice of a breach of unsecured PHI.[21] The final rule generally prohibits the sale of PHI without an individual's authorization and includes more stringent limitations on the use and disclosure of PHI for marketing and fundraising purposes.[22] In addition, the final rule expands individuals' rights to receive electronic copies of their health information and requires covered entities to modify and redistribute notices of their privacy practices.

The final rule makes important changes regarding compliance with HIPAA by covered entities, business associates, and others that are subject to HIPAA and amends HIPAA's provisions on enforcement by providing for stiffer civil money penalties (CMP) and criminal penalties, hereinafter the Enforcement Rule.[23] For example, under 45 C.F.R. § 160.402(c), a covered entity is liable for a CMP for a violation based on an "act or omission of any agent of the covered entity, including a workforce member or business associate, acting within the scope of the agency."[24] It should be noted that the term "workforce" means more than an entity's employees. HIPAA defines the term "workforce" to mean employees, *volunteers*, trainees, *and other persons* serving under the direct control of a covered entity or business associate regardless of whether the covered entity or business associate is paying them (emphasis added).[25] HITECH subjects business associates to the same civil and criminal penalties that apply to covered entities.[26]

As a result of HITECH, state attorneys general are authorized to bring civil actions for damages on behalf of residents in their states for violations of HIPAA.[27] Consequently, the federal and state governments have more means to enforce HIPAA and to enforce the law against more entities and persons.[28] HITECH's amendments to HIPAA "encourage[d] companies, and not just health care companies, to reevaluate how they use and disclose personal health information."[29]

Although HHS's final rule was effective as of March 26, 2013, covered entities and business associates had 180 days beyond the effective date to become compliant.[30] The Enforcement Rule was effective as of the date the final rule became effective.[31]

## III. HIPAA'S APPLICATION TO COVERED ENTITIES

HIPAA applies only to covered entities, their business associates, subcontractors of business associates, and hybrid entities having health care components as discussed hereafter. Under

[20] *See* HITECH Act, Pub. L. No. 111-5, 123 Stat. 115, 260 (2009).

[21] The term "unsecured protected health information" means PHI "not secured through the use of a technology or methodology." HITECH Act, Pub. L. No. 111-5 § 13402(h), 123 Stat. 115 (2009) and 42 U.S.C. § 17932(h). *See also* 78 Fed. Reg. 5639.

[22] The term "marketing" means "to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service." 42 C.F.R. § 164.501 (2013). *See* Anna L. Spencer, *Responding to Challenging Aspects of HITECH'S Modifications to HIPAA*, at 131, INSIDE THE MINDS: RECENT DEVELOPMENTS WITH HIPAA, Thomas Reuters, Aspatore (2010), hereinafter referred to as "Spencer."

[23] HITECH Act, Pub. L. No. 111-5 § 13410(d), 123 Stat. 115 (2009) and 42 U.S.C. § 17939 (2013); U.S. Dep't of Health and Human Services, Office of the Secretary, 45 C.F.R. part 160, HIPAA Administrative Simplification: Enforcement, Interim Final Rule, 74 Fed. Reg. 56123 (effective November 30, 2009) (adopted to conform the enforcement of HIPAA regulations to statutory revisions made by HITECH); *see* 45 C.F.R. §§ 160.400, 160.402, 160.404, 160.406, 160.408, 160.410 (2013). *See also* Phillips, *supra* note 13, at 134.

[24] 45 C.F.R. § 160.402(c)(1) (2013). *See also* Phillips, *supra* note 13, at 134.

[25] 45 C.F.R. § 160.103 (definition of "workforce").

[26] 42 U.S.C. § 17934(c) (2013) (liability of business associates for privacy violations); 42 U.S.C. § 17931(b) (2013) (liability of business associates for security violations). *See* 45 C.F.R. § 160.402(c)(2) (2013) (stating that "[a] business associate is liable, in accordance with the Federal common law of agency, for a civil money penalty for a violation based on the act or omission of any agent of the business associate, including a workforce member or subcontractor, acting within the scope of the agency"). *See also* Acevedo & Rathburn, *supra* note 15, at *3.

[27] HITECH Act Pub. L. 111-5 § 13410(d), 123 Stat. 115 (2009) and 42 U.S.C. § 1320d-5(d). *See also* Acevedo & Rathburn, *supra* note 15, at *3.

[28] Kelly M. Jolley & Kathleen G. Chewning, *The New HIPAA Privacy and Security Rules are Here: What do Your Clients Need to Know?* 21 S. CAROLINA LAWYER 16, 18 (2010), hereinafter referred to as "Jolley & Chewning." HHS's final rule also implements § 105 of title I of the Genetic Information Nondiscrimination Act, Pub. L. No. 110-233, 122 Stat. 881 (2008), by prohibiting most health plans from using or disclosing genetic information for underwriting purposes. *See* 42 U.S.C. § 1320-d (9) (2013); 78 Fed. Reg. 5566.

[29] Jolley & Chewning, *supra* note 28, at 17-18.

[30] 78 Fed. Reg. 5569; 45 C.F.R. § 160.105 (2013).

[31] *Id.*

HIPAA, the term covered entities means only (1) health plans, (2) health care clearinghouses, and (3) health care providers "who transmit[] any health information in electronic form in connection with a transaction covered by this subchapter."[32] Transit agencies thus are not covered entities. HIPAA does not apply to transit agencies unless, as discussed in Sections IV.A and IX.C and D of this digest, they meet HIPAA's criteria for being a business associate of a covered entity. Regardless of whether transit agencies meet HIPAA's definition of a business associate, some transit agencies have contracts to provide transportation to covered entities, which stipulate that HIPAA applies to the agreements.

As defined by HIPAA, first, a health plan means an individual or group plan that provides or pays the cost of medical care. Health plans include group health plans; issuers of health insurance; health maintenance organizations; part A or part B of the Medicare program; issuers of Medicare supplemental policies; the Medicaid program; issuers of certain long-term care policies; employee welfare benefit plans; the health care program for the uniformed services under title 10 of the United States Code; the veteran's health care program;[33] the Federal Employees Health Benefits Program; other plans or programs identified in 45 C.F.R. § 160.103; and any other individual or group plans that provide or pay for the cost of medical care.[34]

Second, the definition of covered entities includes group health plans such as employee welfare benefit plans, both insured and self-insured plans, to the extent that they provide "medical care…including items and services paid for as medical care, to employees or their dependents directly or through insurance, reimbursement, or otherwise" that have 50 or more participants or that are "administered by an entity other than the employer that established and maintains the plan."[35]

Third, a covered entity includes a "health care provider who transmits any health information in electronic form or in connection with a transmission covered by this subchapter."[36] A health care provider means a provider of medical or health services and "any other person or organization who furnishes, bills, or is paid for health care in the normal course of business."[37] (citations omitted) Doctors, clinics, psychologists, dentists, chiropractors, nursing homes, and pharmacies are health care providers.[38]

As stated, only covered entities, their business associates, subcontractors of business associates, and hybrid entities are subject to HIPAA. As HHS acknowledges, many entities have or receive PHI without being subject to HIPAA.[39] HHS does not have the authority to regulate employers, life insurance companies, or even public agencies that provide social security or welfare benefits.[40] Even though the Social Security Administration collects medical and health information, it is not a covered entity and is not subject to HIPAA's Privacy Rule discussed in Section VIII of this digest.[41] As one article states,

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[32] 45 C.F.R. § 164.104(a) (2013).

[33] The Veterans Health Administration's (VHA) treatment activities meet the definition of a covered health care provider. The VHA also is a designated health plan as to care provided or paid for under chapter 17 of title 38 of the United States Code. The Veterans Benefits Administration (VBA) is not a covered entity. Thus, with one exception, "the Privacy Rule does not apply to protected individually identifiable health information once it is received by VBA." Department of Veterans Affairs, Memorandum by the General Counsel, at 3-4 (March 17, 2003), hereinafter referred to as "Veterans Administration Legal Memorandum," available at http://www.va.gov/ogc/docs/ADV3-2003.pdf . The VBA does "not need a Privacy Rule authorization to disclose health information received from VHA or another covered entity." *Id*. at 7.

[34] 45 C.F.R. § 160.103 (2013). *See id*. for programs and plans that are excluded from the definition of a health plan.

[35] 45 C.F.R. § 164.103 (2103) (definition of group health plan).

[36] 45 C.F.R. § 160.103 (2013) (definition of health care provider).

[37] 45 C.F.R. § 160.103 (2013).

[38] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html.

[39] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, available at http://www.hhs.gov/ocr/privacy/hipaa/faq/covered_entities/366.html.

[40] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html.

[41] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/businessassociates.html.

> The Privacy Rule includes the following exceptions to the business associate standard…The collection and sharing of protected health information by a health plan that is a public benefits program, such as Medicare, and an agency other than the agency administering the health plan, such as the Social Security Administration, that collects protected health information to determine eligibility or enrollment, or determines eligibility

> [E]mployers often house large amounts of health information, but generally employers are not covered entities. Others parties such as advertising companies, life insurance companies, data-mining companies, financial institutions, home health agencies, hospices, intermediate care facilities, and social networking sites do not seem to be covered by the privacy rule.[42]

The courts in several cases have reenforced the position that the scope of covered entities subject to HIPAA is limited to health plans, health care clearinghouses, and health care providers; thus, governments and their agencies (such as law enforcement agencies) that do not come within the meaning of covered entities are not subject to HIPAA regardless of whether they obtain PHI from a covered entity such as a hospital.[43]

## IV. HIPAA'S APPLICATION TO BUSINESS ASSOCIATES OF COVERED ENTITIES

### A. Definition of a Business Associate

A business associate is one who performs activities, functions, or services on behalf of a covered entity that involve the use or disclosure of PHI discussed in Section IV.B of this digest.[44] Previously, if a covered entity's business associate failed to meet its obligations, the business associate's liability was limited to a breach of contract claim by the covered entity pursuant to the business associate agreement between them.[45] However, since HITECH's enactment, business associates are now directly liable under HIPAA's enforcement provisions.[46]

As defined in § 160.103, a business associate of a covered entity is a person (a term that includes a partnership, corporation, professional association or corporation, or other public or private)[47] who:

> (i) *On behalf of such covered entity*…creates, receives, maintains, or transmits protected health information for a function or activity regulated by this subchapter, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 3.20, billing, benefit management, practice management, and repricing; or
>
> (ii) Provides…legal, actuarial, accounting, consulting, data aggregation…, management, administrative, accreditation, or financial services to or for such covered entity…where the provision of the service involves the disclosure of protected health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.[48]

HHS has provided examples of persons or entities that may be business associates of covered entities:

- A third-party administrator that assists a health plan with claims processing.
- A CPA firm whose accounting services to a health care provider involves access to protected health information.
- An attorney whose legal services to a health plan involve access to protected health information.
- A consultant that performs utilization reviews for a hospital.
- A health care clearinghouse that translates a claim from a nonstandard format into a standard transaction on behalf of a health care provider and forwards the processed transaction to a payer.
- An independent medical transcriptionist that provides transcription services to a physician.

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or enrollment, for the government program, where the joint activities are authorized by law.

*Id. (citing* 45 C.F.R. § 164.502(e)). *See also* MASSLEGAL SERVICES, HIPAA AND THE SOCIAL SECURITY ADMINISTRATION, available at http://www.masslegalservices.org/content/hipaa-and-social-security-administration:

> Once health information protected by the HIPAA Privacy Rule is released to a non-covered entity such as [the Social Security Administration], the HIPAA Privacy Rule ceases to apply to the released information. The bottom line is that the release forms currently being used by advocates in dealing with SSA and DDS do not need to be modified because of HIPAA.

[42] Martha Tucker Ayres, *Confidentiality and Disclosure of Health Information in Arkansas*, 64 ARK. L. REV. 969, 978 (2011) (footnotes omitted), hereinafter referred to as "Ayres."

[43] United States v. Prentice, 683 F. Supp. 2d 991, 1001 (D. Minn. 2010) (law enforcement agency not a covered entity subject to HIPAA restraints on the use or receipt of PHI); United States v. Elliott, 676 F. Supp.2d 431, 440 (D. Md. 2009) (law enforcement agencies not covered entities under HIPAA); United States v. Mathis, 377 F. Supp. 2d 640, 645 (M.D. Tenn. 2005) (FBI not within the meaning of covered entities under HIPAA); Beard v. City of Chicago, 2005 U.S. DIST. LEXIS 374, at *2 (N.D. Ill. 2005) (city fire department not a covered entity under HIPAA).

[44] 78 Fed. Reg. 5598.

[45] Jolley & Chewning, *supra* note 28, at 22-23.

[46] *See* 42 U.S.C. § 17931(a) (2013) (application of security provisions and penalties to business associates of covered entities) and 42 U.S.C. § 17934 (application of privacy provisions and penalties to business associates of covered entities) (2013). *See also* Spencer, *supra* note 22, at *2

[47] 45 C.F.R. § 160.103 (2013) (definition of person).

[48] 42 C.F.R. § 160.103 (2013).

• A pharmacy benefits manager that manages a health plan's pharmacist network.[49]

The question of whether an entity is a business associate of a covered entity is always "fact specific."[50] HHS is clear that a business associate is one that requires access to PHI to perform certain activities or functions on behalf of a covered entity.[51] Any person or entity "public or private[] who performs these functions or activities or services is a business associate for purposes of the HIPAA Rules, regardless of whether such person has other professional or privilege-based duties or responsibilities."[52] HHS explains that a business associate generally is an agent of a covered entity if a business associate agreement grants the "covered entity the authority to direct the performance of the service provided by its business associate…."[53]

As explained by HHS in its final rule issued in January 2013:

• *A person becomes a business associate by definition*, not by the act of contracting with a covered entity or otherwise (emphasis added).[54]

• Liability for impermissible uses and disclosures attaches immediately when a person creates, receives, maintains, or transmits PHI on behalf of a covered entity or business associate and otherwise *meets the definition of a business associate* (emphasis added).

• Liability also does not depend on the type of PHI as it "may not necessarily include diagnosis-specific information…."[55]

Even though the definition of a business associate and the above examples do not include transit agencies, some transit agencies have contracts with covered entities to provide individuals with transportation to covered entities. It appears that transit agencies receive health information from patrons, but also may receive health information from covered entities or business associates of covered entities. For example, as discussed in Section IX.C, a transit agency may act as a broker for a coordinated transportation services program.

Sections IX.C and IX.D of this digest consider the issue of whether transit agencies meet the definition of a business associate so as to be subject to HIPAA. Although it does not appear that transit agencies satisfy HIPAA's definition of a business associate, some transit agencies have entered into contracts that provide that they will comply with HIPAA. Regardless of whether HIPAA applies to transit agencies because of a stipulation in their agreements, a covered entity (or its business associate) may share PHI with a transit agency *only* when a patient or client authorizes the disclosure of his or her health information or when a disclosure is required by law.[56] As discussed in subpart B below, a covered entity's (or a business associate's) permitted uses and disclosures of PHI do not include disclosures to a transit agency or for transportation.

### B. Uses and Disclosures of PHI by Business Associates

Although the HIPAA rules authorize a business associate to *create, receive, maintain, or transmit* PHI on behalf of a covered entity, the HIPAA regulations in 45 C.F.R. § 160.103 are quite clear that a function performed by a business associate must be one that is regulated "by this subchapter," such as for processing or billing on behalf of a covered entity. The definition of a business associate is somewhat narrower when a business associate performs other functions, such as accounting or consulting. With respect to the latter functions, HIPAA permits a *disclosure* of PHI but does not go as far as to provide that a business associate may create, receive, maintain, or transmit PHI on behalf of a covered entity. When a covered entity engages a business associate, the covered entity must obtain satisfactory assurances that the business associate will safeguard the privacy of the information (emphasis added).[57] The assurances must be documented in an agreement or other "arrangement" in writing between a covered entity and a business associate.[58] A covered entity does not need to have such assurances from a subcontractor of a business associate.[59]

[49] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, BUSINESS ASSOCIATES, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/businessassociates.html.

[50] 78 Fed. Reg. 5571.

[51] *Id.* at 5571 and 5598.

[52] *Id.* at 5598.

[53] *Id.* at 5581; 45 C.F.R. § 160.402 (2013).

[54] 78 Fed. Reg. 5598.

[55] *Id.*

[56] 45 C.F.R. § 164.103 (definition of required by law).

[57] 45 C.F.R. § 164.502(e)(1)(i) (2013).

[58] 45 C.F.R. § 164.502(e)(2) (2013). The agreement or arrangement must meet the requirements set forth in § 164.504(e) (2013).

[59] 45 C.F.R. § 164.502(e)(1)(i) (2013).

As stated, business associates include persons and entities that perform functions for or provide services to covered entities and need PHI to do so.[60] A business associate may use or disclose PHI only in the same manner that a covered entity may use or disclose PHI.[61] There is no provision in the HIPAA regulations that expressly or impliedly permit a disclosure of PHI by a covered entity to an entity such as a transit agency. Unless a disclosure of PHI is required by law (*see* Sections VIII.B.1 and VIII.B.2), a covered entity (or its business associate) must have an authorization signed by the subject of the PHI before using or disclosing the information, a point emphasized by this report, quoted below.

PHI may be shared when:

1. The required Business Associate Agreements are in place between the covered entity and the organizations that receive the protected health information;
2. Only the minimum necessary information is shared among the providers and/or brokers;
3. Protected health information is safeguarded according to the provider's and/or broker's Privacy Plan and Business Associate Agreements; and
4. Clients have been properly educated about the provider's and/or broker's HIPAA policies and practices and *have signed authorizations to release information as directed by the client* (emphasis added).[62]

## C. Requirements for a Business Associate Agreement

HIPAA requires that before a covered entity provides PHI to a business associate, the two entities must enter into a contract that complies with the HIPAA regulations. The contract must state when a business associate is permitted to create, receive, maintain, or transmit PHI.[63]

A business associate agreement must provide, *inter alia*, that the business associate will not use or further disclose the information other than as permitted or required by the contract or as required by law; use appropriate safeguards and comply with HIPAA requirements concerning electronic PHI to prevent its unauthorized use or disclosure; report to the covered entity any unauthorized uses or disclosures of the information including any breaches of unsecured PHI; and ensure that any of the business associate's subcontractors agree to the same restrictions and conditions that apply to the business associate with respect to the PHI.[64] (References therein to other parts of the C.F.R. omitted.) Under the regulations certain "implementation specifications" apply to a business associate contract.[65] Section 164.504(e)(3) sets forth the implementation specifications that apply when a covered entity and a business associate are both government entities.

A business associate is not authorized (except in two situations not pertinent here[66]) to use or disclose PHI unless the covered entity is permitted by HIPAA to make the same uses and disclosures.[67] As the regulations clearly state:

A business associate may use or disclose protected health information only as permitted or required by its business associate contract or other arrangement pursuant to § 164.504(e) or as required by law. The business associate may not

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[60] *See* 78 Fed. Reg. 5598. *See* 42 U.S.C. § 17931 (2013) (requiring business associates to comply with certain provisions of the Security Rule); 42 U.S.C. § 17934 (2013) (requiring business associates to comply with certain provisions of the Privacy Rule)). *See also* Briar A. Andresen, *The Changing World of HIPAA: Adapting Strategies and Preparing Clients*, INSIDE THE MINDS: RECENT DEVELOPMENTS WITH HIPAA, at *2 (*citing* 45 C.F.R.§ 160.103 (2006)), hereinafter referred to as "Andresen," and Spencer, *supra* note 22, at *1.

[61] 78 Fed. Reg. 5597; *see also*, 45 C.F.R. §§ 164.502(a)(3)(4) and (5) (2013).

[62] Federal Opportunities Workshop, *Agency Council on Coordinated Transportation, Final Report*, at 59 (Olympia, WA 2011), available at http://www.wsdot.wa.gov/acct/documents/FOW/JTC_FOWFinalReport.pdf, hereinafter referred to as "ACCT Final Report."

[63] 45 C.F.R. § 164.504(e)(2)(i) (2013).

[64] 45 C.F.R. § 164.504(e)(2)(ii) (2013).

[65] 45 C.F.R. § 164.504(e)(2)(i) (2013).

[66] 45 C.F.R. § 164.524 (2013) is entitled "Access of Individuals to Protected Health Information" but includes numerous exceptions, such as for psychotherapy notes; information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding; and certain categories of PHI maintained by a covered entity. *See* 45 C.F.R. § 164.524 (a)(i)-(iii) (2013).

[67] 45 C.F.R. § 164.504(e)(2)(i) (2013). The two exceptions are that "[t]he contract may permit the business associate to use and disclose [PHI] for the proper management and administration of the business associate, as provided in paragraph (e)(4) of this section" and "[t]he contract may permit the business associate to provide data aggregation services relating to the health care operations of the covered entity." 45 C.F.R. §§ 164.504(e)(2)(i)(A) and (B) (2013).

use or disclose protected health information in a manner that would violate the requirements of this subpart, if done by the covered entity, except for the purposes specified under § 164.504(e)(2)(i)(A) or (B) if such uses or disclosures are permitted by its contract or other arrangement.[68]

If an entity satisfies the definition for a business associate but is performing services for a covered entity without a business associate agreement, HIPAA of course applies to their relationship.[69] Some transit agencies responding to the survey provided copies of their business associate and subcontractor agreements that include provisions that require compliance with HIPAA.[70] However, Sections IX.C and IX.D of this digest discuss whether transit agencies meet the definition of a business associate and thus are subject to HIPAA's requirements in the absence of an agreement to be bound by HIPAA.

## V. APPLICABILITY OF HIPAA TO SUBCONTRACTORS

HIPAA applies to business associates that meet HIPAA's definition of a business associate and that have an agreement with a covered entity that permits the business associate to create, receive, maintain, or transmit PHI so that covered entities may perform their health care functions.[71] Because HIPAA's privacy and security requirements apply to subcontractors of business associates, business associates may disclose PHI to a subcontractor.[72] The reason that subcontractors are bound by HIPAA is to avoid a lapse of protection in privacy and security for PHI when a function is performed by an entity that does not have a direct relationship with the covered entity.[73] Under HIPAA, a subcontractor is one "to whom a business associate delegates a function, activity, or service, other than in the capacity of a member of the workforce of such business associate."[74] Subcontractors may have access to and use PHI on behalf of business associates as long as business associates obtain satisfactory assurances from subcontractors that they "will appropriately safeguard the information."[75]

One transit agency responding to the survey reported that it is a subcontractor because it has a contract with the state to provide rides for the Oregon Health Plan and Medicaid-eligible participants.[76] The agreements provided by transit agencies for this digest stipulate that the agencies will comply with HIPAA. Assuming that transit agencies are subject to HIPAA as a business associate, transit agencies that are subcontractors of a business associate also would be subject to HIPAA and may receive and maintain health information on patrons.

## VI. APPLICATION OF HIPAA TO HYBRID ENTITIES

HIPAA applies to entities that perform in the capacity of a covered entity as well as provide services or exercise functions that do not involve health care. A hybrid entity is a single legal entity that is a covered entity whose business activities include both covered and non-covered functions.[77] An entity that is a hybrid entity may designate health care components in accordance with 45 C.F.R. § 164.105(a)(2)(iii)(D).[78]

As explained in HHS's final rule,

> [M]any covered entities perform both covered and non-covered functions as part of their business operations. For such covered entities, the entire entity is generally required to comply with the Privacy Rule. However, the hybrid entity provisions of the HIPAA Rules permit the entity to limit the application of the Rules to the entity's components that perform functions that would make the component a "covered entity" if the component were a separate legal entity.[79]

The final rule further explains:

> [T]his provision allows an entity to designate a health care component by documenting the components of its organization that perform covered entity functions. *The effect of such a designation is that most of the requirements of the HIPAA Rules apply only to the designated health*

[68] 45 C.F.R. § 164.502(a)(3) (2013). Section 164.504(e)(2)(i)(A) and (B) referenced in the section are not applicable to transit agencies, but nevertheless state that the business associate "(A) …contract may permit the business associate to use and disclose protected health information for the proper management and administration of the business associate, as provided in paragraph (e)(4) of this section; and (B) …contract may permit the business associate to provide data aggregation services relating to the health care operations of the covered entity."

[69] 78 Fed. Reg. 5598.

[70] *See* App. C of this digest.

[71] 78 Fed. Reg. 5573.

[72] *Id.* at 5573, 5689; 45 C.F.R. § 160.103 (2013) (excluding one serving as a member of the workforce of the business associate).

[73] 78 Fed. Reg. 5572-5573.

[74] *Id.* at 5689; 45 C.F.R. § 160.103 (2013).

[75] 45 C.F.R. § 164.502(e)(1)(ii) (2013).

[76] *See* App. C of this digest.

[77] 45 C.F.R. § 164.103 (2013).

[78] 45 C.F.R. § 164.105 (2013).

[79] 78 Fed. Reg. 5588.

> *care component of the entity and not to the functions the entity performs that are not included in the health care component*. While most of the HIPAA Rules' requirements apply only to the health care component, the hybrid entity retains certain oversight, compliance, and enforcement obligations (emphasis added).[80]

HHS's Web site explains that:

> [I]f a State, county, or local health department performs functions that make it a covered entity, or otherwise meets the definition of a covered entity they must comply with the HIPAA Privacy Rule. For example, a state Medicaid program is a covered entity (*i.e.*, a health plan) as defined in the Privacy Rule. Some health departments operate health care clinics and thus are health care providers. If these health care providers transmit health information electronically in connection with a transaction covered in the HIPAA Transactions Rule, they are covered entities.

Most of the requirements of the Privacy Rule apply only to the hybrid entity's health care component(s).[81]

An example of a hybrid entity is the Office of Management Enterprises and Services (OMES), an agency of the state of Oklahoma.[82] The OMES is comprised of separate departments, "some of which provide 'covered functions' as 'health care components' of OMES" as those terms are defined in HIPAA.[83] Pursuant to HIPAA, OMES designated its HealthChoice Insurance Program, flexible spending accounts unit, and state wellness program as covered components.[84] In doing so, OMES excluded its non-covered components from the application of the HIPAA Privacy Rule. As explained in a policy memorandum, OMES operationally segregates its non-covered functions from its covered functions to ensure "that each health care component…[d]oes not disclose PHI to another (non-health care) component of the covered entity in circumstances in which HIPAA would prohibit such disclosure if the health care component and the other component were separate and distinct legal entities."[85]

Some counties have identified themselves as hybrid entities under HIPAA.[86] Fairfax County in Virginia states that the county government

> provides care and services related to the physical or mental health of our residents. Fairfax County also provides numerous non-health care related services to our residents. Fairfax County has chosen to restrict the application of the HIPAA Privacy Rule to those parts of the County enterprise that are performing covered health care transactions.

Fairfax County advises that "as agencies seek to automate business processes related to health care billing and electronic transactions, then they will be designated within the Fairfax County Government's HIPAA hybrid entity."[87] Fairfax County also reports that the county's

> hybrid entity currently consists of the Fire and Rescue Department (FRD), the Health Department (HD) and the Fairfax-Falls Church Community Services Board (CSB). *Agencies providing human services support to clients of the HD and the CSB will be designated within the hybrid entity as appropriate policies and procedures are adopted* (emphasis added). [88]

The above italicized language suggests that an agency providing human services transportation ("human services support") could be "designated within [a] hybrid entity." HIPAA's final rule states that the health care component of a hybrid entity includes all business associate functions within the entity.[89] Nevertheless, it is not clear whether a county health department could designate a county agency that provides transportation as part of the hybrid entity's health care functions and services to permit sharing of PHI between the two county agencies. In the case of a covered entity and a completely separate entity, however, it appears that a covered entity would have to enter into a business associate agreement with the separate entity to permit the sharing of PHI.

Two transit agencies responding to the survey stated that they are hybrid entities.[90] On the

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[80] *Id*. *See* 45 C.F.R. § 164/1-5 (2013).

[81] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY, available at http://www.hhs.gov/ocr/privacy/hipaa/faq/covered_entities/358.html.

[82] 62 OK. STAT. § 34.3 (2012).

[83] Memorandum, Office of Management Enterprises Services (OMES), *Designation of OMES as a Hybrid Entity under HIPAA*, (effective July 19, 2012), available at http://www.ok.gov/OSF/documents/HybridEntityHIPAA.pdf, hereinafter referred to as "OMES Memorandum."

[84] 45 C.F.R. § 164.1 05(a)(2)(iii)(C).

[85] OMES Memorandum, *supra* note 83, at 2.

[86] *See* resolution of Clark County, Nevada (dated December 7, 2010), available at http://www.clarkcountynv.gov/Depts/internal_audit/Services/Documents/DesignationofHIPAAHybridEntity-4thAmend-signed.pdf.

[87] Fairfax County, Virginia (re: HIPAA), http://www.fairfaxcounty.gov/hipaa/covered_entity.asp.

[88] *Id*.

[89] 78 Fed. Reg. 5588.

[90] One transit agency responding to the survey stated that it is a hybrid entity because it transported "some passengers to health care covered entities." Another transit agency also identified itself as a hybrid entity because as much as 25 percent of the ADA para-

other hand, Metro Transit in Madison, Wisconsin, which maintains that it is not subject to HIPAA, stated that some departments of its municipal government have been designated hybrid entities.

## VII. HIPAA'S DEFINITION OF PROTECTED HEALTH INFORMATION

PHI means individually identifiable health information transmitted by electronic media; maintained in electronic media; or transmitted or "*maintained in any other form or medium* (emphasis added)."[91] PHI does not include individually identifiable health information in employment records held by a covered entity in its role as an employer or in education records covered by the Family Educational Rights and Privacy Act,[92] as well as otherwise set forth in the regulations.[93] Although transit agencies may receive health information directly from patrons or from covered entities when authorized by the subjects of the health information, transit agencies are not the type of entity that must create health information for it to be subject to HIPAA. However, assuming that transportation services come within HIPAA's definition of a business associate, an assumption that appears to be doubtful given the specific, limiting language in HIPAA's definition, a transit agency as a business associate could create, receive, maintain, or transmit PHI on behalf of a covered entity.[94]

The definitions of three terms in the HIPAA regulations give effect to what kind of information is subject to HIPAA: health information, individually identifiable health information, and PHI.

First, the term "health information" applies to any information regardless of whether it is "oral or recorded in any form or medium;"[95] thus, HIPAA's Privacy Rule is not limited to electronic records.[96]

Second, health information as defined by HIPAA is not health information that is created or received by just anyone, such as a transit agency. Health information subject to HIPAA includes "information, including genetic information, whether oral or recorded in any form or medium, that…[i]s *created or received* by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse…(emphasis added)."[97]

Third, health information is not just any kind of medical information. The health information must come within one of three categories or types of health information: it must relate "to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual."[98] Even if a transit agency meets one or more of the last three criteria (*i.e.,* the health information "relates to"), a transit agency does not come within the HIPAA definition of health information, which must have been "*created or received by* a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse… (emphasis added)."[99] A transit agency does not *create* health information nor is it one of the named entities that must *receive* the health information for it to become PHI subject to HIPAA. As HHS's commentary to its 2013 final rule states, there are many businesses and other entities that *receive* PHI that are not subject to HIPAA.[100]

A subset of health information under HIPAA is individually identifiable health information (IIHI). IIHI includes information that is "demographic information collected from an individual."[101] IIHI either must identify an individual or provide a "reasonable basis" for believing that the information could be used to identify an individ-

transit trips it provides are "actually Medicaid eligible trips."

[91] 45 C.F.R. §§ 160.103(1)(i)-(iii) (2013) (subsection (1) of the definition of PHI).

[92] Pub. L. No. 93-380 § 513, 88 Stat. 484 (1974), codified at 20 U.S.C. § 1232g (2013).

[93] 45 C.F.R. § 160.103 (2013) (subsection (2) of the definition of PHI).

[94] *See* Section IX.D of this digest.

[95] 45 C.F.R. § 160.103 (2013) (defining health information).

[96] South Carolina Medical Ass'n v. Thompson, 327 F.3d 346 (4th Cir. 2003); Association of American Physicians & Surgeons, Inc. v. U.S. Dep't of Health and Human Services, 224 F. Supp. 2d 1115 (S.D. Tex. 2002).

PHI stored, whether intentionally or not, in photocopiers, facsimile, and other devices is subject to the Security Rule. 78 Fed. Reg. 5576. *See* discussion in Section VIII.C of this digest.

[97] 45 C.F.R. § 160.103 (2013) (subsection (1) of the definition of health information).

[98] *Id.*

[99] 45 C.F.R. § 160.103 (2013).

[100] 78 Fed. Reg. 5591.

[101] 45 C.F.R. § 160.103 (2013) (definition of individually identifiable health information).

ual.[102] However, individually identifiable health information is information that "[i]s *created or received* by a health care provider, health plan, employer, or health care clearinghouse… (emphasis added)."[103] As with the definition of health information, IIHI must relate "to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual…."[104]

The terms "health information" and "individually identifiable health information" are part of HIPAA's definition of PHI. Under HIPAA the term "protected health information" or "PHI" includes individually identifiable health information that is: "(i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) *Transmitted or maintained in any other form or medium*… (emphasis added)."[105] The Security Rule requires covered entities and business associates to implement certain administrative, physical, and technical safeguards, discussed in Section VIII.C of this digest, to protect PHI that is transmitted or maintained in electronic form.[106]

The fact that some transit agencies have health information on their patrons, some of which may have been transmitted by covered entities as authorized by patrons, may explain why some transit agencies have assumed that HIPAA applies to them. However, as discussed in Section VIII.B.1 of this digest, PHI may not be used or disclosed unless it comes within one of HIPAA's permissive or mandatory uses or disclosures. It appears that of the possible permitted or mandatory uses or disclosures of PHI under HIPAA, the only ones that apply to a transit agency are when a patient or client obtains and provides the health information; a patient or client authorizes the disclosure of health information by a covered entity to a transit agency; or another law requires that PHI be disclosed by the covered entity or a business associate.

Regardless of the applicability of HIPAA to transit agencies, some transit agencies have contracts that include a stipulation that the HIPAA rules apply to their contracts. As discussed in Sections IX.C and IX.D, an example of when a covered entity may be sharing PHI with a transit agency is when there is a coordinated transportation services program for which a transit agency serves as a broker or business associate (or as a subcontractor of a business associate) to provide transportation for ADA, Medicare, or other qualified recipients. It appears that if a transit agency receives PHI from one or more covered entities then the transit agency may be subject to HIPAA, not because the transit agency meets the definition of a business associate under HIPAA, but because the agreement between a covered entity and a transit agency states that HIPAA applies.

## VIII. HIPAA'S PRIVACY AND SECURITY RULES

### A. Introduction

The HIPAA regulations state that unless specifically permitted by HIPAA a patient must authorize in writing any disclosures of PHI.[107] Only specified covered entities are subject to HIPAA: health plans, health care clearinghouses, and health care providers. Business associates of covered entities may create, receive, maintain, or transmit PHI on behalf of the covered entity for the purposes and functions (*e.g.*, claims processing) identified in 45 C.F.R. § 160.103. HHS estimates that there are approximately 700,000 entities that qualify as covered entities, approximately one to two million business associates of covered entities, and "an unknown number of subcontractors."[108]

### B. The Privacy Rule

HIPAA's Privacy Rule is intended to prevent the unauthorized disclosure of PHI.[109] Although the constitutionality of the Privacy Rule has been challenged on the grounds that it violates the First, Fourth, and Tenth Amendments to the Con-

[102] 45 C.F.R. § 160.103 (2013) (subsections (2)(i) and (ii) of the definition of individually identifiable health information).

[103] 45 C.F.R. § 160.103 (2013) (subsection (1) of the definition of individually identifiable health information).

[104] 45 C.F.R. § 160.103 (2013) (subsection (2) of the definition of individually identifiable health information).

[105] 45 C.F.R. § 160.103 (2013) (subsection (1)(i)-(iii) of the definition of PHI) (except as provided in paragraph (2) of the definition of PHI).

[106] 45 C.F.R. parts 160 and Part 164, subparts A and C (2013); *see also* 78 Fed. Reg. 5567.

[107] 45 C.F.R. §§ 164.502 and 164.508 (2013).

[108] 78 Fed. Reg. 5669.

[109] 45 C.F.R. § 502(a) (2013) (stating that "[a] covered entity or business associate may not use or disclose [PHI], except as permitted or required by this subpart or by subpart C of part 160 of this subchapter").

stitution,[110] as well as on the basis that it is unconstitutionally vague,[111] the rule's constitutionality has been upheld.

### *1. Permissive Disclosures of PHI*

The HIPAA regulations in the C.F.R., part 164, subpart E, beginning with § 164.500, *et seq*., set forth the permissible and mandatory uses and disclosures of PHI. Section 164.502(a) states that "[a] covered entity or business associate *may not* use or disclose protected health information, *except as permitted or required* by this subpart or by subpart C of part 160 of this subchapter (emphasis added)."[112] HIPAA's provisions thus apply to both covered entities and their business associates concerning when PHI may be used or disclosed (permissive uses and disclosures) and when PHI must be disclosed (mandatory uses and disclosures). If under the particular circumstances a covered entity may not use or disclose PHI, neither may its business associate do so.

Of course, a covered entity is permitted to disclose protected health information to the subject of the PHI.[113] Another situation when a covered entity or its business associate is permitted to disclose PHI is when an individual authorizes the disclosure of the information to another person or entity.[114]

In the absence of a patron obtaining and providing PHI or authorizing a disclosure of a patron's PHI, a disclosure to or by a transit agency is not an occasion when a disclosure of PHI is specifically permitted by HIPAA.[115] For example, a covered entity may use or disclose PHI to carry out treatment, payment, or health care operations.[116] However, it does not appear that, absent a patient's written authorization, a covered entity is permitted to disclose PHI to a transit agency on the basis that a disclosure is for treatment, payment, or health care operations. The term "treatment" refers to the "provision, coordination, or management of health care and related services by one or more health care providers," language that is inapplicable to transit agencies.[117] The term "payment" refers to activities undertaken by a health plan to determine its responsibility for coverage and benefits provided under the plan including determinations of eligibility and billing.[118] The term "health care operations" refers to "activities of the covered entity to the extent that the activities are related to covered functions."[119] None of the definitions of treatment, payment, or health care operations applies to transit agencies.

There are other permissive occasions when PHI may be disclosed, such as for certain public health or benefit reasons;[120] for law enforcement purposes; in judicial and administrative proceedings; and when PHI has been de-identified.[121] Covered entities must give individuals notice of their privacy policies.[122]

None of the foregoing permitted uses or disclosures under HIPAA would allow a covered entity to share PHI with a transit agency without an authorization provided by the subject of the information.

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[110] Ass'n of American Physicians & Surgeons, Inc. v. U.S. Dep't of Health and Human Services, 224 F. Supp. 2d 1115711 (S.D. Tex. 2002).

[111] South Carolina Medical Ass'n v. Thompson, 327 F. 3d 346 (4th Cir. 2003).

[112] 45 C.F.R. § 164.502(a) (2013).

[113] 45 C.F.R. § 164.502(a)(1)(i) (2013)

[114] 45 C.F.R. § 164.502(a)(1)(iv) (2013).

[115] Edward F. McArdle, *2002-2003 Survey of New York Law: Health Law*, 54 SYRACUSE L. REV. 1179, 1186 (2004) (stating that unless one of the HIPAA exceptions apply "a written patient authorization is required for the use of PHI"), hereinafter referred to as "McArdle." 45 C.F.R. § 164.508 sets forth the general rule:

> Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

[116] 45 C.F.R. § 164.502(a)(1)(ii) (2013). *See* 45 C.F.R. § 164.506 (2013) for additional requirements regarding uses and disclosures to carry out treatment, payment, or health care operations.

[117] 165 C.F.R. § 164.501 (2013) (definition of treatment).

[118] 164 C.F.R. § 164.501 (2013) (subsections (1)(i) and (2)(i) and (iii) of the definition of payment).

[119] 164 C.F.R. § 164.501 (2013) (definition of health care operations).

[120] *See, e.g*., 45 C.F.R. § 164.512 (2013).

[121] 45 C.F.R. § 164.502(a)(1)(vi) (2013). *See* 45 C.F.R. §§ 164.51 and 164.514(e), (f), or (g) (2013). Section 164.512 sets forth the uses and disclosures for which an authorization or opportunity to agree or object is not required, such as when a disclosure is required by law. Section 164.514 includes some additional requirements not discussed herein. *See also* McArdle, *supra* note 1115, at 1186.

[122] 45 C.F.R. § 164.520(a)(2)(2013) (relating to an individual's access to PHI and the right to receive an accounting of disclosures made by a covered entity).

### *2. Mandatory Disclosures of PHI*

A disclosure to an individual of his or her health information is one of HIPAA's permissive uses or disclosures of PHI. A disclosure of PHI to the subject of the PHI is also one of the mandatory situations when PHI must be disclosed.[123] Under § 164.502(a)(2)(i) a covered entity must provide PHI "[t]o an individual, when requested under, and required by § 164.524 or § 164.528…."[124] In general, although there are exceptions under § 164.524, "an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set" for as long as the PHI is maintained in the set.[125]

Another mandatory situation is when a disclosure of PHI is required by law. Thus, a covered entity may use or disclose PHI without an individual's written authorization "to the extent that such use or disclosure is required by law."[126] Part of the definition of the term required by law includes "Medicare conditions of participation with respect to health care providers participating in the program…."[127] The term required by law also includes "statutes or regulations that require such information if payment is sought under a government program providing public benefits."[128]

Whether the above parts of the definition of required by law would permit a covered entity to share PHI with a transit agency because of another federal, state, or local law is not addressed in the final rule. There is some language in the commentary that implies that health information could be shared when an agency is billing for its services pursuant to a government program. In the final rule, HHS states that "if a covered entity is required by law to submit protected health information to a Federal health plan, it may continue to do so as necessary to comply with that legal mandate."[129] Legal commentators have barely focused on the issue, but one writer states that

> [A] Covered Entity that is required to disclose IIHI under the Social Security Act, the Family and Medical Leave Act, the Environmental Protection Act, the National Labor Relations Act, state law, or any other "law," remains obligated to do so, and may do so without violating HIPAA. This is true so long as the disclosure complies with, and is limited to, the relevant requirements of that law (emphasis added).[130]

It is not clear that in this context the required by law provision affects transit agencies that may be billing, for example, a state Medicaid program for transportation services. The issue may be moot. For example, a covered entity's practice may be to require a patient to sign an authorization for the release of PHI to qualify for transportation services and/or to require that a transit agency agree to comply with HIPAA.

Business associates are required to disclose PHI to a covered entity, to an individual, or to an individual's designee to satisfy a covered entity's obligations under HIPAA and to comply with an individual's request for an electronic copy of protected health information.[131] A business associate "may use or disclose protected health information only as permitted or required by its business associate contract pursuant to § 164.504(e) or as required by law."[132] Business associates also are required to disclose PHI when required by the Secretary of HHS to investigate or determine a business associate's compliance with HIPAA.[133]

A use or disclosure of PHI by a covered entity or business associate violates the Privacy Rule that does not come within one of the permitted or mandatory uses and disclosures established by the HIPAA regulations.[134] It appears, however, that patrons of transit agencies provide health information or authorize a covered entity to provide it to the agencies to receive transportation services required by the ADA or made available under Medicaid or another public program.

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[123] 45 C.F.R. § 164.502 (2013).

[124] 45 C.F.R. § 164.520(a)(2)(i) (2013).

[125] 45 C.F.R. § 164.524(a)(1) (2013). There are some situations when a covered entity may deny an individual access and the covered entity's grounds are "unreviewable." 45 C.F.R. § 164.524(a)(2) (2013).

[126] 164 C.F.R. § 164.512(a) (2013).

[127] 165 C.F.R. § 164.501 (2013) (definition of required by law).

[128] *Id.*

[129] 78 Fed. Reg. 5628.

[130] Scott D. Stein, *What Litigators Need to Know about HIPAA* 36, No. 3 JOURNAL OF HEALTH LAW 433, n.57 (2003).

[131] 45 C.F.R. § 164.502(a)(4)(ii) (2013). *See also* 45 C.F.R. § 164.524(c)(2)(ii) (2013) referenced in the foregoing section.

[132] 45 C.F.R. § 164.502(a)(3) (2013). The section provides further that a "business associate may not use or disclose [PHI] in a manner that would violate the requirements of this subpart, if done by the covered entity, except for the purposes specified under § 164.504(e)(2)(i)(A) or (B) if such uses or disclosures are permitted by its contract or other arrangement."

[133] 45 C.F.R. § 164.502(a)(4)(i) (2013).

[134] 45 C.F.R. § 164.502(a) (2013).

*3. Minimum Disclosure Requirement*

When disclosing PHI, such as in response to a subpoena or court order, "a covered entity or business associate must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."[135]

## C. The Security Rule

HIPAA's Privacy Rule is intended to prevent the unauthorized disclosure of PHI. HHS enacted the Security Rule in 2005 to complement the Privacy Rule "to address the privacy, security, and risks to the integrity of electronic health-record systems" by requiring covered entities "to implement reasonable administrative, physical and technical safeguards to secure electronic health information."[136] Any transit agency that has entered into a contract with a covered entity in which it has agreed to be bound by HIPAA or that is considering entering into an agreement with a covered entity will be interested in the obligations imposed by the Security Rule.

Prior to HITECH, HIPAA's Security Rule did not apply directly to business associates of covered entities. Now the Security Rule's provisions on administrative, physical, and technical safeguards[137] and the rule's requirements on procedures and documentation apply both to covered entities and their business associates.[138] As HHS's 2013 final rule provides, covered entities and business associates must "comply with the applicable standards, implementation specifications, and requirements…with respect to electronic protected health information of a covered entity."[139] Consequently, a covered entity or a business associate must "[i]mplement technical policies and procedures for electronic information systems that maintain electronic protected health information to allow access only to those persons or software programs that have been granted access rights as specified in § 164.308(a)(4)."[140] Both covered entities and business associates are subject to the Enforcement Rule.[141]

Within the context of the Security Rule, confidentiality means that "data or information is not made available or disclosed to unauthorized persons or processes."[142] In addition to other specified requirements, covered entities and business associates must "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information the covered entity or business associate creates, receives, maintains, or transmits."[143] In deciding on security measures to use a covered entity or business associate must consider its "size, complexity, and capabilities," as well "technical infrastructure, hardware, and software security capabilities."[144]

Administrative safeguards include "security measures to protect electronic protected health information and to manage the conduct of the covered entity's or business associate's workforce in relation to the protection of that information."[145] A covered entity or business associate must "[i]mplement policies and procedures to prevent, detect, contain, and correct security violations;"[146] conduct a risk analysis of the "electronic protected health information held by the covered entity or business associate;"[147] "implement security measures sufficient to reduce risks and vulnerabilities to a reasonable and appropriate level to comply with § 164.306(a);"[148] sanction "workforce members who fail to comply with the security policies and procedures of the covered entity or business associate;"[149] and conduct regular reviews of "information system activity…."[150]

As defined in § 164.304, physical safeguards are those physical measures, policies, and proce-

[135] 45 C.F.R. § 164.502(b) (2013). Section 164.514(d) (2013) concerns requirements regarding "minimum necessary" uses and disclosures of PHI. There are exceptions to the minimum necessary standard. *See id.* § 164.502(b)(2) (2013). Section 164.530(c) (2013) requires a covered entity to have administrative, technical, and physical safeguards to protect the privacy of PHI. *See also* Jolley & Chewning, *supra* note 28, at 23.

[136] Ayres, *supra* note 42, at 983 (*citing* 45 C.F.R. §§ 164.302, 304, 306, and 501 (2010)).

[137] 45 C.F.R. §§ 164.308, 164.310, and 164.312 (2013) respectively.

[138] 45 C.F.R. § 164.316 (2013).

[139] 45 C.F.R. § 164.302(a)(1) (2013).

[140] 45 C.F.R. § 164.302(a)(1) (2013).

[141] 78 Fed. Reg. 5589.

[142] 45 C.F.R. § 164.304 (2013).

[143] 45 C.F.R. § 164.306(a)(1) (2013).

[144] 45 C.F.R. § 164.306(a)(2) (2013). In addition, a covered entity or business associate must comply with §§ 164.308, 164.310, 164.312, 164.314 and 164.316 (2013) with respect to all electronic PHI. *See* 45 C.F.R. § 164.306(c) (2013).

[145] 45 C.F.R. § 164.304 (2013) (definition of administrative safeguards).

[146] 45 C.F.R. § 164.308(a)(1)(i) (2013).

[147] 45 C.F.R. § 164.308(a)(1)(ii)(A) (2013).

[148] 45 C.F.R. § 164.308(a)(1)(ii)(B) (2013).

[149] 45 C.F.R. § 164.308(a)(1)(ii)(C) (2013).

[150] 45 C.F.R. § 164.308(a)(1)(ii)(D) (2013).

dures for the protection of "a covered entity's or business associate's electronic information systems and related buildings and equipment, from natural and environmental hazards, and unauthorized intrusion."[151] A covered entity or business associate must "[i]mplement policies and procedures to limit physical access to its electronic information systems and the facility or facilities in which they are housed…."[152]

As for technical standards, a covered entity or business associate must have "technical policies and procedures" in place so that only "those persons or software programs that have been granted rights have access to protected health information…."[153]

Prior to HITECH, only state laws applied to breaches of privacy.[154] There was no federal requirement for notification of a security breach caused by an improper disclosure of medical information. HIPAA defines the term "breach" to "mean[] the acquisition, access, use, or disclosure of protected health information in a manner not permitted under subpart E of this part which compromises the security or privacy of the protected health information."[155] When a business associate discovers a breach of unsecured PHI, the business associate must notify the covered entity of the breach.[156] A business associate's knowledge of a breach includes a situation in which the business associate would have known of a breach by exercising reasonable diligence.[157]

However, assuming that transit agencies meet the definition of a business associate under HIPAA or have agreed by contract to comply with HIPAA, thus being subject to the Security Rule, transit agencies will be interested in knowing that the definition of a breach excludes certain unintentional, inadvertent, or inconsequential disclosures. First, a breach excludes any unintentional acquisition of, access to, or use of PHI by a workforce member of a covered entity or a business associate (or a person who is acting under the authority of a covered entity or a business associate) if an acquisition of, access to, or use of PHI was made "in good faith and within the scope of authority and does not result" in a further nonpermitted use or disclosure.[158]

Second, a breach does not include any inadvertent disclosure by a person who is authorized to have access to PHI at a covered entity or business associate to another person who is authorized to have access to PHI at the same covered entity or business associate.[159] The PHI received because of a disclosure must not have been used or disclosed thereafter in a nonpermitted manner.[160]

Third, a breach in security has not occurred when there is a disclosure of PHI when "a covered entity or business associate has a good faith belief that an unauthorized person to whom the disclosure was made would not reasonably have been able to retain such information."[161]

Of the agencies responding to the survey that have health information on patrons, four agencies stated that they did not have security arrangements, such as those required by HIPAA, for the safeguarding of health information or records including those in electronic format. Thirteen agencies stated that that they secure a patron's health information by keeping the information in a locked file cabinet[162] and/or in a locked room[163] or in a "secure area[164] with access restricted only to authorized personnel.[165] Transit agencies stated that they receive health information on patrons by hand[166] or by mail[167] or electronically by

[151] 45 C.F.R. § 164.304 (2013) (definition of physical safeguards).

[152] 45 C.F.R. § 310(a)(1) (2013).

[153] 45 C.F.R. § 164.312(a)(1) (2013).

[154] Andresen, *supra* note 60, at *1.

[155] 45 C.F.R. § 164.402 (2013).

[156] 45 C.F.R. § 164.410(a)(1) (2013).

[157] 45 C.F.R. § 164.410(2) (2013).

[158] 45 C.F.R. § 164.402(1)(i) (2013).

[159] 45 C.F.R. § 164.402(1)(ii) (2013).

[160] *Id*.

[161] 45 C.F.R. § 164.402(1)(iii) (2013).

[162] Responses of HART and KAT (applications are kept in a locked file cabinet); Responses of Manchester and MATA ("lockable files").

[163] Response of HART (applications kept in locked file cabinet in locked file room); Response of Utah Transit Authority (all information stored in a secure locked file room and no information shared without a written request of a client or the client's agent).

[164] Response of MATA; Response of Metro Transit (stating that paratransit application records are kept confidential; that as of yet no electronic encryption has been implemented; and that all supplemental eligibility materials are kept in a secure area with limited access).

[165] Response of Manchester (locked file cabinet with restricted access); Response of Hart (access to patrons' health information restricted only to authorized personnel in the paratransit department, meaning two or three employees of the agency).

[166] Responses of KAT and MATA.

[167] Responses of New Haven Transit and HART (stating that certifications provided by physicians are only accepted in "hard-copy format through regular mail"); Response of KITSAP (stating that requests are sent by

email[168] or by telefax.[169] However, some transit agencies may be receiving PHI from covered entities (or their business associates) such as when transit agencies are participating in a coordinated transportation services program or are serving as direct providers to covered entities pursuant to an agreement.[170]

East Bay Paratransit Consortium (EBPC) stated that electronic files are password protected and that printed files on clients are kept in a locked room that requires a pass code. EBPC also reported that there is "limited medical information" in its database on clients. Manchester stated that it does not deal with electronic information as "applications are filled out on paper and physically stored." Metro Transit advised that it "maintains ADA paratransit application forms…in a secure area with limited access" and that "[o]nly hard copy files are maintained, no electronic copies."[171] Riverside has applicants submit a physician's verification documenting their disability; the documents are only stored "electronically as part of the certification file and used for comparison over time;" and "the software used to store the data has security measures built in to ensure the privacy and confidentiality of these documents."

Although noting that HIPAA does not apply to the agency, Whatcom stated that the agency is "committed to maintenance of customer confidentiality." Whatcom reported that it receives health information as authorized by an applicant for paratransit eligibility and that the "information is stored in locked, physical files and password protected computer files."[172]

Finally, the Greater Attleboro-Taunton Regional Transit Authority (GATRA), which has a business associate agreement with the Massachusetts Executive Office of Health and Human Services (EOHHS) and its constituent entities, stated that in addition to telefax and secure e-mail "transportation authorizations are received via secured FTP transmission [and] are posted for subcontractors via secure FTP on our portal (web)." GATRA's security arrangements include "employee training" and service agreements with subcontractors.

Even if a person or entity is subject to HIPAA, HIPAA's Security Rule does not necessarily apply to PHI received by telefax or by e-mail. First, HIPAA defines electronic media subject to the Security Rule to include "[e]lectronic storage material on which data is or may be recorded electronically," such as in a computer hard drive or removable or transportable digital memory devices.[173] Electronic media includes "transmission media used to exchange information already in electronic storage media," such as the Internet, and the physical movement of removable/transportable electronic storage media.[174] However, the Security Rule does not apply to certain transmissions including the use of paper or telefax or telephone transmissions when "the information being exchanged did not exist in electronic form immediately before the transmission."[175] Although PHI stored in covered entities' and business associates' photocopiers, facsimiles, and other devices is subject to the Security Rule, PHI that is stored is secured appropriately when it is monitored or when physical access is restricted to a photocopier or telefax fax machine that is used for copying or sending PHI.[176]

## D. De-Identified Information

Under HIPAA de-identified health information is not subject to limitations or restrictions on its

telefax or by mail to a named medical professional with a cover sheet, a questionnaire, and a release-form; that after the response is returned to KITSAP, it is reviewed, and retained with an applicant's file; and that inactive and archived passenger files are destroyed after 6 years); Response of KAT; Response of MATA (stating that applications help to determine eligibility; that applications request information on medical conditions; and that applications are received by mail, by email, or by hand; and that after being reviewed applications are stored in locked files); Responses of North County, Pierce Transit, Salem-Keizer, and Space Coast.

[168] Responses of GATRA, MATA, North County, and Salem-Kaiser.

[169] Responses of GATRA, KITSAP, KAT, North County, Pierce Transit, Salem-Keizer; and Space Coast.

[170] *See* Section IX.C.

[171] Pierce Transit stated that applications for paratransit as well as requests for professional verification are sent to Pierce Transit by mail or by telefax but that the agency stores only paper files.

[172] Response of Whatcom.

[173] 45 C.F.R. § 160.103 (2013) (sub-part 1 of the definition of electronic media).

[174] 45 C.F.R. § 160.103 (2013) (sub-part 2 of the definition of electronic media).

[175] *Id*.

[176] 78 Fed. Reg. 5576. HHS cautions that "before removal of the device from the covered entity or business associate, such as at the end of the lease term for a photocopier machine, proper safeguards should be followed to remove the electronic [PHI] from the media." *Id*.

use or disclosure. De-identified health information is that information that does not identify an individual. If "there is no reasonable basis to believe that the information can be used to identify an individual" the information "is not individually identifiable health information."[177] Thus, covered entities and business associates may divulge information that is de-identified.

HIPAA provides two ways for information to be de-identified. One method is by a formal determination by a qualified statistician. A properly qualified statistician using accepted analytic techniques must conclude that there is a substantially limited risk of identifying the subject of the information.[178] The second method is by a covered entity's or business associate's removal from the information of 18 specified identifiers of an individual.[179]

## IX. WHETHER HIPAA APPLIES TO TRANSIT AGENCIES

### A. Introduction

As one source notes, some transit agencies assume that HIPAA applies to their paratransit service, while other agencies "struggle to understand their role within the HIPAA regulations" or "question how HIPAA applies to their service."[180]

Whether HIPAA is applicable to transit agencies having health information on patrons is addressed in Metro Transit's response to the survey conducted for this digest.

Metro Transit is not a health care provider and it does not make claims for service. Care organizations opt to make use of transit infrastructure to further their programs and for cost efficiencies.

Utilizing public transit has a direct impact on patient care, costs, and access. *Applying HIPAA regulations to public transit at each point of service would result in an increase cost to the service and potentially a reduction in service available.* Public transportation entails requesting information about the nature of the trip which could potentially contain protected health information[.] [I]f HIPAA regulations applied to public transit, it would in turn require that public transit comply with all HIPAA regulations, including providing privacy notices and acknowledgment of said notice (via gathering signatures at the time of each applicable boarding) implementing security measures for electronic transmissions of manifests, and [the use of] direct service as opposed to shared ride service to avoid inappropriate disclosure to unauthorized persons at the time of boarding. The implication if HIPAA is applied to public transit is a fundamental change in the manner in which public transit is delivered, increased costs, and decreased access not just for health care, but all trip purposes and would adversely affect all involved parties (emphasis added).[181]

One article concludes that that very few, if any, transit systems' operations are subject to HIPAA:

> There is no concrete guidance available on how transportation, particularly non-emergency medical transportation, relates to the HIPAA privacy rule. However, a privacy expert at HHS's Office for Civil Rights reiterated the…definition for a covered entity by indicating that only those organizations that provide health care and bill for services electronically must comply with the HIPAA law. So, there are very few, if any, transit systems that fall within that category.[182]

The above article concludes that transit systems do not violate HIPAA's privacy rule, for example, if they have a bus stop at a social service agency; coordinate transportation with mental health agencies, health care facilities, or social service agencies; or use a paratransit vehicle with the agency's system's logo "to provide door-to-door service."[183]

### B. Health Information Provided by or Authorized by Patrons

Five agencies responding to the survey that have health information on their patrons stated that they have not been advised, nor have they assumed, that they are subject to HIPAA simply because of having such information. Five agencies stated that they assumed without being so ad-

[177] 45 C.F.R. § 164.514(a) (2013), .

[178] 45 C.F.R. § 164.514(b) (2013).

[179] 45 C.F.R. § 164.514(b) (2013). The identifiers that must be removed are names; geographical subdivisions smaller than a state; all dates excluding years; telephone and telefax numbers; email addresses; and social security, medical record, health plan beneficiary, account, and certificate or license numbers; vehicle identifiers; device identifiers; Web URLs; IP address numbers; biometric identifiers, such as fingerprints; full face photographic images; and any other unique identifying number, characteristic, or code.

[180] Maureen Hensley Quinn, RTAP National Resource Center, *The Health Insurance Portability and Accountability (HIPAA) Rule's Affect on Rural Transit Agencies* (Fall 2006), hereinafter referred to as "Quinn," available at http://www.ctaa.org/webmodules/webarticles/articlefiles/hipaabrief.pdf.

[181] Response of Metro Transit.

[182] Quinn, *supra* note 180.

[183] *Id*.

vised that HIPAA applied to them, or they at least treated the information as being confidential without knowing whether HIPAA actually applied.[184]

There are several reasons a transit agency would not be subject to HIPAA as a result of having health information on patrons. When a transit agency receives health information from a patron or pursuant to a patron's authorization or a release, the health information in the possession of a transit agency arguably is not PHI within the meaning of the HIPAA regulations. PHI is created, received, maintained, or transmitted only by covered entities. Moreover, a transit agency may be receiving and acting on the information on behalf of a patron, not on behalf of a covered entity.[185] To be subject to HIPAA, a transit agency would have to meet HIPAA's definition of a business associate and have a business associate agreement with a covered entity that authorized the transit agency to create, receive, maintain, or transit PHI, as defined by HIPAA, on behalf of a covered entity.

If a patron authorizes a covered entity such as a health care provider to furnish health information to a transit agency, the information thereafter in the possession of the transit agency is no longer subject to HIPAA. HHS long ago recognized the existence of this gap in privacy coverage:

> We understand that many entities may use and disclose individually identifiable health information. However, our jurisdiction under the statute is limited to health plans, health care clearinghouses, and health care providers who transmit any health information electronically in connection with any of the standard financial or administrative transactions in section 1173(a) of the Act. These are the entities referred to in section 1173(a)(1) of the Act and thus listed in § 160.103 of the final rule. Consequently, once protected health information leaves the purview of one of these covered entities, their business associates, or other related entities (such as plan sponsors), the information is no longer afforded protection under this rule.[186]

Of the 17 agencies responding to the survey that have health information on their patrons, twelve agencies replied that they do receive health information from covered agencies for the purpose of providing transportation service to their patrons. However, based on the transit agencies' responses to the survey, with some possible exceptions, it appears that their patrons provide information directly to the transit agencies or provide a release or an authorization to enable transit agencies to receive health information from the patrons' health care providers or other covered entities.[187]

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[184] Response of EBPC (stating that it replied affirmatively to the survey questions but had nothing in writing that HIPAA applied to the agency); Response of KAT (stating that that it has not been advised that HIPAA applies but "just work[s] under the assumption that the information would be covered under HIPAA law"); Response of Manchester (stating that the agency has not been "formally advised but it has long been our assumption that we were subject to HIPAA, having no evidence to the contrary"); Response of Pierce County (stating that "[t]he agency is not assumed to be a designated HIPAA organization, but we do handle some information that is protected under HIPAA"); Response of Utah Transit (stating that "[a]s we receive information from healthcare providers on our clients' disabilities, we assume that we are to treat such information as confidential").

[185] 78 Fed. Reg. 5572.

[186] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF THE SECRETARY, 45 C.F.R. parts 160 and 164, Standards for Privacy of Individually Identifiable Health Information, Final Rule, 65 Fed. Reg. 82,462, 82,567 (Dec. 28, 2000), hereinafter referred to as "HHS Dec. 2000 Final Rule," available at http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/prdecember2000all8parts.pdf.

[187] Response of EBPC ("stating that "[i]n order to use the ADA…paratransit program…applicants must complete a certification process, which [is] a requirement under the ADA. For EBPC, this includes a paper application, an in-person interview, and at times, a medical verification received from a health care provider" and that "[a]ll information in the rider's file is strictly confidential and EBPC does not transmit this information to anyone"); Response of New Haven Transit (clients required to sign a release of information); Response of HART (requires medical certification forms be completed by physicians on patrons for eligibility of paratransit services); Response of KAT (receives medical information regarding a client's need for paratransit service); Response of Kitsap (in some cases contacts named medical professionals for additional information regarding applicant's "functional abilities" to travel independently); Response of Manchester ("clients must submit documentation from their health care provider that illustrates disability [and] its impact on clients' ability to use fixed routes"); Response of MATA (requires certification of all patrons whose medical information is "received and stored on site"); North County (receives health information from medical providers to determine eligibility of service; eligibility application requires a patron to acknowledge the use of PHI); Pierce Transit (seeks "professional verification and reports from health care providers" for paratransit service); Response of Utah Transit (receives health information that may affect an individual's functional ability to ride public transportation; information is received by fax or provided to the authority by the client); and

For instance, Metro Transit, which maintains that HIPAA does not apply to the agency, stated that that it has a contract with a covered entity, but that "none of the health records come from the covered entity. Health records come directly from the patron. The covered entity obtains a release from the patron to voluntarily participate in the program."[188]

Likewise, Pierce Transit stated that the agency "is not assumed to be a designated HIPAA organization" but that the agency does "handle some information that is protected under HIPAA." In a follow-up interview, a representative of Pierce Transit described his agency's procedure.

> Pierce Transit seeks professional verification as needed to support our paratransit eligibility decision making. *Our paratransit application includes a release of information that allows us to contact relevant treatment professionals*. Pierce Transit commonly seeks information by faxing specific questions to these treatment professionals or by seeking copies of existing evaluations. The information we seek is related to claimed limitations or conditions the applicant has identified as barriers to regular bus use. This information helps to further define the applicants' need for service and reduces the need for in person assessment (emphasis added).[189]

Pierce Transit further explained that it

> does not directly receive any information from the Medicaid system or Health Department. The medical information we receive comes directly from the medical providers who are the primary care sources for our applicants for our ADA paratransit service. We receive this via a release of information during the eligibility process.
>
> Pierce Transit contracts with First Transit as a service provider[;] they do the actual ADA paratransit driving. [Pierce Transit] *does not provide specific health information to the transportation provider beyond the pick-up and drop off points* and what type of mobility aid will be used. This information is transferred by way of a manifest. There is no specific data transfer agreement that I am aware of (emphasis added).[190]

In sum, based on the survey responses, transit agencies receive health information directly from patrons or from their health care providers pursuant to a release or authorization signed by patrons. Although transit agencies such as Metro Transit and Pierce Transit may receive and maintain health information from applicants or from their health care providers pursuant to a release of information, neither Metro Transit nor Pierce Transit assumes that it is subject to HIPAA. It appears that HIPAA only applies to a transit agency if the agency meets HIPAA's definition of a business associate and receives PHI directly from a HIPAA-covered entity pursuant to a business associate agreement with a covered entity.

## C. Effect of HIPAA on Coordinated Transportation Services Programs

### *1. Development of Coordinated Human Transportation Services Programs*

In February 2004 President George W. Bush signed Executive Order 13330 that mandated the coordination of human service transportation services.[191] A 2005 report to the president regarding Executive Order 13330 recognized five states—Florida, Maryland, North Carolina, Ohio, and Washington—for "building and implementing transportation infrastructure, policies and programs that facilitate human service transportation coordination…by implementing strategies such as transportation brokerages, Medicaid transit pass programs, and joint planning efforts."[192] As of 2012, nearly 60 percent of transit agencies were coordinating with health and human services providers to improve ADA paratransit services.[193] Transit operators must provide ADA

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Whatcom (seeks professional verification from physicians and other providers to assist the eligibility specialist in making an ADA paratransit determination).

[188] Metro Transit also stated "paratransit service manifests are generated for distribution to directly operated service drivers and to contracted service drivers for transportation purposes only. …No health related information is provided on the manifests. Manifests are distributed manually and electronically."

[189] Email, dated Oct. 15, 2013, from Pierce Transit.

[190] *Id*.

[191] Human Service Transportation Coordination, 69 Fed. Reg. 9185 (Feb. 26, 2004), available at http://www.gpo.gov/fdsys/pkg/FR-2004-02-26/pdf/04-4451.pdf.

[192] United We Ride, Coordinating Council on Access and Mobility, *Report to the President–Human Service Transportation Coordination–Executive Order 13330* (2005), available at http://www.unitedweride.gov/1_866_ENG_HTML.htm.

[193] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-17, *ADA Paratransit Services: Demand Has Increased, but Little is Known about Compliance* (Nov. 15, 2012) (*see* unnumbered page in section entitled *What GAO Found*), available at http://www.gao.gov/products/GAO-13-17. Another GAO report entitled *Transportation Coordination, Benefits and Barriers Exist, and Planning Efforts Progress Slow* states that "the lack of coordination among human services transportation provid-

complementary paratransit service, but state and local social services agencies offer paratransit for clients using government funding provided by one of approximately 90 programs.[194]

Under HIPAA, if a covered entity is providing PHI to a business associate, the parties must have a business associate agreement that complies with HIPAA's specifications. Although there is an issue of whether transit agencies satisfy HIPAA's definition of a business associate,[195] some transit agencies are serving as brokers and/or have business associate agreements with covered entities to deliver transportation services. Some transit agencies are subcontractors of business associates. In addition, some transit agencies may have contracts as direct providers with one or more covered entities. Regardless of whether transit agencies come within the meaning of HIPAA's definition of a business associate, the contracts reviewed for this digest stipulated that the transit agencies will comply with HIPAA.

### *2. Use of Brokerage Agreements and Subcontractors*

Some state and local governments, social services agencies, and transit districts coordinate their efforts to provide paratransit service by using brokers, including the use of transit agencies as brokers.[196] When there are coordinated transportation services using transit, the largest component is the Non-Emergency Medical Transportation (NEMT) services program for Medicaid recipients.[197] Medicaid, of course, is a health plan covered by HIPAA.[198] Under federal law, state Medicaid programs must "ensure that recipients have necessary medical transportation to and from covered Medicaid services (42 CFR 431.53)" and that all "ordering or rendering providers [are] enrolled direct with the Medicaid agency."[199] However, some state coordination programs do not include NEMT.[200] When there is a coordinated approach, transportation may be arranged by a broker for ADA passengers and Medicaid recipients, as well as for urban or rural passengers, the elderly, low income persons, and other recipients of social services.[201]

Although the states use a variety of approaches, transportation may be approved and arranged, for example, after a Medicaid recipient submits an eligibility form completed by his or her health care provider. Again the practice may vary, but a Medicaid recipient may call a broker or transit agency and provide the necessary information to obtain transportation. Information that is

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ers and public transit operators contributes to the duplication or overlapping of transportation services. Thus, particular clients may be left unserved or underserved, while transportation providers serving other clients may have excess capacity." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-1, *Transportation Coordination, Benefits and Barriers Exist, and Planning Efforts Progress Slowly*, at 2 (Oct. 1999), available at http://www.gao.gov/new.items/rc00001.pdf.

[194] Lave & Mathias, *supra* note 3, at 4.

[195] *See* Section IX.E of this digest.

[196] Lave & Mathias, *supra* note 3, at 5. *See also* Kenneth I. Hosen & Elisabeth Fetting, *Transit Agency Participation in Medicaid Transportation Programs*, TCRP Synthesis 65, TRANSPORTATION RESEARCH BOARD OF THE NATIONAL ACADEMIES, Washington, D.C. at 13 (2006) (*see id*., Table 2, "General State NEMT Characteristics," describing state and local practices), hereinafter referred to as "TCRP Report 65," available at http://www.nap.edu/catalog.php?record_id=13961.

[197] ACCT Final Report, *supra* note 62. *See also* CENTER FOR WORKERS WITH DISABILITIES, AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, *Improving Human Services Transportation: The Massachusetts Brokerage and Coordination Model*, at 2, hereinafter referred to as "The Massachusetts Brokerage and Coordination Model," available at http://www.aphsa.org/content/dam/CWD/PDF/Resources/Trans-Brief-MA-2012.pdf. Since 2005, however, brokerages have been a "Medicaid state plan option." *Id*.

[198] *See* Section III of this digest. *See also* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, available at http://www.hhs.gov/hipaafaq/providers/treatment/1040.html (May a Medicaid State Agency and a Medicare Advantage plan share protected health information to identify dually eligible enrollees); The Health Insurance Portability and Accountability Act (HIPAA) and Medicaid Billing, available at http://www.oasas.ny.gov/admin/hcf/medhipaa.cfm (regarding HIPAA-compliant claims); and N.C. DEP'T OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE (regarding Medicaid and HIPAA compliance), available at http://www.ncdhhs.gov/dma/hipaa/.

[199] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT TO THE JOINT LEGISLATIVE OVERSIGHT COMMITTEE ON HEALTH AND HUMAN SERVICES AND THE JOINT LEGISLATIVE OVERSIGHT COMMITTEE ON TRANSPORTATION, *Non-Emergency Medical Transportation Services Management Report*, at 8 (Oct. 15, 2012), hereinafter referred to as "NEMT Services Management Report," available at www.starnewsonline.com/assets/doc/WM25807107.DOC.NEMT.

[200] The Massachusetts Brokerage and Coordination Model, *supra* note 197, at 2.

[201] NEMT Services Management Report, *supra* note 199, at 3.

provided by a Medicaid recipient to a transit agency does not appear to be subject to HIPAA because a transit agency is not a covered entity. However, a state Medicaid program or agency or one providing coordinated transportation services may require a contract with a transit agency that provides that the transit agency is subject to HIPAA.

In many states the department of social services or the equivalent acts as the lead coordinating agency that is responsible for NEMT.[202] Moreover, about 40 states use brokers to administer their NEMT program.[203] A recent TCRP Report on transit agencies and Medicaid transportation programs discusses the diversity in approach among the states regarding eligibility, screening, and verification of recipients of transportation services.[204] Arrangements vary widely from the use of a statewide broker to regional or county brokers. The brokers may be profit or not-for-profit entities or government agencies.[205] Although brokers may fulfill a number of roles, typically their contracts with a sponsor provide that a broker will establish a network of vendors or subcontractors, verify eligibility of applicants, and arrange for the least expensive means of transportation.[206]

Massachusetts is one of the states that has developed a "transit administered brokerage" system to coordinate NEMT and other human services transportation programs.[207] The Massachusetts EOHHS manages a "statewide brokerage network for eligible consumers" to serve, for example, the Massachusetts Department of Public Health and other agencies.[208] Brokers are selected through competitive bidding that is open to regional transportation agencies (RTA). The arrangement is essentially that

> [T]he RTA brokers contract with the [Human Service Transportation] (HST) Office to provide brokerage management services for a negotiated annual rate, which includes the brokerage services but not the cost of the rides. The brokerage services include phone banks, scheduling, verification of eligibility, quality reviews, and reporting. The brokers subcontract with local transportation providers to provide the trips under one of two service delivery models: route based and demand response transportation.[209]

The HST Provider Performance Standards applicable to EOHHS require a broker/transit provider to comply with HIPAA and that the contracts with transportation providers state that the providers will comply with HIPAA.[210]

Other states use brokers to coordinate transit services including for Medicaid recipients. In Florida, "all programs that receive or administer state funds for transportation must participate in the coordinated transportation network."[211] Pennsylvania, New York, and Oregon use a brokerage system as well. For the Portland, Oregon area, TriMet serves as the broker, screens clients for eligibility, and contracts with transportation providers.[212] For a coordinated transportation approach brokers also may use fixed-route transit service because many states have had significant financial savings by using fixed-route service for capable individuals.[213]

### *3. Whether HIPAA Applies to Coordinated Transportation Services*

HIPAA has been described as a "very complex piece of legislation and regulations [that] is frequently cited as a barrier to coordinating transportation between Medicaid and other agencies."[214] There is some divergence of opinion regarding whether the above and similar brokerage arrangements are subject to HIPAA. One report notes the disagreement and states that there is "little guidance" for determining whether NEMT providers, the largest component of coordinated transportation services, "meet the busi-

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[202] *Id*. at 4.

[203] *Id.* at 5.

[204] TCRP Report 65, *supra* note 196, at 13.

[205] NEMT Services Management Report, *supra* note 199, at 5.

[206] *Id.* at 7.

[207] The Massachusetts Brokerage and Coordination Model, *supra* note 197, at 1.

[208] *Id*. at 3.

[209] *Id.* at 4.

[210] HST Provider Performance Standards (Massachusetts) (Updated Jan. 1, 2011), available at http://www.mass.gov/eohhs/docs/hst/provider-performance-standards.pdf.

[211] *Comparison of Non-Emergency Medical Transportation across Various States*, hereinafter referred to as "Comparison of NEMT across Various States," available at www.ime.state.ia.us/docs/StateComparisonsofMed Trans.doc.

[212] *Id*.

[213] Kenneth I. Hosen & Elisabeth Fetting, *Transit Agency Participation in Medicaid Transportation Programs*, TRANSPORTATION RESEARCH BOARD OF THE NATIONAL ACADEMIES, Washington, D.C. at 29 (2006), (*citing* 45 C.F.R. §§ 164.502(e), 164.504(e), 164.532(d) and (e)), hereinafter referred to as "TCRP Synthesis No. 65," available at http://www.nap.edu/catalog.php?record_id=13961.

[214] ACCT Final Report, *supra* note 62, at 4.

ness associate requirements or exceptions" and are subject to HIPAA.[215] This report also states that whether a participating agency may disclose information to another agency "for a particular purpose is a highly fact specific determination that must be made on a case by case basis."[216]

This report found that that the "HIPAA regulations are for the most part silent on the impact and responsibilities specifically for public transportation providers."[217] However, this report also found that transportation providers generally are "required to comply with HIPAA if it is determined that, in addition to basic client demographic and medical service trip information, a client's protected health information (PHI) is also being shared when consolidating medical transportation trip information."[218] As noted previously, a subset of PHI is individually identifiable health information that includes "demographic information collected from an individual."[219]

The TCRP Report noted earlier discusses the "opportunities" for public transit agencies to participate as a "direct provider, broker, or subcontractor" in Medicaid transportation programs.[220] This report states that the confidentially of records is a potential barrier to coordinated transit service because public transit agencies may not be "equipped" to maintain the confidentiality of medical information.[221] The TCRP Report also suggests, albeit in one brief sentence, that transit agencies are not subject to HIPAA regarding NEMT trips that may be arranged by a transit agency as a broker.[222] However, as noted, a contract for NEMT could provide that HIPAA applies.

Although one issue is whether a particular arrangement for coordinated transportation services involves the sharing of PHI by covered entities with transit agencies, another issue is that "sometimes it is difficult to discern whether information is protected health information."[223] For example, it may be a patron who provides the health information or authorizes that it be provided to a transit agency, and it may be a patron who requests transportation and provides any additional health-related information needed by a transit agency that is serving as a broker and/or provider. Nevertheless, in a particular coordinated transportation services program, a transit agency serving as a broker and business associate or as a subcontractor could be expected to receive and transmit PHI.[224] In addition to a business associate agreement of the kind included in Appendix C there could be a "data sharing agreement" between a covered entity and a business associate.[225]

### *4. Transit Agencies having Business Associate, Subcontractor, or Direct Provider Agreements*

Assuming that the HIPAA definition of a business associate applies to a person or entity, when a covered entity is sharing PHI with another entity for use on behalf of the covered entity, the two parties must have a business associate agreement "in place."[226] Some agencies responding to the survey stated that they are business associates of a covered entity and provided copies of their business associate and subcontractor agreements.[227]

GATRA provided a copy of its business associate agreement with EOHHS pursuant to which GATRA serves as a broker for coordinated transportation services. GATRA's contract states that GATRA is a business associate as defined by HIPAA and subject to the Privacy and Security Rules.[228] The HST Office of EOHHS contracts with six regional transit authorities who act as brokers to provide transportation services for participating agencies, including MassHealth (Medicaid), MassHealth funded Day Habilitation, the Department of Developmental Services; and the Massachusetts Department of Public Health.[229] The brokers subcontract with transit providers to provide direct transportation services to "EOHHS consumers."[230]

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[215] *Id*. at 58.

[216] *Id*. at 55.

[217] *Id*. at 56.

[218] *Id*.

[219] 45 C.F.R. § 160.103 (2013) (definition of individually identifiable health information).

[220] TCRP Report 65, *supra* note 196, at 4.

[221] *Id*. at 21.

[222] *Id*.

[223] ACCT Final Report, *supra* note 62, at 57.

[224] *Id*.

[225] *Id*. and App. C of this digest.

[226] ACCT Final Report, *supra* note 62, at 57.

[227] *See* App. C of this digest.

[228] Copies of GATRA's contract with EOHHS and of its internal operating policy and procedure and HIPAA compliance plan are included in Appendix C of this digest.

[229] COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES, HUMAN SERVICE TRANSPORTATION OFFICE, *2012 Annual Report*, at 5, available at http://www.mass.gov/eohhs/docs/hst/hst-annual-report-fy12.pdf.

[230] *Id*.

Salem-Keizer in Oregon in a follow-up interview explained the process for its agency and others involved with coordinated transportation services but noted that the arrangements may be in the process of changing.[231] Salem-Keizer provided a copy of a Provider Agreement that is required to enroll

> [A]s a Provider with the Oregon Health Authority ("Authority")…to submit claims, and receive payment, for medical care, services, equipment and/or supplies furnished by Provider to persons eligible for medical assistance in Oregon ("Recipients"). Payments for medical assistance are made using Medicaid, State Children's Health Insurance Program, or funds from other federally funded programs.[232]

Paragraph 7 of the agreement provides for the protection of confidential information that may be "*released with appropriate written authorization of the recipient or their authorized representative*, or for purposes directly connected with the administration of the OHA program in accordance with applicable federal and state law (emphasis added)."[233] Paragraph 7 of the agreement, moreover, provides that the parties will comply with HIPAA.[234]

Salem-Kaiser also provided a copy of a new agreement entitled Subcontractor Agreement that may or may not be utilized in the future.[235] The draft agreement states that the "[s]ubcontractor specializes in the provision, coordination and management of NEMT services and is designated and subcontracted currently as a transportation brokerage in the State of Oregon NEMT." With respect to HIPAA compliance, Paragraph 4 of the draft agreement states:

> Individually Identifiable Health Information relating to specific individuals may be exchanged between Contractor and the Oregon Health Authority for purposes directly related to the provision of services to Members. Since Subcontractor will have access to personally identifiable patient health information, Subcontractor agrees to enter into and abide by Contractor's Business Associate Agreement under HIPAA as attached to this Agreement as Exhibit C "Business Associate Agreement."[236]

The referenced business associate agreement states in paragraph B that HIPAA compliance is required because the "Business Associate will be providing services…for one or more members of [an] Affiliated Covered Entity involving creating, receiving, maintaining, or transmitting [PHI] on behalf of [an] Affiliated Covered Entity."[237]

Lastly, a Blanket Purchase Agreement that Salem-Keizer uses with private providers that perform NEMT trips also requires compliance with HIPAA.[238]

As discussed in the next subsection, however, it is not clear that a transit agency meets HIPAA's definition of a business associate. According to HHS, if an entity does not satisfy the definition of a business associate, HIPAA does not apply. However, in practice, there are business associate and subcontractor agreements that stipulate that a transit agency must comply with HIPAA when individually identifiable health information or PHI more generally will be transmitted (or there is a possibility of transmittal) by a covered entity.

## D. Whether Transit Service Is a Business Associate Function Under HIPAA

The business associate and subcontractor agreements included with this digest stipulate that HIPAA applies to the arrangements because of the possible sharing of PHI. The parties may have stipulated that HIPAA applies because it is unclear whether HIPAA applies, because the covered entity or entities simply require such a stipulation for one or more reasons, and/or because the stipulation seems to be the best practice for protecting the privacy and security of a patient's health information that otherwise would not be subject to HIPAA. Nevertheless, there is an argument that such a stipulation is not warranted, because a transit agency does not meet HIPAA's definition of a business associate. Indeed, one source notes that the HIPAA regulations place

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[231] Email, dated Oct. 18, 2013, from Salem-Keizer Transit.

[232] *See* App. C of this digest.

[233] *See id*.

[234] *See id*.

[235] *See id.*

[236] *See id.*

[237] *See* App. C of this digest (exhibit C to Subcontractor Agreement).

[238] Email, dated Oct. 18, 2013, from Salem-Keizer Transit. *See* App. C of this digest. The Blanket Purchase Agreement reflects that an agreement between Salem Area Mass Transit District as broker and the undersigned contractor has been established to provide non-emergency transportation for Medicaid and OHP PLUS recipients to and from Medicaid covered medical services in the Service Area. *See* App. C of this digest. Paragraph 28(3) of the agreement states:

> If Contractor reasonably believes that the Contractor's or BROKER's data transactions system or other application of HIPAA privacy or security compliance policy may result in a violation of HIPAA requirements, Contractor shall promptly consult the OHA Information Security Office. Contractor or BROKER may initiate a request for testing of HIPAA transaction requirements, subject to available resources and the BROKER testing schedule.

"an enormous burden" on covered entities to determine which individuals and organizations are business associates under HIPAA.[239]

The HIPAA regulations define a business associate as a person or entity that performs on behalf of a covered entity a "function or activity regulated by [HIPAA], including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 C.F.R. 3.20, billing, benefit management, practice management, and repricing…."[240] These are not functions and activities that are performed by transit agencies on behalf of covered entities.

Moreover, as specified by HIPAA, a transit agency is not an entity that

> [p]rovides…legal, actuarial, accounting, consulting, data aggregation, …management, administrative, accreditation, or financial services to or for such covered entity, …where the provision of the service involves the disclosure of protected health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.[241]

As one source observes, HIPAA has rules regarding who is a business associate of a covered entity (footnotes omitted).[242]

Because the regulation is drafted to refer to "business associates" in connection with a covered entity, the types of organizations covered as business associates are limited to those that assist with the business processes of a covered entity. The types of services covered as business associates include "legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services (footnotes omitted)."[243]

Another writer argues that covered entities may disclose PHI only to persons or entities that meet HIPAA's definition of a business associate.[244] The definitional issue has arisen in connection with whether financial institutions are subject to HIPAA.

A banking organization may be subject to HIPAA if it is considered either a "health care clearinghouse" or a "business associate" of a "covered entity."

When a financial institution processes health care payments, it may become subject to HIPAA standards. But there is still uncertainty as to where financial institutions fit under either the "health care clearinghouse" definition or the "business associate" definition that would render them accountable for compliance with HIPAA.[245]

The article implies, however, that when banks provide health care clearinghouse services, they may agree by contract to comply with HIPAA.[246]

Nevertheless, HHS advises that "[i]f an entity does not meet the definition of a…business associate, it does not have to comply with the HIPAA Rules."[247] A search of the HHS Web site did not disclose any HHS guidance, advice, opinion, or decision regarding whether transit agencies meet the criteria for being a business associate of a covered entity. An online article states that HHS's final rule clarifies its interpretation of entities that qualify as business associates by providing, for example, "that entities that maintain or store protected health information on behalf of a covered entity are business associates, even if they do not actually view the protected health information," a clarification that does not apply to transit agencies.[248]

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[239] Randi Heitzman, *The Business Associate Brain Teaser: A Look at Problems Involving the Business Associate Regulations under the Health Insurance Portability and Accountability Act of 1996*, 11 ANN. HEALTH L. 159, 194 (2002).

[240] 45 C.F.R. § 160.103 (2013) (subsection (i) of the definition of business associate) (definition excludes one who provides services as a member of the workforce of a covered entity or arrangement).

[241] 45 C.F.R. § 160.103 (2013) (subsection (ii) of the definition of business associate) (definition excludes one in capacity of a member of the workforce of the covered entity); *see also*, 78 Fed. Reg.5688.

[242] Sonia W. Nath, *Relief for the E-patient? Legislative and Judicial Remedies to Fill HIPAA's Privacy Gaps*, 74 GEO. WASH. L. REV. 529, 538 (2006).

[243] *Id*.

[244] Brian Zoeller, *Health and Human Services' Privacy Proposal: A Failed Attempt at Health Information Privacy Protection*, 40 BRANDEIS L.J. 1065, 1082 (2002).

[245] Steven Robert Roach & William R. Schuerman, Jr., *2004 Privacy Year in Review Annual Update: Financial: Privacy Year in Review: Recent Developments in the Gramm-Leach Bliley Act, Fair Credit Reporting Act, and other Acts Affecting Financial Privacy*, 1 ISJLP 385, 437-438 (2005) (footnotes omitted).

[246] *Id.*

[247] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY FOR COVERED ENTITIES AND BUSINESS ASSOCIATES, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/.

[248] Kimberly J. Kannensohn, Nathan A. Kottamp, Amanda Enyeart & Lindzi M. Timberlake, *HHS Adopts a Broad Interpretation of Entities that Qualify as Business Associates under HIPAA in the Omnibus Final Rule* (January 30 2013), available at http://www.mondaq.com/unitedstates/x/218636/Healthcare/HHS+Adopts+A+Broad+Interpretation+Of+Entities

As seen, the HIPAA regulations limit the kinds of entities that may be business associates and create, receive, maintain, or transmit PHI on behalf of a covered entity. With a patient's authorization, however, a covered entity may disclose health information to anyone permitted by a patient including a transit agency. Moreover, a covered entity may disclose PHI without a patient's authorization when a use or disclosure is required by law. Even if the required by law provision means medical information needed to qualify an individual for a program to receive public benefits, in practice a covered entity or agency administering a public benefits program may require or receive an authorization from a patient before disclosing PHI in connection with providing benefits.

Finally, regardless of whether transit agencies meet the criteria to be a business associate under HIPAA, the survey responses and contracts provided by transit agencies indicate that covered entities or their agents and transit agencies are stipulating that HIPAA applies, particularly when PHI may be shared by a covered entity with a transit agency, even if a patient already has provided health information or authorized its disclosure.

## E. Whether Transit Agencies Must Provide a Privacy Notice

Covered entities must provide a notice of their privacy practices. Business associates are not required to do so. According to HHS, the Privacy Rule does not require a business associate to create a notice of privacy practices.

However, a covered entity must ensure through its contract with the business associate that the business associate's uses and disclosures of protected health information and other actions are consistent with the covered entity's privacy policies, as stated in covered entity's notice. Also, a covered entity may use a business associate to distribute its notice to individuals.[249]

Eleven transit agencies that have health information on patrons stated that they do not provide their patrons (or others) with a notice of their privacy policies or practices regarding any further use or disclosure of health information. At most, transit agencies notify their patrons that their information will be kept confidential and/or require that a patron provide a signed release for the disclosure of health information.[250]

EBPC stated that an applicant must sign a certification acknowledging that the applicant understands that all information given to EBPC is confidential and used only to certify whether the applicant is eligible for ADA paratransit service. Metro Transit provided a notice of confidentiality with a release of information that must be signed by an applicant.

> I, the applicant, understand that the purpose of this application form is to determine my eligibility to use Metro Paratransit Service. I agree to release the information requested to Metro and any eligibility review panel, and understand that the information contained herein will be treated confidentially. I understand further that Metro reserves the right to request additional information at its discretion.

Finally, two agencies reported that they do provide their patrons with a notice of privacy practices.[251]

In practice, based on the survey responses, transit agencies come into possession of patrons' health information when a patron provides the information or authorizes a health care provider (or other covered entity) to provide it. Transit agencies also may come into possession of PHI when they are a direct provider to one or more covered entities or when they participate in a coordinated transportation services program through a broker.[252] In those instances, transit agencies could receive PHI from a covered entity or from a broker that arranges transportation for ADA, Medicare, and other qualified recipients. However, a covered entity similarly would need a patient's authorization to disclose PHI unless the covered entity is required by another law to disclose PHI. In that instance, if HIPAA does not apply to a person or entity receiving the health information, another federal or state law mandating the disclosure of PHI could apply to the pri-

+That+Qualify+As+Business+Associates+Under+HIPAA+In+The+Omnibus+Final+Rule.

[249] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY, available at http://www.hhs.gov/ocr/privacy/hipaa/faq/business_associates/390.html.

[250] Response of MATA (noting that each application explains that medical information will be kept confidential); Response of EBPC; Response of Utah Transit (stating that a patron is only advised verbally in an interview that all information is confidential and will not be shared without a request signed by the client or the client's agent).

[251] Responses of Kitsap and Pierce Transit.

[252] Health information subject to HIPAA does not have to be diagnostic information. A subset of PHI is individually identifiable health information or IIHI that includes demographic information collected on an individual. *See* Section VII of this digest.

vacy and security of the information.[253] The agreements that transit agencies provided in response to the survey provide that the agencies will comply with HIPAA; thus, the required by law provision in HIPAA and/or in the agreements could mean that laws other than HIPAA may apply.

## X. DISCLOSURE OF PROTECTED HEALTH INFORMATION WHEN REQUIRED BY LAW

### A. Subpoenas and Discovery Requests

The HIPAA regulations provide that when required by law, covered entities may disclose PHI without a written authorization of the individual who is the subject of the information and in some cases without an opportunity for the individual to agree or object.[254]

First, covered entities may disclose PHI in response to an order of a court or an administrative tribunal but only as required by the order.[255] That is, PHI is not to be disclosed beyond what is required by a judicial or an administrative order.[256] Second, covered entities may disclose PHI in response to a subpoena including a grand jury subpoena,[257] discovery request, or other lawful process.[258] When served with a subpoena or a demand for discovery covered entities must comply with certain HIPAA requirements before disclosing PHI.[259] A covered entity must receive satisfactory assurance that "reasonable efforts" have been made by the requesting party to ensure that an individual who is the subject of the requested PHI has been notified of the request[260] or that "reasonable efforts" have been made by the requesting party to obtain a "qualified protective order."[261] PHI requested during a lawful process also may be disclosed without a covered entity having received satisfactory assurance if the covered entity makes reasonable efforts to provide notice to the individual or seeks a qualified protective order.[262]

A business associate agreement must provide that a business associate will not use or disclose PHI other than as provided in its contract or as required by law,[263] such as in response to a subpoena, request for discovery, or a FOIA or similar request. Although HHS's sample business associate agreement does not deal specifically with subpoenas and discovery requests, the sample agreement includes a provision that it is a business associate's duty to disclose PHI as required by law.[264]

In regard to what is required by law in a particular state, state law that is more stringent than HIPAA may result in an exception to HIPAA. For instance, in Ohio the state's physician-patient privilege permits disclosures only in certain limited circumstances "and responding to a grand jury subpoena is not one of them."[265] Thus, "because Ohio's physician-patient privilege statute provides more protection, it is not preempted by HIPAA"[266]

Twelve agencies having health information on patrons reported that they had not been required or requested to provide health information on their patrons pursuant to a subpoena, a discovery request, or a court or administrative order. How-

[253] *See* Section XV.C. of this digest.

[254] 45 C.F.R. § 164.512(a) (2013). *See also* 45 C.F.R. § 164.508 and 164.510 referenced in the preceding section. *See also*, 45 C.F.R. § 164.103 (2013) (definition of required by law). HIPAA also requires the disclosure of PHI when payment is sought under a government program providing public benefits. *Id*

[255] 45 C.F.R. § 164.512(e)(1)(i) (2013).

[256] 45 C.F.R. § 164.512(e)(1) (2013).

[257] 45 C.F.R. § 164.512(f)(1)(ii)(B) (2013).

[258] 45 C.F.R. § 164.512(e)(1)(ii) (2103).

[259] 45 C.F.R. § 164.512(e) (2013).

[260] 45 C.F.R. § 164.512(e)(1)(ii)(B) (2013). *See* § 164.512(e)(1)(iii) (2013) for additional requirements on what constitutes the receipt by a covered entity of satisfactory assurances from a party seeking protected health information.

[261] 45 C.F.R. § 164.512(e)(1)(ii) (2013). *See* § 164.512(e)(1)(iv) (2013) regarding the written statement and accompanying documentation needed by a covered entity as satisfactory assurances. *See* § 45 C.F.R. § 164.512(e)(1)(v) (2013) regarding what is meant by a qualified protective order.

[262] 45 C.F.R. § 164.512(e)(vi) (2013) (internal citations omitted).

[263] 45 C.F.R. § 164.504(e)(2)(A) (2013).

[264] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SAMPLE BUSINESS ASSOCIATE AGREEMENT PROVISIONS, (Jan. 25, 2013), available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html.

[265] Natalie F. Weiss, *To Release or not to Release: An Analysis of the HIPAA Subpoena Exception*, 15 MICH. ST. J. MED. & LAW 253, 271 (*citing* O.R.C. §§ 2317.02(B)(1)(a)-(e) (2011) and 2317.02(B)(2)(a) (2011)), hereinafter referred to as "Weiss."

[266] *Id*. (*citing* O.R.C. § 2317.02(B)(1) (2011); 45 C.F.R. § 164.512(f)(1)(ii)(B) (2011)). The Weiss article contains a state-by-state discussion of subpoenas for health information.

ever, four agencies reported that they had.[267] GATRA has provided certain unspecified documents in response to a discovery request by a customer's legal representative. MATA in Memphis has provided records of a paratransit patron's scheduled rides in response to a court order arising out of a patron's complaint regarding service. Pierce Transit has provided certain unspecified documents as requested or required. On the other hand, one transit agency that assumes that HIPAA applies to the agency reported that when requested on one occasion to provide records the agency did not to release them because of "HIPAA constraints."

## B. FOIA Requests

The term required by law has been construed to include requests made under the federal or a state FOIA or public records disclosure law. In *State ex rel. Cincinnati Enquirer v. Daniels*[268] the court held that it was HHS's intention to "preserve access to information considered important enough by state or federal authorities to require its disclosure by law;" that Congress did not intend to preempt the disclosure laws; and that the Privacy Rule's "approach is simply intended to avoid any obstruction to the health plan or covered health care provider's ability to comply with its existing legal obligations (citations omitted)."[269]

In *Abbott v. Texas Dep't of Mental Health & Mental Retardation*[270] the court, quoting 45 C.F.R. § 164.103, ruled that the phrase required by law, which is a legal mandate that is enforceable in a court of law for the disclosure of PHI, includes "statutes or regulations that require the production of information." The court held that HIPAA did not preempt the Texas Public Information Act, that the information requested was not confidential, and that the records could be released (some internal quotation marks omitted).

When FOIA or public records disclosure laws mandate disclosure by a covered entity, PHI must be disclosed as long as HIPAA's "minimum necessary" standard is met and the disclosure does not exceed what is allowed by state laws that are more stringent than HIPAA.[271] When state law allows but does not require the disclosure of PHI, or when there are exceptions or other qualifications that exempt the disclosure of PHI, the requested disclosures are not required by law and, therefore, do not come within the meaning of the Privacy Rule.[272]

A FOIA or public records disclosure law may or may not be more restrictive than HIPAA with respect to the PHI requested. Under Exemption 6 of the federal FOIA, federal agencies may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[273] The Arkansas FOIA does not allow government entities to disclose individuals' mental health records, adoption or education records[274] or "medical information contained in a non-medical record relating to a medical condition, diagnosis, or treatment."[275]

No transit agency having health information on patrons reported having been required to provide such information pursuant to a request under the federal or a state FOIA or public records disclosure law.[276]

[267] One transit agency did not respond to the question.

[268] 108 Ohio St. 3d 518, 844 N.E.2d 1181 (Ohio 2006).

[269] *Id.* at 1187.

[270] 212 S.W. 3d 648, 654-655 (Tex. App. 2006).

[271] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION PRIVACY, MINIMUM NECESSARY REQUIREMENT, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/minimumnecessary.html.

[272] U.S. DEP'T OF HEALTH AND HUMAN SERVICES (answering question regarding the application of HIPAA to FOIA laws) (*citing* 45 C.F.R. § 164.512(a)), available at http://www.hhs.gov/hipaafaq/permitted/require/506.html.

[273] 5 U.S.C. § 552(b)(6) (2013); *see* HHS Dec. 2000 Final Rule, *supra* note 186, 65 Fed. Reg. 82482.

[274] Ayres, *supra* note 42, at 1007 (*citing* ARK. CODE ANN. §§ 20-46-104 (Repl. 2001) and 25-19-105(b)(2) (Supp. 2011)).

[275] *Id*. at 2 (*citing* ARK. CODE ANN. § 14-14-110(b) (Repl. 1998); Ark. Op. Atty. Gen. No. 2009-021 (Feb. 25, 2009)). The author notes also that "state hospital records, including mental-health information, may only be used for specific research-related purposes and may not otherwise be disclosed." *Id*. (*citing* ARK. CODE ANN. § 20-46-104(a)-(b)).

[276] One transit agency did not respond to the question.

## XI. HIPAA PREEMPTION OF CONTRARY STATE LAWS THAT ARE LESS STRINGENT THAN HIPAA

HIPAA preempts state privacy laws that are contrary[277] to the HIPAA requirements and that are less stringent than the HIPAA rules in protecting an individual's PHI.[278] However, a state law is contrary to HIPAA only when it would be impossible for a covered entity or business associate to comply with both the state law and the applicable HIPAA requirement.[279] Although there are cases holding that HIPAA preempts a provision of state law, the HIPAA preemption provision may not be as broad as it would first seem.

First, the Secretary of HHS may be requested to determine that there is an exception pursuant to which a particular state privacy law is not preempted.[280] There are various grounds on which the Secretary may determine that a provision of state law is "necessary."[281] There is no preemption when the Secretary determines that a provision of state law is needed to prevent fraud and abuse relating to the provision of or payment for health care; constitutes appropriate state regulation of insurance and health plans; concerns state reporting on health care delivery or costs; or serves a compelling need regarding public health, safety, or welfare such as to warrant an intrusion into privacy.[282] There is also no preemption when the Secretary determines that the purpose of a state law concerns the "regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances" as the terms are defined under federal or state law.[283]

Second, there is no preemption when a contrary state law "relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation" under HIPAA.[284] To be more stringent than a HIPAA provision means that a state law must prohibit or restrict a use or disclosure when the use or disclosure would be permitted by HIPAA.[285] A more prohibitive or restrictive state law still may be preempted either when the Secretary requires disclosure to determine whether a covered entity or business associate is in compliance with HIPAA or when a disclosure is to be made to an individual who is the subject of individually identifiable health information.[286]

Third, a state law is more stringent and thus not preempted when a state law permits an individual "greater rights of access" to his or her individually identifiable health information; "provides greater privacy protection for the individual" who is the subject of the individually identifiable health information; or furnishes an individual with a "greater amount of information."[287] Some state laws address the legal authority needed from an individual for the use or disclosure of individually identifiable health information. Thus, more stringent state laws are not preempted when they "narrow the scope or duration" of the legal permission or "reduce the coercive effect of the circumstances surrounding the express legal permission."[288]

Fourth, there may not be necessarily a conflict when a state privacy law is contrary to HIPAA. A covered entity may be able to comply both with the contrary state law and with the HIPAA requirement at issue. For instance, there is no conflict when a HIPAA requirement permits a covered entity to disclose PHI and the contrary state law also permits disclosure. If the issue involves a permissible disclosure under HIPAA, a covered entity may comply with both laws.

Fifth, if a state law prohibits a use or disclosure of information without an authorization for which HIPAA requires an individual's authorization, a covered entity or business associate may comply with both laws by obtaining an individual's authorization as provided by the HIPAA regula-

[277] 45 C.F.R. § 160.202 (2013) (definition of contrary).

[278] 45 C.F.R. § 160.203 (2013) (stating that "[a] standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law"). *See also* Weiss, *supra* note 265, at 258 (citation omitted).

[279] 45 C.F.R. § 202 (2013) (subsection (1) of the definition of contrary). The term "contrary" alternatively means that the state law is an "obstacle to the accomplishment of the objectives" of the federal laws designated in the subjection. *Id*. (subsection (2) of the definition of contrary).

[280] 45 C.F.R. § 160.204(a) (2013).

[281] 45 C.F.R. § 160.203(a) (2103).

[282] 45 C.F.R. §§ 160.203(a) and (a)(1)(i), (ii), (iii), and (iv) and 45 C.F.R. § 160.204 (2013).

[283] 45 C.F.R. § 160.203(a) (2013).

[284] 45 C.F.R. § 160.203(b) (2013).

[285] 45 C.F.R. § 160.202 (2013) (subsection (1) of the definition of more stringent).

[286] 45 C.F.R. §§ 160.202(1)(i) and (ii) (2013).

[287] 45 C.F.R. § 160.202 (2013) (subsections (3) and (6) of the definition of more stringent).

[288] 45 C.F.R. § 160.202 (2013) (subsection (4) of the definition of more stringent).

tions.[289] As observed by a New Jersey court "[a]n authorization is a document that is signed by an individual or personal representative of an individual to allow release of protected health information," the minimal elements of which are set forth in 45 C.F.R. § 164.508(c)(1).[290]

One source has concluded that there may not be that many instances when state laws are preempted by HIPAA.[291] The reason is that

> HIPAA *mandates* disclosure only in two instances: (1) when the disclosure is sought by the Secretary of HHS to enforce the Privacy Rule, and (2) when the disclosure is to an individual at the individual's request. Thus, the state law will have to either prohibit or restrict disclosure to the Secretary of HHS or prohibit or restrict disclosure to the individual at the individual's request in order to be contrary to HIPAA. It is unlikely that there are many state laws that refuse access to HHS or refuse access to the individual of his or her own medical information, so that few state laws potentially qualify for preemption (emphasis added).[292]

Finally, as discussed in Section X, if a state law requires a use or disclosure of PHI, HIPAA will not prevent the use or disclosure of the information. Under 45 C.F.R. § 164.512(a) a "covered entity may use or disclose protected health information…to the extent that such use or disclosure is required by law."[293] Although § 164.512 addresses the uses and disclosures for which a patient's authorization or opportunity to agree or object is not required, a covered entity must comply with the procedures in subparts (c), (e), and (f) when complying with a law that requires a covered entity to make a disclosure of PHI.

A number of cases have held that HIPAA's Privacy Rule does not preempt state law.[294] In *Kalinoski v. Evans*[295] a federal court decided that the District of Columbia's limitations on the disclosure of the personal notes of mental health professionals are more stringent than HIPAA's requirements and therefore are not preempted by HIPAA.[296] Although the HIPAA regulations allow the disclosure of PHI pursuant to a court order, the District of Columbia's privacy law prohibited disclosure.[297] Nevertheless, the court held that the information could be disclosed as a matter of a federal evidentiary rule that circumscribed the more stringent District of Columbia privacy law.[298]

In *National Abortion Federation v. Ashcroft*[299] the court held that an Illinois privacy law was more stringent than HIPAA and therefore not preempted. The Illinois law forbade the disclosure of information without a patient's consent, even in response to a subpoena and regardless of whether PHI had been deleted or redacted.[300] Under HIPAA the disclosure of the information would be permitted if sensitive information contained in the documents were deleted or redacted.[301] Because the state law was found to be more stringent and more protective of a patient's privacy, the court held that HIPAA did not preempt the Illinois law.

In 2009, the Minnesota Court of Appeals upheld a statute that gives patients a private right of action for the improper disclosure of medical information.[302] The medical clinic argued that HIPAA preempted the state statute.[303] The court explained that a state statute is contrary to HIPAA if it makes it impossible for a health care provider to comply, or is an obstacle to a health care provider being able to comply, with both the

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[289] *See, e.g.,* 45 C.F.R. §§ 164.502(a)(1)(i) and (iv) and 164.502(2)(i) and (4) (ii) (2013). *See also* 45 C.F.R. §§ 164.508 and 164.510 (2013).

[290] Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical, 372 N. J. Super. 105, 114, N 6, 855 A.2d 608, 613 N 6 (2003).

[291] Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1140-1141 (2006).

[292] *Id*.

[293] 45 C.F.R. §§ 164.512(a)(1) and (2) (2103); 65 Fed. Reg. 82481-82482.

[294] In Alvista Healthcare Center, Inc. v. Miller, 286 Ga. 122, 126, 686 S.E. 2d 96, 99 (2009) (holding that OCGA § 31-33-2 (a) (2) is more stringent than and thus not preempted by 45 C.F.R. § 164.502(g)(4) of the HIPAA regulations); State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St. 3d 518, 524, 844 N.E. 2d 1181, 1186-1187 (2006) (no HIPAA preemption of certain lead-citations issued by the Cincinnati Health Department); Grove v. Northeast Ohio Nephrology Assoc., Inc., 164 Ohio App. 3d 829, 844 N.E.2d 400 (2005) (OHIO REV. CODE ANN. § 2317.02(B)(1) relating to the privacy of individually identifiable health information held not superseded by HIPAA); Bihm v. Bihm, 932 So.2d 732 (La. Ct. App. 3d Cir. 2006) (no HIPAA preemption of La. Code Evid. Ann. art. 510).

[295] 377 F. Supp. 2d 136 (D.D.C. 2005).

[296] *Id* at 139 (*citing* D.C. CODE § 7-1201.03).

[297] *Id.* at 139.

[298] *Id.* at 140–141.

[299] 2004 U.S. Dist. LEXIS 1701 (N.D. Ill. 2004).

[300] *Id.* at 10, 18.

[301] *Id.* at 9–12.

[302] Yath v. Fairview Clinics, N.P., 767 N.W. 2d 34, 49-50 (Minn. Ct. App. 2009).

[303] *Id.* at 49.

state's and HIPAA's requirements (quotation marks omitted).[304] The only difference between HIPAA and the Minnesota statute is the remedy that each provides, not the requirements that each law imposes.[305] Therefore, the state statute was not contrary to HIPAA and was in fact "supporting at least one of HIPAA's goals by establishing another disincentive to wrongfully disclose a patient's health care record."[306]

In *Smith v. American Home Products Corporation*[307] an interesting issue presented was whether HIPAA's requirements conflicted with and preempted common law as established in 1985 in *Stempler v. Speidell*.[308] In S*templer*, the New Jersey Supreme Court dealt with whether *ex parte* interviews between defense counsel and a plaintiff's treating physician are permissible. The *Stempler* court held that such *ex parte* interviews are permissible if the plaintiff consents; the defense counsel gives the plaintiff's counsel reasonable notice of the time and place of the interviews; the defense counsel provides the participating physician with a description of the expected scope of the interview; and the defense counsel's request clearly indicates to the participating physician that the interview is voluntary.[309] In *Smith,* the court agreed that HIPAA did not preempt the informal discovery allowed by *Stempler*. However, because the safeguards for the disclosure authorization permitted in the *Stempler* case were less stringent than HIPAA, the federal law preempted state law to some extent. That is, the court held that the authorization had to be rewritten to comply with HIPAA.[310]

There are cases in which the courts have held that because HIPAA is more stringent than a particular state privacy law, HIPAA preempted the state law.[311] *Law v. Zuckerman*[312] involved a Maryland law that also regulated *ex parte* communications between a lawyer and a treating physician of an adverse party who has placed his or her medical condition at issue.[313] The court held that the mandatory disclosure required by Maryland law was less protective than HIPAA of patient privacy and control of the patient's medical records. Because the Maryland law was less stringent, HIPAA preempted the Maryland law.[314]

In *United States, ex. Rel. Stewart v. Louisiana Clinic*[315] a federal court held that a state law requiring either patient consent or a court order for the disclosure of a patient's records was less stringent than HIPAA's regulations.

> [B]ecause…Louisiana law does not address the form, substance, or the need for *express legal permission from an individual*, as required by 45 C.F.R. § 160.202 for the exception to apply…the Louisiana statute provides a way of negating the need for such permission. In other words, although the individual patient may attend the contradictory hearing, the Louisiana provision states that the court shall issue an order for disclosure (despite the patient's lack of consent), if the court finds that release of the information is proper (emphasis added).[316]

Because the Louisiana law was less stringent than the HIPAA regulations, HIPAA preempted the Louisiana law.[317]

None of the transit agencies having health information on patrons was aware of an opinion by a court (federal, state, city, or county) in which an issue was whether HIPAA preempted a state law on the use or disclosure of PHI.[318]

## XII. THE ENFORCEMENT RULE: CIVIL AND CRIMINAL PENALTIES UNDER HIPAA

### A. Introduction

Transit agencies are not covered entities; however, some transit agencies have entered into con-

[304] *Id.* (*quoting* 45 C.F.R. § 160.202).

[305] *Id.*

[306] *Id.* at 50.

[307] 372 N. J. Super. 105, 855 A.2d 608 (2003).

[308] 100 N.J. 368, 495 A.2d 857 (1985).

[309] *See* discussion in *Smith*, 855 A. 2d at 612.

[310] *Id.* at 624.

[311] Bayne v. Provost, 359 F. Supp. 2d 234 (N.D. N.Y. 2005) (on the issue of whether defendants were restricted from conducting *ex parte* interview of plaintiff's nurse practitioner, HIPAA held to preempt New York law because HIPAA was more stringent than New York law); Moreland v. Austin, 284 Ga. 730, 733, 670 S.E.2d 68, 71 (2008) (holding that "HIPAA preempts Georgia law with regard to *ex parte* communications between defense counsel and plaintiff's prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians"); Allen v. Wright, 282 Ga. 9, 14, 644 S.E. 2d 814, 818 (2007) (holding that HIPAA preempted OCGA § 9-11-9.2 because Georgia law "cannot authorize disclosure based upon less stringent requirements than those mandated by the federal law").

[312] 307 F. Supp. 2d 705 (D. Md. 2004).

[313] *Id.* at 709.

[314] *Id.* at 709.

[315] 2002 U.S. DIST. LEXIS 24062 at *1 (E.D. La. 2002).

[316] *Id*. at 5.

[317] *Id.*

[318] One agency did not respond to the question.

tracts as business associates or subcontractors of business associates of covered entities, contracts in which they may have agreed to comply with HIPAA. However, it is not clear that a transit agency meets HIPAA's definition of a business associate. Thus, there may be an argument that even if a transit agency has agreed to comply with HIPAA and could be sued by a covered entity for breach of the agreement, the transit agency still would not be subject to HIPAA's Enforcement Rule, because transit agencies do not meet HIPAA's definition of a business associate.

Inasmuch as there is some lack of clarity on whether HIPAA applies to transit agencies, this report discusses briefly the civil and criminal penalties authorized by HIPAA. HHS's January 2013 final rule in response to the HITECH amendments strengthened the Enforcement Rule for violations of HIPAA.[319]

## B. Complaints and Civil Penalties

HHS's Office of Civil Rights (OCR) investigates complaints of violations of the Privacy Rule and the Security Rule. Anyone who believes that a covered entity or a business associate of one has violated or is violating a HIPAA provision has 180 days within which to file a complaint with the Secretary of HHS.[320] Affirmative defenses are addressed in § 160.410 of the regulations. If the Secretary determines that there is noncompliance, the Secretary may attempt to resolve the matter by "informal means."[321] The Secretary is authorized to impose a CMP on a covered entity or a business associate.[322] It is possible for willful violations of HIPAA regulations to be turned over to the Justice Department for criminal prosecution.[323]

Under the enforcement provisions, a covered entity may be liable for an act or omission of any of its agents, including a member of its workforce or a business associate, acting within the scope of its agency.[324] Similarly, a business associate may be liable for a CMP for an act or omission of any of its agents, including a member of its workforce or a subcontractor, acting within the scope of its agency.[325] HITECH established four tiers of penalties in increasing amounts based on the level of culpability, an approach that may make the assessment of significant penalties more likely than prior to HITECH.[326] In all cases, the maximum penalty that may be assessed is $50,000 per violation with a cap of $1.5 million for identical violations in a calendar year.[327] As of February 18, 2009, the Secretary may not impose a CMP:

1. In an amount of less than $100 or more than $50,000 for a violation in which it is established that a covered entity or business associate did not know and by exercising reasonable diligence would not have known that the covered entity or business associate committed a violation;[328]
2. In an amount of less than $1,000 or more than $50,000 for a violation in which it is established that a violation was due to reasonable cause and not to willful neglect;[329]
3. In an amount of less than $10,000 or more than $50,000 for a violation in which it is established that a violation was due to willful neglect and was corrected during the 30-day period beginning on the first date a covered entity or business associate liable for the penalty knew or by exercising reasonable diligence would have known that a violation had occurred;[330] or

[319] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, SCOPE OF ENFORCEMENT UNDER 42 U.S.C. § 1320D-6 (2005), available at http://www.justice.gov/olc/hipaa_final.htm.

[320] 45 C.F.R. §§ 160.306(a) and (b)(3) (2013). The 180-day period begins "when the complainant knew or should have known that the act or omission complained of occurred, unless this time limit is waived by the Secretary for good cause shown." 45 C.F.R. § 160.306(b)(3) (2013).

[321] 45 C.F.R. § 160.312(a) (2013).

[322] 45 C.F.R. § 160.402(a) (2013).

[323] Jack Brill, *Giving HIPAA Enforcement Room to Grow: Why There Should not (yet) be a Private Cause of Action*, 83 NOTRE DAME L. REV. 2105, 2116 (2008), hereinafter referred to as "Brill."

[324] 45 C.F.R. § 160.402(c)(1) (2013).

[325] 45 C.F.R. § 160.402(c)(2) (2013). Under § 160.402(c)(1) (2013) a covered entity that is a member of an affiliated covered entity may be jointly and severally liable for a CMP "based on an act or omission of the affiliated covered entity…." *See also* 45 C.F.R. § 160.402(b)(2) (2013) (including an exception to liability when it is established that another member of the affiliated covered entity was responsible for the violation). *See also* 78 Fed. Reg. 5580.

[326] 78 Fed. Reg. 5577, 5580 (*citing* HITECH, § 13410(d) that revised § 1176(a) of the Social Security Act); *see* Andresen, *supra* note 60, at 3.

[327] 45 C.F.R. §§ 160.404(b)(2)(i)(B), (ii)(B), (iii)(B), and (iv)(B) (2013). *See* Andresen, *supra* note 60, at 3.

[328] 45 C.F.R. § 160.404(b)(2)(i)(A) (2013); 78 Fed. Reg. 5582. *See also* 45 C.F.R. § 404(a) for penalties applicable to violations prior to Feb. 18, 2009.

[329] 45 C.F.R. § 160.404(b)(2)(ii)(A) (2013).

[330] 45 C.F.R. § 160.404(b)(2)(iii)(A) (2103).

4. In an amount of less than $50,000 for a violation in which it is established that the violation was due to willful neglect and was not corrected during the 30-day period beginning on the first date a covered entity or business associate liable for the penalty knew or by exercising reasonable diligence would have known that a violation had occurred.[331]

The Secretary is permitted to consider a number of mitigating and aggravating factors in determining the amount of a CMP,[332] to settle any issue or compromise any penalty,[333] and to collect any penalty including by a civil action brought in the appropriate federal district court.[334]

As of May 31, 2012, the OCR of HHS had investigated and resolved over 16,259 cases with most complaints being filed against private practices, general hospitals, outpatient facilities, health plans, and pharmacies.[335] Prior to HITECH, most of the alleged HIPAA violations did not result in an assessment of actual monetary damages.[336] Even in cases in which penalties are assessed, complainants generally do not receive a portion of the CMPs collected from covered entities or business associates.

### C. Criminal Penalties

It is important to note that although persons such as employees or other individuals who are not covered entities or business associates may not be held liable for CMPs, they are subject to possible criminal penalties under HIPAA.[337]

Criminal penalties may be imposed for violations of HIPAA when a person knowingly violates HIPAA by obtaining and using a unique health identifier; by obtaining individually identifiable health information relating to an individual; or disclosing IIHI to another person.[338] A clear threshold is set for a violation: a person commits a violation when he or she obtains or discloses individually identifiable health information maintained by a covered entity without authorization to do so.[339]

The penalty for a violation may be up to $50,000 and/or up to 1 year in prison. If a violation is committed under false pretenses, the violator may be fined up to $100,000, receive a prison sentence of up to 5 years, or both. Finally, if a violation is committed with the intent to sell, transfer, or use individually identifiable health information for commercial gain, malicious harm, or personal gain, a person may be fined up to $250,000, sentenced up to 10 years in prison, or both.[340]

## XIII. JUDICIAL CLAIMS FOR HEALTH PRIVACY VIOLATIONS

### A. Section 1983 Claims for Wrongful Disclosure of Health Information

Under 42 U.S.C. § 1983, individuals may bring an action against one who deprives them of a "federally secured" right.[341] There may be a narrow category of claims for which a plaintiff could bring an action against a transit agency under § 1983 for an unauthorized disclosure of a person's health information.[342] As the Second Circuit recognized in *Matson v. Board of Education of the City School District of New York*,[343] "there exists in the United States Constitution a right to privacy protecting 'the individual interest in avoiding disclosure of personal matters (citations omitted) (some internal quotation marks omitted).'"[344] There is some medical information that comes

[331] 45 C.F.R. § 160.404(b)(2)(iv)(A) (2013).

[332] 45 C.F.R. § 160.408 (2013).

[333] 45 C.F.R. § 160.416 (2013).

[334] 45 C.F.R. § 160.424(b) (2013). *See* 42 U.S.C. § 1320a-7a(f) (providing for the disposition of CMPs that are recovered).

[335] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INFORMATION POLICY, ENFORCEMENT HIGHLIGHTS, available at http://www.hhs.gov/ocr/privacy/hipaa/enforcement/highlights/index.html.

[336] Brill, *supra* note 323, at 2129 (article published prior to HITECH's amendments to HIPAA).

[337] HITECH § 13409 and 42 U.S.C. § 17938 (2013). *See also* Acevedo & Rathburn, *supra* note 15, at *14.

[338] 42 U.S.C. §§ 1320d–6(a)(1)-(3) (2013).

[339] 42 U.S.C. § 1320d–6(a) (2103).

[340] 42 U.S.C. § 1320d–6(b) (2013).

[341] Joshua D.W. Collins, *Toothless HIPAA: Searching for a Private Right of Action to Remedy Privacy Rule Violations*, 60 VAND. L. REV. 199, 203 (2007), hereinafter referred to as "Collins."

[342] Section 1983 states in part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

[343] 631 F.3d 57 (2d Cir. 2011)

[344] *Id*. at 64.

within "this constitutionally protected sphere" that is actionable under § 1983.[345]

In *Matson*, the Second Circuit discussed medical conditions that are protected by a constitutional right of privacy. Matson suffered from a medical condition known as fibromyalgia. Her condition was revealed as a result of her use of sick leave that prompted an investigation. The Board of Education of the City School District of New York's report of the investigation was publicized on the Web site of the Special Commissioner of Investigations for the New York City School District.[346] Matson brought a civil rights action under § 1983 for a violation of her constitutional right to privacy. In dismissing her claim, the district court held that the disclosure of the plaintiff's particular medical condition did not give rise to a constitutionally protected right.[347] The basis of the decision was that there was no evidence of a history of discrimination against persons with fibromyalgia.[348]

The Second Circuit's opinion affirming the district court's dismissal of her claim sets forth what the majority of the panel determined to be the constitutional law of privacy of one's health information. The court agreed that the right to privacy includes the right to protect against the disclosure of one's health information,[349] but the scope of the right to privacy depends on the nature of the condition.[350] Based on prior precedents, the court held that to be actionable a person's medical condition that is disclosed must be one that would expose the subject of the information to "discrimination and intolerance."[351] The court found that there were only a few instances in which the court had held that the nature of a medical condition that was disclosed would subject one to discrimination and intolerance: a disclosure that a person has HIV/AIDs;[352] a disclosure of a person's transsexualism;[353] and a disclosure of one's psychiatric health and substance abuse history that may submit one to "public opprobrium."[354]

The court in Matson stated that its decision in *O'Connor v. Pierson*[355] did not announce "a rule that would protect all medical conditions from disclosure."[356] Rather, whether there is an invasion of privacy that violates the Constitution must be determined on a case-by-case basis.[357] The court held that the disclosure of Matson's medical condition did not violate a constitutional right to privacy as the record did not establish a history of "societal discrimination" against and "intolerance" of persons suffering from fibromyalgia, nor did the plaintiff show that she had experienced any discrimination as a result of the disclosure.[358] A dissenting opinion argued that the court's decision "gives the government substantial reign to publicly disseminate a person's medical information without any justification."[359]

Although there may be a small category of constitutionally protected claims for a violation of a person's medical privacy under § 1983, existing precedent appears to preclude a § 1983 action for the violation of a constitutionally-protected right of privacy of one's health information except under the circumstances outlined in the *Matson* case. As discussed in *Matson*, other medical conditions, although serious, if disclosed without a subject's consent, such as having Hepatitis C,[360] a wrist injury and stomach problems,[361] cancer,[362] or tuberculosis,[363] have been held not to give rise to a constitutional claim under § 1983 for an invasion of health privacy. Thus, the "'privacy of certain medical conditions' has been 'constitutionalized' only '[w]ithin narrow parameters.'"[364] Nevertheless, transit agencies having health information on patrons should exercise appropriate care to maintain the confidentiality of their records. The

[345] *In re Search Warrant*, 810 F.2d 67, 71 (3d Cir. 1987); *see also* United States v. Westinghouse Elec. Corp., 638 F. 2d 570, 577 (3d Cir. 1980).

[346] *Matson*, 631 F. 3d at 58.

[347] *Id.* at 62.

[348] *Id.*

[349] *Id.* at 64-65.

[350] *Id.* at 64.

[351] *Id.*

[352] Doe v. City of New York, 15 F. 3d 264, 266-67 (2d Cir. 1994).

[353] Powell v. Schriver, 175 F. 3d 107, 110-112 (2d Cir. 1999).

[354] O'Connor v. Pierson, 426 F.3d 187 (2d Cir. 2005).

[355] *Id.*

[356] Matson, 631 F.3d at 65.

[357] *Id*. at 66.

[358] *Id.* at 67.

[359] *Id.* at 69 (Straub, C.J., dissenting op.).

[360] Watson v. Wright, 2010 U.S. Dist. LEXIS 586, at *1 (N.D.N.Y. 2010).

[361] Rush v. Artuz, 2004 U.S. DIST. LEXIS 15333, at *1 (S.D.N.Y. 2004).

[362] Golub v. Enquirer/Star Group, Inc., 89 N.Y.2d 1074, 1077, 681 N.E.2d 1282, 659 N.Y.S.2d 836 (1997).

[363] Cruz v. Latin News Impacto Newspaper, 216 A.D.2d 50, 627 N.Y.S.2d 388, 389 (1995).

[364] *Matson*, 631 F.3d at 66 (*quoting Powell*, 175 F.3d at 112).

courts determine on a case-by-case basis whether the disclosure of a particular medical condition comes within the narrow parameters of a constitutional right to privacy that is actionable under § 1983.[365]

As for § 1983 and HIPAA violations, it does not appear that the courts would permit a § 1983 action against a transit agency on the basis of an alleged violation of HIPAA. Since the Supreme Court's decision in *Gonzaga University v. Doe*,[366] the Court has "significantly limited a civil rights plaintiff's ability to bring a private action under § 1983."[367] The Court's decision in *City of Rancho Palos Verdes v. Abrams* "further restricted the use of § 1983."[368]

Plaintiffs seeking to use § 1983 to redress Privacy Rule violations must allege that HIPAA gives them the right to medical privacy and that the defendant deprived them of this right by disclosing their private medical information. However, the Supreme Court's trend toward limiting the applicability of § 1983 makes it doubtful that a plaintiff could successfully use § 1983 to enforce a violation of HIPAA's Privacy Rule. The Privacy Rule ostensibly lacks the explicit rights-creating language that the court required in *Gonzaga*. Additionally, *Abrams* poses a barrier to the use of § 1983 to enforce Privacy Rule violations since the administrative remedies set forth by HIPAA arguably preclude resort to § 1983.[369]

For a private corporation performing a governmental function to be held liable under § 1983 a plaintiff must prove three elements:

> (1) the presence of a policy-maker who could be held responsible, through actual or constructive knowledge, for enforcing a policy or custom that caused the claimed injury; (2) that the corporation has an official custom or policy that could subject it to Section 1983 liability; and (3) that the corporate action was taken with the requisite degree of culpability, with a direct causal link between the action and the deprivation of federal rights.[370]

However, since the *Gonzaga* and *Abrams* decisions unless a statute or regulation authorizes a private right of action, patients and other individuals "whose privacy rights have been violated must look elsewhere for a possible right of action."[371]

As discussed in the next section, there is no private right of action under HIPAA whereby a plaintiff may claim damages against a person or an entity, including a transit agency, for a violation of HIPAA such as for an unauthorized disclosure of a plaintiff's health information.

## B. No Private Right of Action for a HIPAA Violation

Neither HIPAA nor the regulations promulgated thereunder provide for a private right of action. Thus, HIPAA does not authorize a private right of action by an individual against a covered entity or a business associate for a breach of privacy or security of his or her health information. Only the Secretary of HHS or state attorneys general may take administrative or judicial action, respectively, to enforce HIPAA.[372]

There is likewise no implied right of action under HIPAA. Although not involving HIPAA, in *Alexander v. Sandoval*[373] the Supreme Court held that regulations promulgated by the Department of Justice pursuant to Title VI of the Civil Rights Act of 1964 did not create an implied private right of action. In similar fashion, HIPAA's Privacy Rule lacks the sort of "'rights-creating' language critical to showing the requisite congressional intent to create new rights."[374]

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[365] *Id*. at 66. The *Matson* court stated:

> In considering claims that a constitutional right of privacy attaches to various serious medical conditions, we also proceed on a case-by-case basis. In doing so, we examine all the relevant factors that cut both in favor of and against extending privacy protection to such medical conditions. This type of analysis necessarily will include certain medical conditions but will exclude others (emphasis added).

*Id*. at 66–67.

[366] 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed.2d 309 (2002).

[367] Collins, *supra* note 341, at 204.

[368] *Id*. at 207.

[369] *Id*. at 208.

[370] *Watkins*, 2013 U.S. DIST. LEXIS 66376 at 17-18 (*citing* Olivas v. Corrections Corp., 408 F. Supp.2d 251, 255 (N.D. Tex. 2006). The court in *Watkins* also stated that the courts have held also that liability in § 1983 actions may not be based on the doctrine of *respondeat superior*. *Id.* at 17.

[371] Collins, *supra* note 334, at 212.

[372] 42 U.S.C. § 300gg-22 (2013).

[373] 532 U.S. 275, 290, 293, 121 S. Ct. 1511, 1521-1522, 1523, 149 L. Ed.2d 517, 531, 532-533 (2001) (stating that congressional inclusion of an express method of enforcing a substantive rule "suggests that Congress intended to preclude" other methods and holding that "[N]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602").

[374] Collins, *supra* note 341, at 208 (*quoting* Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002)).

In *Acara v. Banks*[375] the United States Court of Appeals for the Fifth Circuit stated:

> Private rights of action to enforce federal law must be created by Congress. HIPAA has no express provision creating a private cause of action, and therefore we must determine if such is implied within the statute. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative*.... HIPAA does not contain any express language conferring privacy rights upon a specific class of individuals (citations omitted) (emphasis added).[376]

Furthermore, HIPAA's Enforcement Rule providing for administrative complaints, remedies, and CMPs are "a strong indication that Congress intended to preclude private enforcement."[377]

Other courts have held as well that there is no implied right of action for private litigants to sue either a covered entity or a business associate for an alleged violation of the HIPAA requirements.[378] However, it has been held that in a tort action brought under state law the HIPAA standards may be evidence of the required standard of care applicable to the protection of health information.[379]

Finally, transit agencies having health information on patrons reported that they have not been sued nor have they been the subject of an administrative proceeding concerning their handling of health information on their patrons.[380]

In sum, there is no private right of action under HIPAA. Any legal action for damages by a patron against a transit agency would have to be brought under another federal privacy law or under state law.[381]

## XIV. COMMENTATORS' VIEWS OF HIPAA

Commentators have divergent views on HIPAA's efficacy. Some writers are more sanguine than others. One writer argues that the Privacy Rule assures that an individual's health information will be protected by HIPAA but permits the release of "health information needed to provide and promote high quality health care, and to protect the public's health and well-being...."[382] The writer argues that HIPAA "provides federal protections for personal health information held by covered entities and gives patients an array of rights with respect to that information;"[383] prohibits those subject to HIPAA from "releasing to third parties any personal health information that may lead to the identification of an individual without that individual's express consent;"[384] "creates national standards to keep individuals' medical records and other personal health information confidential;" "restricts...the ability of health plans, health care clearinghouses, and most health care providers to divulge patient medical records;"[385] and requires a covered entity to provide an individual with notice of a covered entity's practices "concerning the uses and disclosures that may be made of such information."[386]

HIPAA's critics, however, argue that HIPAA does not create patient rights or protect the confidentiality of patients' health information. One argues that HIPAA is "in essence a federal confidentiality code based around a regulatory compliance model" that permits "widespread sharing of medical data among 800,000 or so health, business and government entities."[387] Another source

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[375] 470 F.3d 569, 570 (5th Cir. 2006).

[376] *Id.* at 571.

[377] *Id.*

[378] Cintron-Garcia v. Supermercados Econo, Inc., 818 F. Supp. 2d 500 (D.P.R. 2011); Quintana v. Lightner, 818 F. Supp. 2d 964 (N.D. Tex. 2011); Carpenter v. Phillips, 419 Fed. Appx. 658 (7th Cir. 2011); Bonney v. Stephens Memorial Hosp., 2011 Me. 46, 17 A. 3d 123 (Me. 2011); Seaton v. Mayberg, 610 F. 3d 530 (9th Cir. 2010); Wilkerson v. Shinseki, 606 F. 3d 1256 (10th Cir. 2010); Spencer v. Roche, 755 F. Supp. 2d 250 (D. Mass. 2010); Johnson v. Quander, 370 F. Supp. 2d 79 (D.D.C. 2005); University of Colorado Hospital v. Denver, 340 F. Supp. 2d 1142 (D. Col. 2004) (court rejecting the hospital's contention that the failure to recognize an implied right of action would effectively frustrate the purposes of enacting HIPAA); O'Donnell v. Blue Cross Blue Shield of Wyo., 173 F. Supp. 2d 1176 (D. Wyo. 2001); Brock v. Provident Am. Ins. Co., 144 F. Supp. 2d 652, 657 (N.D. Tex. 2001); Means v. Ind. Life & Accident Ins. Co., 963 F. Supp. 1131, 1135 (M.D. Ala. 1997).

[379] *See* discussion in Section XVII.C.1. *See* Sorenson v. Barbuto, 2006 UT App. 340, 143 P. 3d 295 (2006) and Acosta v. Byrum, 180 N. C. App. 562, 638 S.E. 2d 246 (2006).

[380] Two transit agencies did not respond to the question.

[381] Collins, *supra* note 341, at 208.

[382] Weiss, *supra* note 265, at 255.

[383] *Id*.

[384] *Id*. at 256–57.

[385] *Id*. at 257.

[386] *Id*.

[387] Nicolas P. Terry & Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Re-*

observes that "HIPAA does not prohibit non-covered entities, such as those organizations that operate electronic health record databases, from disclosing protected health information;"[388] that there are also numerous "unrestricted uses of patient information outside of treatment and billing;" and that "as the number of people with access to patient information increases, so too does the risk that the security of that information may be compromised (citation omitted)."[389] Yet another commentator contends that "[g]enerally, it is not the patient who decides how and when disclosure of personal health information occurs. The privacy rule, where applicable, decides (footnote omitted)."[390]

Of course, as discussed in this digest, most states have privacy laws, some of which are more restrictive than HIPAA. Some states' laws, moreover, are intended to prevent the further dissemination of a person's health information, even if the recipient of the information is not subject to HIPAA, without a specific authorization from the subject of the information.[391]

## XV. APPLICABILITY OF OTHER FEDERAL LAWS

### A. Americans with Disabilities Act and the Rehabilitation Act of 1973

According to HHS, the information protected by the two primary federal disability nondiscrimination laws, the ADA[392] and the Rehabilitation Act of 1973,[393] "falls within the larger definition of 'health information' under the Privacy Rule."[394]

Although this digest does not involve the privacy of employee's health information, it should be noted that HIPAA does not apply to employers, not even to covered entities in their capacity as an employer.[395] However, employers such as transit agencies "are subject to the federal disability nondiscrimination laws and, therefore, must protect the confidentiality of all medical information concerning their applicants and employees."[396] Moreover, "[i]f an employer-sponsored group health plan is closely linked to an employer, the group health plan may be subject to ADA confidentiality restrictions," as well as to HIPAA.[397] Employers who are at "greater risk" for privacy violations are those who are handling health information that is subject to the provisions of the ADA.[398]

In regard to paratransit and the ADA, several transit agencies responding to the survey observed that paratransit services are subject to ADA requirements, in particular parts 27, 37, and 38 of title 49 of the C.F.R. The purpose of Part 27 is to carry out § 504 of the Rehabilitation Act. Section 27.7(a) of part 27 provides, *inter alia*, that

[n]o qualified handicapped person shall, solely by reason of his disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance administered by the Department of Transportation.

Part 37 establishes the requirements for complementary paratransit service[399] and the ADA paratransit eligibility standards.[400] Under 49

*cords*, 2007 U. ILL. L. REV. 681, 714 (2007), hereinafter referred to as "Terry & Francis."

[388] Pasternack, *supra* note 8, at 827.

[389] *Id*. at 828.

[390] Ayres, *supra* note 42, at 982.

[391] *See* Sections XVI.C–XVI.E.

[392] 42 U.S.C. § 12101, *et seq*. (2013).

[393] 29 U.S.C. § 701, *et seq*. (2013).

[394] 65 Fed. Reg. 82485. *See also* the Workforce Investment Act of 1988, 29 U.S.C. § 2938 (barring discrimination on the basis of disability).

[395] U.S. DEP'T HEALTH AND HUMAN SERVICES, OFFICE OF THE SECRETARY, 45 C.F.R. PARTS 160 AND 164 STANDARDS FOR PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION; FINAL RULE, 67 Fed. Reg. 53182, 53192 (Aug. 14, 2002), available at http://www.gpo.gov/fdsys/pkg/FR-2002-08-14/html/02-20554.htm.

[396] 65 Fed. Reg. 82485-82486.

[397] *Id.* at 82486. Covered entities under HIPAA that receive federal financial assistance are subject to § 504 of the Rehabilitation Act and its regulations. *See* 29 U.S.C. § 794 (2013). The regulations impose restrictions on recipients of federal funds concerning "the disclosure of medical information regarding persons who apply to or participate in a federal financially assisted program or activity." *Id*.

[398] Philip Gordon, *Two Recent Decisions Illuminate for Employers the Broad Contours of ADA Confidentiality vs. the Narrow Boundaries of HIPAA Privacy* (July 22, 2011), hereinafter referred to as "Gordon," available at http://www.littler.com/2011/07/articles/federal-privacy-laws/two-recent-decisions-illuminate-for-employers-the-broad-contours-of-ada-confidentiality-vs.

[399] 49 C.F.R. § 37.121 (2013).

[400] 49 C.F.R. § 37.123 (2013). The section states:

> (a) Public entities required by § 37.121 of this subpart to provide complementary paratransit service shall provide the service to the ADA paratransit eligible individuals described in paragraph (e) of this section.
>
> (b) If an individual meets the eligibility criteria of this section with respect to some trips but not others, the in-

C.F.R. § 37.125, each entity that must provide complementary paratransit must establish a process for determining ADA paratransit eligibility. The process strictly limits ADA paratransit eligibility to individuals described in 49 C.F.R. § 37.123. Section 37.131 of title 49 of the C.F.R. establishes the service criteria for complementary paratransit service under the ADA. Part 38 of title 49 of the C.F.R. provides minimum guidelines and requirements for accessibility standards under the ADA.

If a state uses FTA § 5311 funding to pay a private entity to operate a fixed route service, the department of transportation (DOT) disability nondiscrimination regulations regarding complementary paratransit service are applicable. Although state and local governments may delegate the performance of ADA functions to private entities, public entities must continue to fulfill their responsibilities to provide service to passengers.

When a public entity enters into a contractual or other arrangement (including, but not limited to, a grant, subgrant, or cooperative agreement) or relationship with a private entity to operate fixed route or demand responsive service, the public entity shall ensure that the private entity meets the requirements of this part that would apply to the public entity if the public entity itself provided the service.[401]

Transit agencies responding to the survey reported that they maintain strict confidentiality of their patrons' health information that is provided for certification for paratransit service.[402] However, the term "privacy" appears only once in part 37: "All documents and other information concerning the planning procedure and the provision of service shall be available, upon request, to members of the public, *except where disclosure would be an unwarranted invasion of personal privacy* (emphasis added)."[403] The term "privacy" does not otherwise appear in parts 27, 37, and 38, nor do the terms "confidential," "medical," "health," "health information," "health records," or "physician," or for that matter "HIPAA."

Metro Transit reported that it maintains the confidentiality of its records in accordance with the *ADA Paratransit Eligibility Manual*. In a section entitled "Observing Privacy Rights" the Manual states that

> [t]he medical information that may be gathered as part of the ADA paratransit eligibility certification process should not be shared with any other party. This would include specific diagnosis provided by professionals and information about the nature of disabilities provided by the applicant. Access to eligibility files should be limited and those with access to these files should be informed and instructed to respect the privacy of applicants. This should include in-house staff as well as any third-party contractors used in the determination process.[404]

According to the Manual, health information obtained for certification may be shared with other transit providers, such as when they "call to obtain more detailed information about a person's ability to travel if that person has requested service in another area as a visitor."[405]

EBPC stated that it receives and maintains certain health information on riders that are certified to use the ADA paratransit program, information that comes directly from the applicant and that on occasion is verified by a medical professional. EBPC also reported that for the purpose of scheduling rides for certified riders "an electronic client file is established in the database. The client file only contains information necessary for the rider's trip to be scheduled in a way that is safe for the rider and the driver."[406] Information in the database that may be shared with a driver includes whether mobility devices are used; whether a service animal accompanies a rider; whether a rider has vision issues; whether a rider travels with a personal care attendant; whether a rider may never be left alone; whether a rider is

dividual shall be ADA paratransit eligible only for those trips for which he or she meets the criteria.

(c) Individuals may be ADA paratransit eligible on the basis of a permanent or temporary disability.

[401] 49 C.F.R. § 37.23(a) (2013). *See* FTA, *Paratransit Requirements for § 5311-Funded Fixed-Route Service Operated by Private Entities*, available at http://www.fta.dot.gov/12325_3892.html.

[402] Response of EBPC (stating that the agency is required to follow all regulations under the ADA); Response of KAT (stating that the ADA applies "only in how it relates to paratransit requirements"); Response of Pierce Transit (stating that that "DOT/ADA Rules require a paratransit eligibility process which has required Pierce Transit to handle HIPAA-related information"); and Response of Whatcom (stating that it is subject to DOT and ADA laws and regulations and that it collects and maintains files "in accordance with ADA and DOT regulations for the specific purpose of authorizing and providing complementary paratransit service for disabled passengers").

[403] 49 C.F.R. § 37.137(b)(2) (2013).

[404] U.S. DEP'T OF TRANSPORTATION, AMERICANS WITH DISABILITIES ACT (ADA) PARATRANSIT ELIGIBILITY MANUAL, (DOT-T-93-17, Sep. 1993), hereinafter referred to as the "ADA Paratransit Eligibility Manual," available at http://ntl.bts.gov/DOCS/ada.html.

[405] *Id*.

[406] Response of EBPC.

unable to climb steps and requires a boarding chair to enter a van; and whether a rider travels with oxygen tanks.[407]

The transit agencies' responses to the survey concerning their handling of patrons' health information indicate that they are maintaining strict confidentiality of any patrons' health information that they receive and maintain.

### B. Other Federal Privacy Laws

Transit agencies did not identify any federal laws applicable to them other than the ADA and DOT laws and regulations.[408] HHS has identified a number of federal statutes and regulations that restrict the disclosure of patient information to those disclosures that are required by law. Appendix A of this digest discusses other federal privacy statutes, including those identified by HHS, that are important to the privacy of health information.[409] Some of the federal privacy laws are more extensive than HIPAA and "touch on privacy issues slightly differently."[410] Federal privacy laws may restrict federal grantees or other entities that are providing services under programs that are affected from making many of the disclosures that the HIPAA regulations would permit under 45 C.F.R. §§ 164.510 or 164.512.[411] Moreover, there are federal privacy laws and regulations that "impose unique requirements affecting the incorporation of covered information into an EHR system."[412]

### C. Resolving Conflicts Between HIPAA and Other Federal Laws

HIPAA permits disclosures of PHI that are required by law pursuant to 45 C.F.R. § 164.512(a). Thus, there is no conflict with HIPAA when another federal law requires a covered entity or business associate to disclose specific information.[413] In such a case, an individual's authorization under 45 C.F.R. § 164.508 is not needed before making the disclosure.[414]

There is also no conflict with HIPAA when the federal law permits but does not require disclosure, but HIPAA permits disclosure of the information. If there is no basis for a permissible disclosure, then a covered entity or business associate must obtain "an authorization from the individual who is the subject of the information or de-identify the information before disclosing it."[415]

## XVI. STATE LAWS APPLICABLE TO THE PRIVACY OF HEALTH INFORMATION

### A. Introduction

Prior to HIPAA, the regulation of medical records was primarily a matter of state law.[416] Since the advent of HIPAA, state law is still important, because there are many businesses and institutions with health information on their patrons that are not subject to HIPAA, including:

> gyms, health websites not offered by covered entities, Internet search engines, life and casualty insurers, Medical Information Bureau, employers (but this one is complicated), worker's compensation insurers, banks, credit bureaus, credit card companies. many health researchers, National Institutes of Health, cosmetic medicine services, transit companies, hunting and fishing license agencies, occupational health clinics, fitness clubs, home testing laboratories, massage therapists, nutritional counselors, alternative medicine practitioners, disease advocacy

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[407] *Id*.

[408] Sixteen of 17 transit agencies having health information on patrons reported said that they were unaware of other federal privacy laws that were applicable to their agency.

[409] App. A of this digest does not discuss several federal privacy laws that clearly are inapplicable to transit agencies having health information on patrons. *See, e.g*., Electronic Communications Privacy Act, 18 U.S.C. § 2511(1)(a)-(b) (disclosure of wire, oral, or electronic communications); Telecommunications Act, 47 U.S.C. § 222(a)-(c) (expressing a telecommunications carrier's duty to protect the confidentiality of proprietary customer information); Cable Communications Act, 47 U.S.C. § 551 (prohibiting the disclosure of cable subscriber information without consent); and Child Online Protection Act, 15 U.S.C. §§ 6501(4) and (8) (defining disclosure and personal information).

[410] WORLD PRIVACY FORUM, *Patient's Guide to HIPAA–Overview: What Federal Laws are Relevant to Health Privacy?* (*see* subsection 3 entitled "What Federal Laws are Relevant to Health Privacy") (identifying the five most important as being the Privacy Act of 1974, Confidentiality of Alcohol and Drug Abuse Patient Records Regulations, Family Educational Rights and Privacy Act, Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act), hereinafter referred to as "World Privacy Forum," available at http://worldprivacyforum.org/2013/09/hipaaguide3/.

[411] 65 Fed. Reg. 82484.

[412] Acevedo & Rathburn, *supra* note 15, at *8.

[413] 65 Fed. Reg. 82485.

[414] *Id*.

[415] *Id*.

[416] Terry & Francis, *supra* note 387, at 708–09 (footnote omitted).

groups, marketers of non-prescription health products and foods, and some urgent care facilities.[417]

In some jurisdictions, state privacy law is as important as HIPAA.[418] Consequently, transit agencies with health information on their patrons will want to be aware of their states' laws on the privacy and security of health information. There are "dozens" of state statutes that obligate corporations and individuals to secure health information (footnotes omitted).[419] Although there are myriad gaps in state legislation, some states have "robust common law and statutory protections applicable to the confidentiality of health information (footnote omitted)."[420] Conveniently, there are several sources available on line with current citations and information on state laws applicable to the privacy and/or security of health information.[421]

As discussed below, the possible sources of protection under state law include a state's constitution, statutes and regulations or administrative codes, and the common law.

## B. State Constitutions and the Privacy of Health Information

In some states there may be an express or implied right of privacy in a state's constitution;[422] however, "the vast majority of state constitutions protect only against state action."[423] In contrast, the constitutions of California and Hawaii guarantee the right of privacy of their citizens, a right that by virtue of judicial decisions includes the protection of individual health information, from invasions of privacy by private parties or the state.[424] Privacy in some states is a statutory rather than a constitutional right.[425]

In Alaska, Article 1, Section 22 of the Alaska Constitution establishes a right to privacy that only applies to government actors, not private actors.[426] The right to privacy vis-à-vis employers is covered under Alaska state statutes. The Supreme Court of Alaska has recognized that an individual has a fundamental privacy interest in his or her medical records[427] and that there is a common law right to privacy that protects individuals from intrusions into privacy.[428] To establish a violation of a common law right to privacy a plaintiff must establish that there was an intentional intrusion by the defendant into "the solitude or seclusion of another or his private affairs or concerns" that a reasonable person would find to be highly offensive.[429] If the state or a state actor interferes with an individual's fundamental right to privacy, the state or state actor "must demonstrate a compelling governmental interest and the absence of a less restrictive means to advance that interest."[430]

In California an individual has a right to privacy under Article 1, Section 1 of the California Constitution.[431] To assert a constitutional claim

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[417] World Privacy Forum, *supra* note 410, at ¶ 9 (*see* "Part 1: Learning about HIPAA" and subpart entitled "Other Record Holders"). *See also* Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 327, 328 (2002), hereinafter referred to as "Pritts."

[418] *See* Phillips, *supra* note 13.

[419] Pasternack, *supra* note 8, at 830.

[420] Terry & Francis, *supra* note 387, at 712.

[421] *See The State of Health Privacy, A Survey of State Health Privacy Statutes* (2d ed.), hereinafter referred to as "Survey of State Health Privacy Statutes," available at http://ihcrp.georgetown.edu/privacy/pdfs/statereport1.pdf. and *National Conference of State Legislatures, State Security Breach Notification Laws*, hereinafter referred to as "State Security Breach Notification Laws," available at http://www.ncsl.org/issues-research/telecom/security-breach-notification-laws.aspx. *See also* Elizabeth Hutton & Devin Barry, *2004 Privacy Year in Review: Developments in HIPAA*, 1 ISJLP 347, 381 (2005).

[422] Pritts, *supra* note 417, at 330 and n.17 (*citing* King v. State, 535 S.E.2d 492, 494-95 (Ga. 2000) (recognizing an implied right to privacy of personal medical records under Georgia's constitution)).

[423] *Id*.

[424] *Id*. (*citing* CAL CONST., art. I, 1 and HAW. CONST. art. I, 6.). *See also id*. at 352 (*citing* Jeffrey H. v. Imai, 101 Cal. Rptr. 2d 916, 921 (Cal. Ct. App. 2000) (the court stating that disclosure of a medical condition concerned a "core value" protected by the California Constitution, article I, section 1, on informational privacy) and Hill v. National Collegiate Athletic Ass'n, 865 P. 2d 633, 658 (Cal. 1994)).

[425] *See, e.g*., MASS. GEN. LAWS ch. 214, § 1B (2013) and VA. CODE ANN. § 32.1-127.1:03(A) (2103) (discussed in Section XVI.C in this digest).

[426] ALASKA CONST. art. 1, § 22; *see* Luedtke v. Nabors Alaska Drilling, Inc., 768 P. 2d 1123, 1130 (Alaska 1999).

[427] Gunnerud v. Alaska, 611 P. 2d 69, 70 (Alaska 1980).

[428] *Luedtke*, 768 P. 2d at 1133.

[429] *Id.* at 1137 (*quoting Restatement (Second) of Torts* § 652B).

[430] Sampson v. Alaska, 31 P. 3d 88, 91 (Alaska 2001).

[431] CAL. CONST. art 1, § 1.

for invasion of privacy an aggrieved person must establish that there is a specific, legally protected privacy interest at issue; that the individual had a reasonable expectation of privacy; and that the invasion of privacy was "sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."[432]

In Montana, Article 2, Section 10 of the Montana Constitution establishes a right to privacy,[433] a right that applies to "autonomy privacy" and "confidential informational privacy" and that includes medical records.[434] To assert a claim against the state or a state actor an individual must demonstrate that he or she has a subjective or actual expectation of privacy in his or her medical records and that society accepts that expectation as a reasonable one.[435]

Although none involved HIPAA, several cases were located for this digest in which plaintiffs brought a claim for invasion of privacy under a state constitutional provision. In *Faison v. Parker*,[436] although the issue involved disclosure of information in a presentence report, the court observed, first, that the United States Supreme Court has recognized a constitutionally protected privacy interest in two areas: an individual's interest in avoiding disclosure of personal matters and an individual's interest in being able to make certain important decisions independently (citations omitted).[437] Second, the court observed that the Third Circuit has held that medical records "may contain intimate facts of a personal nature [that] are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life (citations omitted) (some quotation marks omitted).'"[438]

In *Faison*, the court stated that the analysis for a state constitutional claim is the same as it is for a federal constitutional claim.[439] In deciding whether a constitutional right of privacy has been violated the court must consider:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of the safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.[440]

In *Faison*, the court held that a "governmental intrusion into medical records is permitted only after balancing the interests of the individual and society" and after "determining that the societal interest in disclosure outweighs the individual's privacy interest" based on the facts of the case (citations omitted).[441] The court held, however, that the plaintiff's constitutional right to privacy in the nondisclosure of her medical and mental health records was not violated by a disclosure of her medical information in a presentence report.

In *Grant v. United States*[442] the plaintiff alleged a violation of the California constitution because of the defendants Pickett's and Mercury Casualty Company's (Mercury) disclosure of the plaintiff's health information to Mercury's attorney. To state a constitutional claim a plaintiff must show "a legally protected privacy interest," a "reasonable expectation of privacy" under the circumstances, and conduct by the defendant constituting "a serious invasion of privacy."[443] The magistrate judge, whose recommendations were adopted by the court, agreed that the plaintiff had stated a claim for invasion of privacy under the California constitution. However, because the claim arose out of or was incident to the litigation the claim was barred by California's absolute litigation privilege.[444]

In *Rhoades v. Penn-Harris-Madison School Corp*.[445] a high school administered a psychological assessment to the plaintiff and other high school students for which the court concluded that Rhoades' parents had not consented and that Rhodes herself had not given a valid consent. As for state constitutional claims, the court held that because "the full body of state tort law" was available to Rhoades, it was not necessary for the court

[432] Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 37, 865 P.2d 633, 654-55, 26 Cal. Rptr. 853, 857 (1994).

[433] MONT. CONST. art 2, § 10.

[434] Montana v. Nelson, 283 Mont. 231, 241, 941 P.2d 441, 448 (1997).

[435] *Id.* at 447–48.

[436] 823 F. Supp. 1198 (E.D. Pa. 1993).

[437] *Id.* at 1201.

[438] *Id.*

[439] *Id.* at 1205.

[440] *Id.* at 1201.

[441] *Id.*

[442] 2011 U.S. Dist. LEXIS 61833, at *1 (E.D. Cal. 2011).

[443] *Id.* at 29.

[444] *Id.* at 31.

[445] 574 F. Supp. 2d 888 (N.D. Ind. 2008).

to find a claim for damages for an invasion of privacy under the Indiana constitution.[446] As for one of Rhoades' privacy claims based on a state statute, the court held that the statute did not create a private right of action.[447]

## C. State Statutory Protection of the Privacy of Health Information

In some situations, although state laws on health privacy vary considerably, a state statute may apply when HIPAA or another other federal law does not.[448] However, as one expert observes,

> there is an increased demand for health care information from secondary users for purposes that are not really related to health care. Many of these holders of health information are not subject to ethical obligations to maintain its confidentiality. Even where an ethical duty exists, in some jurisdictions it is not enforceable by law.[449]

Some states such as California have enacted fairly comprehensive health privacy and security laws, but most state regulation has developed in a "fairly haphazard fashion."[450] In Massachusetts, a person has a statutory right against unreasonable, substantial, or serious interference with a person's privacy.[451] In Virginia, although patient records are the property of a provider, Virginia statutory law also recognizes a patient's right of privacy in the context of his or her medical records.[452] Elsewhere in some states much of the health information is not protected because the statutes are condition-specific or entity-specific.[453]

Some states have statutes that apply to the privacy of health information created, received, or maintained by health care providers or practitioners. With some exceptions (*e.g.*, mental health records), many state statutes reviewed for this digest grant an individual a right of access to his or her medical records held by health care providers.[454] Although statutes may restrict the disclosure of health information, it appears that most state statutes apply only to health care providers as the term is defined by the state statute.[455] In most state statutes reviewed for this digest, the term "health care provider" or "practitioner" is not broad enough to apply to transit agencies having health information on patrons.[456]

Although no cases were located for this digest involving claims against transit agencies for violating patrons' privacy with respect to their health information, some cases were located in which a plaintiff sued for invasion of privacy based on a state statute. In *Cordts v. Chicago Tribune Co.*[457] the plaintiff alleged that an employee of Medeval Corporation, a company hired by the *Chicago Tribune* to evaluate disability claims, wrongfully disclosed to Cordts' ex-wife that he was receiving treatment for depression.[458] The *Chicago Tribune*, his employer, had provided Cordts with a document assuring him that his health information would not be disclosed to unauthorized parties. The plaintiff sued for public disclosure of private facts and for a violation of the Mental Health and Development Disabilities Confidentiality Act.[459]

The court held that Cordts' claim under the Confidentiality Act that provided that mental health services "shall be confidential and shall not be disclosed except as provided in this Act"[460] was not dismissible in part because the defendants had not challenged the sufficiency of Cordts' allegations.[461] However, based on the record the court ruled that Cordts' allegations were sufficient to state a cause of action.[462]

In *Steinberg v. CVS Caremark* Corp.[463] the plaintiffs, claiming that CVS Caremark Corporation and CVS Pharmacy, Inc. misused their confi-

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[446] *Id.* at 910.

[447] *Id.* at 904–05 (*citing* IND. CODE § 20-10.1-4-15).

[448] Survey of State Health Privacy Statutes, *supra* note 421, at ii.

[449] Pritts, *supra* note 417, at 328-329.

[450] *Id*. at 327.

[451] MASS. GEN. LAWS ch. 214, § 1B (2013) (stating that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy" and that the superior court has "jurisdiction in equity to enforce such right and in connection therewith to award damages").

[452] VA. CODE ANN. § 32.1-127.1:03(A) (2103).

[453] Pritts, *supra* note 417, at 335.

[454] California Patient Access to Medical Records Act, CAL. HEALTH & SAFETY CODE § 123110(a) (2013); FLA. STAT. ANN. § 456.057(1) (2013); IND. CODE ANN. § 16-39-1-1(c) (2013); KY. REV. STAT. ANN. § 422.317(1) (2013); LA. REV. STAT. § 40:1299.96 (2013); ME. REV. STAT. ANN. tit. 22, § 1711-B(2); Maryland Confidentiality of Medical Records Act, MD. CODE ANN., Health–Gen. §§ 4-301, 4-309 (2013); 42 PA. CONS. STAT. ANN. § 6155(b) (2013); and VA. CODE ANN. § 32.1-127.1:03 (2013).

[455] Pritts, *supra* note 417, at 336.

[456] *See* Section XVI.D.

[457] 369 Ill. App. 3d 601, 860 N.E.2d 444 (2006).

[458] *Id.* at 602, 860 N.E.2d at 446-447.

[459] 740 ILL. COMP. STAT. 110/1, *et seq*. (2004).

[460] Cordts, 860 N.E.2d at 449, citing 40 ILL. COMP. STAT. 110/2, 3(a) (2004).

[461] *Id.* at 612, 860 N.E 2d at 454.

[462] *Id.*

[463] 899 F. Supp. 2d 331 (E.D. Pa. 2012).

dential prescription information, sued for alleged violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), as well as for invasion of privacy and unjust enrichment. On the UTPCPL claim the plaintiffs argued that the defendants made material misrepresentations in their Notice of Privacy Practices and Code of Conduct regarding how the plaintiffs' information would be used. The court dismissed the UTPCPL claim because the health information had been de-identified and was no longer PHI[464] and because the plaintiffs failed to allege any "compensable value" of the information.[465]

In *Doe v. Guthrie Clinic, Ltd*.[466] a nurse at a medical clinic disclosed to the plaintiff's girlfriend that Doe was being treated for a sexually transmitted disease. In addition to other claims, the plaintiff alleged violations of §§ 2803-c and 4410 of the New York Public Health Law and § 4504 of the New York Civil Practice Law and Rules. However, the court ruled that the defendants did not come within the statutory definition in § 2903-c of a "health-related service." As for § 4410, the court stated that New York courts have held that the section does not authorize a private cause of action for a wrongful disclosure of health information.[467]

In *Cooney v. Chicago Public Schools*[468] the court affirmed the dismissal of an action arising from a firm's disclosure of personal information on 1,700 former Chicago public school employees. The court held that the Chicago Board of Education, which retained the firm that made the disclosure, was not liable to the plaintiffs under the Illinois Personal Information Protection Act.[469] Under the Act, the Board of Education only had to provide timely notice of a security breach, which it did, to the affected parties.[470] The plaintiffs' attempts to make a claim under other statutes also were to no avail (*e.g*., the Consumer Fraud Act) for two reasons. The laws did not apply to the entity allegedly responsible for the disclosure of health information, and the plaintiffs failed to allege "specific actual damages."[471] Allegations of potential harm are not sufficient.[472]

In *Grocela v. General Hosp. Corp*.[473] the plaintiff, a doctor, alleged that the Research Ventures & Licensing Department (RVL Department) of Massachusetts General Hospital (MGH) that administered a research program on behalf of MGH improperly disclosed his personal information on a Web site. The RVL Department identified the doctor as the inventor of a 2005 invention and implied that the invention had been tested on the plaintiff doctor personally.[474] Among other grounds, the doctor's invasion of privacy claim was based on a Massachusetts statute.[475] The court construed the statute to require a plaintiff to prove that a defendant "unreasonably, substantially and seriously interfered" with the plaintiff's privacy by disclosing facts of a "highly personal or intimate nature" and that the defendant "had no legitimate reason for doing so."[476]

The court recognized that publication is essential to a tort claim for invasion of privacy but, first, as did the court in *Faison*, the court applied a balancing test. Because the Massachusetts statute

> "proscribes only unreasonable interferences with a person's privacy, legitimate countervailing business interests in certain situations may render the disclosure of personal information reasonable and not actionable under the statute." … In making such a determination, a court "must balance the employer's legitimate business interest in obtaining and publishing the information against the

[464] *Id.* at 338.

[465] *Id.* at 339; La Court v. Specific Media, Inc., 2011 U.S. DIST. LEXIS 50543, at *1 (C.D. Cal. 2011); *In re JetBlue Airways Corp. Privacy Litig*., 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005); and *In re DoubleClick Inc. Privacy Litig*., 154 F. Supp. 2d 497, 525 & n.35 (S.D.N.Y. 2001).

[466] 2012 U.S. DIST. LEXIS 20507, at *1 (W.D. N.Y. 2012).

[467] *Id.* at 25 (*citing* Burton v. Matteliano, 81 A.D. 3d 1272, 1275, 916 N.Y.S.2d 438 (2011)).

[468] 407 Ill. App. 3d 358, 361, 943 N.E.2d 23, 27 (2010).

[469] *Id. (citing* 815 ILL. COMP. STAT. 530/1).

[470] *Id.* at 362, 943 N.E.2d at 28 (*citing* 815 ILL. COMP. STAT. 530/10).

[471] *Id.* at 365, 943 N.E.2d at 31.

[472] *Id.* (*citing* Yu v. IBM, 314 Ill. App. 3d 892, 732 N.E. 2d 1173, 247 Ill. Dec. 841 (2000)).

[473] 30 Mass. L. Rep. 176, 2012 Mass. Super. LEXIS 206 (Mass. Super. Ct. 2012).

[474] *Id.* at 14–16.

[475] G.L. c. 214, § 1B. The statute provided in part that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." *See Grocela*, 2012 Mass. Super. LEXIS 206 at 16.

[476] *Grocela*, 2012 Mass. Super. LEXIS 206 at 16 (*quoting* Martinez v. New England Med. Ctr. Hosps., Inc., 307 F. Supp. 2d 257, 267 (D. Mass. 2004) (applying Massachusetts law and *citing* Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 409 Mass. 514, 518, 567 N.E.2d 912 (1991) (internal citations omitted) (internal quotation marks omitted)).

> substantiality of the intrusion on the employee's privacy resulting from the disclosure."[477]

Second, the court applied a *de minimis* test.

> MGH has a substantial interest in furthering research and supporting inventions which have the potential to benefit both the hospital and its patients. This interest far outweighs any possible intrusion into Dr. Grocela's privacy which, in any event, is *de minimis*.[478]

Although the balancing of competing interests usually involves a factual inquiry, the court held that a case is "suitable for dismissal" when the record shows that there was only a *de minimis* intrusion into an employee's privacy (citation omitted).[479]

In sum, with a few exceptions, the plaintiffs in the foregoing cases had difficulty stating a claim for a violation of a state privacy statute, as well as difficulty showing that the information had any compensable value.

## D. State Laws Limiting Further Disclosure of Health Information

As discussed in Sections IV, V, and IX of this digest, when a person or entity is a business associate of a covered entity or a subcontractor of a business associate of a covered entity, HIPAA applies when they create, receive, maintain, or transmit PHI on behalf of the covered entity. When HIPAA does not apply to a person or entity having PHI, the laws of some states may restrict a person or entity from any disclosure or redisclosure of an individual's information to what are referred to herein as downstream recipients.

In Arizona, "[a] person who receives medical records…pursuant to this section shall not disclose those records without the written authorization of the patient or the patient's health care decision maker, unless otherwise authorized by law."[480] Furthermore, the Arizona statute provides in part that "[i]f a health care provider releases a patient's medical records…to a *contractor*…the *contractor* shall not disclose any part or all of a patient's medical records or payment records in its custody except as provided in this article (emphasis added)."[481] Unless redisclosure is permitted by another provision of the statute an individual must authorize a further disclosure of his or her health information.

The California Confidentiality of Medical Information Act (CCMIA) states that "[n]o provider of health care, health care service plan, or *contractor* shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan *without first obtaining an authorization*, except as provided in subdivision (b) or (c)."[482] California law also provides that "[a] recipient of medical information pursuant to an authorization…may not further disclose that medical information e*xcept in accordance with a new authorization*" or as otherwise required or permitted by law (emphasis added).[483] Unlike HIPAA, the CCMIA provides that patients may bring a legal action for violations of the law and seek to recover compensatory and punitive damages. The CCMIA provisions permitting a judicial remedy are not preempted by HIPAA because HIPAA has no private right of action.[484]

Under Florida law, a records owner must maintain

> a record of all disclosures of information…to a third party, including the purpose of the disclosure request. … The third party to whom information is disclosed is prohibited from further disclosing any information in the medical record without the expressed written consent of the patient or the patient's legal representative (emphasis added).[485]

The term "records custodian" "means *any person or entity* that…[o]btains medical records from a records owner, (emphasis added) "[486] meaning one who is required to "maintain records or documents as provided under the confidentiality and disclosure requirements" of the statute.[487]

In Massachusetts, every "holder" of "personal data" must identify an individual who is responsible for a personal data system and that person

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[477] *Id.* at 17 (*quoting* Bratt v. IBM Corp., 392 Mass. 508, 520, 521, 467 N.E.2d 126 (1984)).

[478] *Id.* at 19–20. *See also* Doe v. Di Genova, 642 F. Supp. at 634 (also applying a balancing test to the plaintiff's federal constitutional claim for violation of his right of privacy).

[479] *Grocela*, 2012 Mass. Super. LEXIS 206 at 17–18.

[480] ARIZ. REV. STAT. § 12-2294(E) (2013).

[481] *Id.*

[482] CAL. CIV. CODE § 56.10(a) (2013).

[483] CAL. CIV. CODE § 56.13 (2013). *See also* CAL. CIV. CODE §§ 56.10(c) and 56.11 referenced in the section.

[484] David Humiston & Stephen M. Crane, Managed Care (May 2002), *Will Your State's Privacy Law be Superseded by HIPAA?*, hereinafter referred to as "Humiston & Crane," available at http://www.managedcaremag.com/archives/0205/0205.hipaabystate.html.

[485] FLA. STAT. ANN. § 456.057(12) (2013).

[486] FLA. STAT. ANN. § 456.057(3)(b) (2013).

[487] FLA. STAT. ANN. § 456.057(4) (2013).

must insure that the statutory requirements are met to prevent access to or the dissemination of personal data.[488] Under the statute a holder of personal data is an agency that

> collects, uses, maintains or disseminates personal data or any person or entity which contracts or has an arrangement with an agency whereby it holds personal data as [a] part or as a result of performing a governmental or public function or purpose. A holder which is not an agency is a holder, and [is] subject to the provisions of this chapter, only with respect to personal data so held under [a] contract or [an] arrangement with an agency (emphasis added).[489]

It is not apparent that the above provision would apply necessarily to every transit agency. The statute defines the term "agency" to mean an agency "of the executive branch of the government, including but not limited to any constitutional or other office, executive office, department, division, bureau, board, commission or committee thereof; or any authority created by the general court to serve a public purpose, having either statewide or local jurisdiction."[490]

In Texas, the state health privacy law "applies to a broader range of persons and entities that obtain or maintain health information" than HIPAA's Privacy Rule and arguably applies to prevent any holder of health information from disclosing it to downstream recipients.[491] The Texas statute defines the term "covered entity" more broadly than does HIPAA. In Texas a covered entity is:

> Any person who…(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site…. (emphasis supplied).[492]

However, in Texas a covered entity also is

> Any person who…(B) comes into possession of protected health information; (C) obtains or stores protected health information under this chapter; or (D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.[493]

Under the Texas statute if an entity is a covered entity it may not "electronically disclose," except for example to another covered entity in connection with treatment, "an individual's protected health information to any person without a separate authorization from the individual or the individual's legally authorized representative for each disclosure."[494] A Texas governmental publication observes that the Texas health privacy law applies to more types of entities than HIPAA and, indeed, "defines 'covered entity' as anyone who has any role at all in the production, gathering, storing, processing, or transmittal of PHI, as well as anyone who comes into possession of such information…."[495] The attorney general in Texas is authorized to institute an action for a violation and may seek civil penalties ranging from $5,000 to $250,000 against a covered entity, which as noted is a broadly defined term in the Texas statute.[496]

Other states in which a recipient of medical information may be prohibited from disclosing the information include New York[497] and Virginia. Under the Virginia Health Records Privacy Act an individual has a right of privacy in his or her health records.[498] Although the records are the property of the health care entity, except as otherwise permitted by state law, a health care entity or other person working in a "health care setting" may not disclose an individual's health records.[499] With some exceptions relating to treatment or research, the Virginia statute states that "[n]o person to whom health records are disclosed shall redisclose or otherwise reveal the health records of an individual, beyond the purpose for which such disclosure was made, without first obtaining the individual's specific authorization to such redisclosure."[500] Nevertheless, the Virginia statute

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[488] Fair Information Practices, MASS. GEN. LAWS ch. 66A, § 2(a) (2013).

[489] MASS. GEN. LAWS ch. 66A, § 1 (2013) (definitions).

[490] *Id*.

[491] Pritts, *supra* note 417, at 346.

[492] TEXAS HEALTH & SAFETY CODE § 181.001(b) (2013).

[493] *Id*.

[494] *Id*. § 181.154(b) (2013).

[495] *See Especially for Texas Employers*, available at http://www.twc.state.tx.us/news/efte/hipaa_basics.html.

[496] TEXAS HEALTH & SAFETY CODE § 181.201(b). In one instance as provided in the statute a court may assess civil penalty not to exceed $1.5 million annually. TEXAS HEALTH & SAFETY CODE § 181.201(c).

[497] *See* discussion in Section XVI.D.

[498] CODE OF VIRGINIA § 32.1-127.1:03(A) (2013).

[499] *Id.*

[500] *Id*. The Virginia statute does not preclude redisclosure to "(i) any health care entity that receives health records from another health care entity from

includes at least 29 instances when health care entities may or shall disclose health records including when required "by other provisions of state law…."[501]

Unlike HIPAA, some state statutes allow an individual to bring a civil action against a person who intentionally and unlawfully discloses a person's health information.[502] As in Texas, some of the statutes are broad enough to apply to downstream recipients of health information such as transit and other agencies. For example, in Maine the enforcement provision follows the section establishing the state's confidential policies that apply to health care practitioners and health care facilities.[503] Maine's law states in part that "[a]n individual who is aggrieved by conduct in violation of this section may bring a civil action against a *person* who has intentionally unlawfully disclosed health care information…(emphasis added)."[504] The Maryland statute provides that "[a] health care provider *or any other person* is in violation of this subtitle if the health care provider *or any other person*…[d]iscloses a medical record in violation of this subtitle (emphasis added)."[505] Maryland law further provides that "[a] health care provider *or any other person* who knowingly violates any provision of this subtitle is liable for actual damages (emphasis added)."[506]

Thus, although under HIPAA there is no protection of PHI after it is released by a covered entity or business associate to another person or entity not subject to HIPAA, some states have laws that are more restrictive than HIPAA. Some state laws direct that a further disclosure by a downstream recipient of an individual's health information requires the individual's authorization or reauthorization.

## E. Security of Health Information Under State Privacy Laws

According to the National Conference of State Legislatures (NCSL), 46 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have enacted legislation requiring notification of security breaches involving personal information.[507]

State statutes on notification of security breaches "vary widely in the scope of information they cover and their notification requirements. Although some state laws require notification only to affected individuals, the requirements governing the content of such notifications are not materially different from what is required by the HIPAA Breach Notification Rule."[508]

The state statutes and security rules appear to apply only to health care providers.[509] However, some state statutes may be broad enough to apply to other recipients or custodians of health information. In Florida, a "records owner" includes, for example, any health care practitioner who generates a medical record or a health care practitioner to whom records are transferred by a previous records owner or any health care practitioner's employer.[510] Furthermore, a records custodian is "*any person or entity* that…[o]btains medical records from a records owner…. (emphasis added)."[511] In New York, with respect to patient information disclosed by a health care provider to someone other than the subject of the information or to other permitted persons the information is subject to limitations on disclosure as provided in the statute and "should be kept confidential by the party receiving such information."[512]

making subsequent disclosures as permitted under this section and [HIPAA] or (ii) any health care entity from furnishing health records and aggregate or other data, from which individually identifying prescription information has been removed, encoded or encrypted, to qualified researchers" as identified in the statute. *Id*.

[501] CODE OF VIRGINIA § 32.1-127.1:03(D) (2013).

[502] ME. REV. STAT. ANN. tit. 22, § 1711-C(13) (2013); MD. CODE ANN., Health-Gen. § 4-309(f) (2013) (patient's right to sue and recover actual damages from health care providers who knowingly violate the Maryland Confidentiality of Medical Records Act); MASS. GEN. LAWS ch. 214, § 1B (2013) (person has right to maintain civil suit in equity to enforce right of privacy and seek damages).

[503] ME. REV. STAT. ANN. tit. 22, § 1711-C(7) (2013).

[504] *Id*. § 1711-C(13) (2013).

[505] MD. CODE ANN., Health-Gen. § 4-309(c)(2) (2013).

[506] *Id*. § 4-309(f) (2013).

[507] Survey of State Security Breach Notification Laws, *supra* note 421.

[508] Acevedo & Rathburn, supra note 15, at *7 (*citing*, *e.g.,* ARIZ. STAT. § 44-7501; CAL. HEALTH & SAFETY CODE § 1280.15; 815 ILL. COMP. STAT. 530/5.1; MD. CODE ANN. Com. Law §§ 14-3504–3508; and MASS. GEN. LAWS ch. 93H, §§ 1–6 (requiring that notification be given to certain state officials)).

[509] Pritts, *supra* note 417, at 338.

[510] FLA. STAT. ANN. § 456.057(1) (2013).

[511] *Id*. §§ 456.057(3)(b) (2013) and § 456.057(4) (2013). A records owner must maintain "a record of all disclosures of information…to a third party, including the purpose of the disclosure request. FLA. STAT. ANN. § 456.057(12) (2013).

[512] N.Y. PUB. HEALTH LAW § 18(6) (2013).

### F. State Privacy Laws Applicable to State and Local Agencies

Some states have enacted the equivalent of the Federal Privacy Act that is discussed in Appendix A. For example, the California statute governs the collection, use, and disclosure of personal information held by state agencies; the statute does not apply to city or county agencies.[513] Other states have laws similar to the Federal Privacy Act.[514] In Virginia, the statute applies to any agency or governmental entity of the Commonwealth, as well as counties, cities, or other units of local government. Moreover, an agency includes "any entity, whether public or private, with which any of the foregoing has entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function."[515]

### G. State Public Records Disclosure Laws

Public records disclosure laws may apply to state agencies,[516] as well as to local governments.[517] In general, the federal and state FOIAs and public records disclosure laws exempt health information from disclosure.[518] In California, the California Public Records Act and the Information Practices Act of 1977 (IPA) govern how state and local agencies may use and disclose personal information including medical information. The IPA does not apply to city and county agencies.[519] Under the IPA agencies may not disclose medical information unless an individual has voluntarily consented in writing.[520] Moreover, medical information may be exempt from disclosure under the Public Records Act if a disclosure would constitute an unwarranted invasion of personal privacy.[521]

In sum, state public records disclosure statutes tend to have an exception that precludes the production of health records without an individual's consent.

## XVII. CIVIL ACTIONS AT COMMON LAW FOR HEALTH PRIVACY VIOLATIONS

### A. Tort Actions Under State Common Law

Some courts recognize that there is a common law duty to secure another person's confidential information.[522] One source argues that "[s]tate common law provides broader protections against the disclosure of health information and affords patients a right of access to their own health information."[523] Articles typically discuss common

[513] CAL. CIV. CODE §§ 1798.3 and 1798.14 (2013) and CAL. GOV'T CODE § 6252(a) (2013) (defining local agency to mean "a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952").

[514] Indiana Fair Information Practices Act, IC §§ 4-1-6-1 to 4-1-6-8 (2013). *See also,* IND. CODE ANN. § 4-1-6-19(d) (2013) (defining state agency); Massachusetts Fair Information Practices Act, MASS. GEN. LAWS ch 66A, §§ 1-3 (2013) (imposing duties on state agencies regarding personal data they maintain); N.Y. PUB. OFF. LAW § 95 (2013); Government Data Collection and Dissemination Practices Act, VA. CODE ANN. §§ 2.2-3800 and 2.2-3801(2) (2013).

[515] VA. CODE ANN. § 2.2-3801 (2013).

[516] Massachusetts Freedom of Information Act, MASS. GEN. LAWS ch. 4, § 7, cl. 26 (2013) (government-maintained medical files and information not "public records" open to inspection).

[517] Illinois Freedom of Information Act, 5 ILL. COMP. STAT. 140/2 (2013).

[518] 5 ILL. COMP. STAT. 140/7(c) (2013) (exempting from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information" and stating that "'unwarranted invasion of personal privacy' means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information"); Md. Public Information Act, MD. CODE ANN., State Government § 10-616 (2013) (stating that with respect to hospital records a custodian shall deny inspection of a hospital record that "(1) relates to … (iii) medical care; or (iv) other medical information…."); N.Y. PUB. OFF. LAW § 87(2)(b) (2013) (providing that an "agency may deny access to records or portions thereof that…if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of…this article" and that "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to…disclosure of items involving the medical or personal records of a client or patient in a medical facility…."). *See also* New York's Personal Privacy Protection Law, N.Y. PUB. OFF. LAW §§ 91 and 96 (2013).

[519] CAL. CIV. CODE §§ 1798.3 and 1798.14 (2013) and CAL. GOV'T CODE § 6252 (2013).

[520] *Id*. § 1798.24 (2013).

[521] CAL. GOV'T CODE § 6254 (2013) and CAL. CIV. CODE § 1798.24(g) (2013).

[522] Pasternack, *supra* note 8, at 831 (*citing* Thomas J. Smedinghoff, *The Emerging Law of Data Security: A Focus on the Key Legal Trends*, 934 PRACTISING LAW INSTITUTE 13, 22 (2008)).

[523] Pritts, *supra* note 417, at 330.

law claims in the context of claims against health care providers, such as for invasion of privacy, express or implied breach of contract, breach of fiduciary relationship, and other claims discussed herein.[524] In general, HIPAA does not preempt state causes of action for a violation of the confidentiality or privacy of medical records.[525]

No transit agency reported that it had been sued concerning its receipt or handling of health information on its clients. No cases were located in which a transit agency has been sued for alleged improper disclosures of a patron's health information. Nevertheless, as discussed hereafter, there are some privacy cases against persons or entities in which the courts agreed that the plaintiff or plaintiffs stated a claim for invasion of privacy of health information.

## B. Invasion of Privacy

Using the *Restatement (3d) of Torts* (*Restatement*) as a guide, there are at least four causes of action that may apply to an unauthorized and impermissible use or disclosure of health information: public disclosure of private facts; intrusion upon seclusion; misappropriation; and false light.[526] Claimants alleging invasion of privacy often assert other claims such as for negligence, infliction of emotional distress, or breach of fiduciary duty[527] or for breach of contract, all of which are discussed hereafter.[528]

### *1. Public Disclosure of Private Facts*

Although a remedy for disclosure of health information at common law is said to be "difficult,"[529] there are states such as Colorado and Minnesota that recognize "the tort of invasion of privacy based on unreasonable public disclosure of private facts."[530] To be actionable a disclosure has to reveal "'unpleasant or disgraceful or humiliating illnesses' or 'hidden physical or psychiatric problems.'"[531] A tort action for public disclosure is unlikely to succeed if the injury from the disclosure is minimal.[532] It appears that most jurisdictions require that a disclosure was made to the general public, "usually through the media."[533] Several cases have considered what satisfies the publicity requirement.

For example, in *Grant v. United States*[534] the court dismissed the plaintiff's claim for a breach of his right of privacy for public disclosure of private facts. The court held that the tort required a disclosure that was "tantamount to publicity" but that the defendants only disclosed the plaintiff's health information to the attorney of one of the defendants.[535] In *Doe v. Brundage-Bone Concrete Pumping, Inc*.,[536] in which a hospital billing clerk disclosed plaintiff's sensitive health records only to the defendant's manager, the court held that a disclosure to a "limited number of co-workers" is not a publication.[537] In *Watkins v. Cornell Companies, Inc.*[538] the plaintiffs alleged that the defendant violated the plaintiffs' common law right to privacy when the defendant's employees filmed the plaintiffs in violation of the defendant's confidentiality policies[539] and showed the film to groups and individuals to raise money and obtain future contracts.[540] The court decided that the required element of publicity was not satisfied because the film was not "communicated to the pub-

[524] *Id*. at 330–31 (*citing* Horne v. Patton, 287 So. 2d 824 (Ala. 1974); MacDonald v. Clinger, 84 A.D. 2d 482, 446 N.Y.S.2d 801, 802 (N.Y. App. Div. 1982)).

[525] Wright v. Combined Ins. Co. of America, 959 F. Supp. 356 (N.D. Miss. 1997) (holding that HIPAA did not preempt state law causes of action); O'Donnell v. Blue Cross Blue Shield of Wyoming, 173 F. Supp. 2d 1176 (D. Wyo. 2001) (holding that HIPAA did not preempt state law claims for breach of contract, estoppel, misrepresentation, and bad faith); Cowan v. Combined Ins. Co. of America, 67 F. Supp. 2d 1312 (M.D. Ala. 1999) (holding that HIPAA did not preempt state law claims against an insurer for fraud, breach of contract, breach of fiduciary duty, and outrage).

[526] Ayres, *supra* note 42, at 994 (footnote omitted).

[527] *See* Section XVII.C of this digest.

[528] *See* Section XVII.D of this digest

[529] Pritts, *supra* note 417, at 331.

[530] *Id*. (*citing* Colorado and Minnesota). *See id*. (*citing*, *e.g*., Ozer v. Borquez, 940 P.2d 371, 377 (Colo. 1997) and Lake v. Wal-Mart Stores Inc., 582 N.W.2d 231, 234 (Minn. 1998)).

[531] Pasternack, *supra* note 8, at 833 (footnote omitted).

[532] *Id*. (footnote omitted).

[533] Ayres, *supra* note 42, at 995 (stating that a recovery in tort for an invasion of privacy is limited as the disclosure or communication must be "to the public at large"); *see* Pritts, *supra* note 417, at 331.

[534] 2011 U.S. Dist. LEXIS 61833, at *1 (E.D. Cal. 2011).

[535] *Id.* at 18.

[536] 2006 U.S. Dist. LEXIS 100042 (W.D. Okla. 2006).

[537] *Id.* at 10.

[538] 2013 U.S. Dist. LEXIS 66376, at *1 (N.D. Tex. 2013).

[539] *Id.* at 3.

[540] *Id.* at 4.

lic at large or disseminated to so many people that it [became] public knowledge."[541]

In *Cordts*, the plaintiff alleged that a company hired by his employer to evaluate disability claims wrongfully disclosed to his ex-wife that he was receiving treatment for depression. The plaintiff further alleged that the disclosure violated his employer's written assurance that his health information would not be disclosed to unauthorized parties.[542] The plaintiff sued for public disclosure of private facts,[543] as well as for a violation of the Illinois Mental Health and Development Disabilities Confidentiality Act as discussed in Section XVI.C of this digest.[544]

The court held that the disclosure to Cordts' ex-wife (via a text message) stated a claim for invasion of privacy based on a public disclosure of private facts.[545] The court observed that the required element of publicity may be satisfied when "a disclosure is made to a small number of people who have a 'special relationship' with the plaintiff"[546] and a "natural and proper interest" in the information (citations omitted).[547] The court held that the plaintiff's ex-wife continued to have a natural and proper interest, because Cordts' claim for disability benefits indicated that he had a condition that potentially could affect his ability to support his daughter and thereby harm his ex-wife.[548]

### *2. Intrusion Upon Seclusion*

A second cause of action for an invasion of privacy for disclosing health information is for intrusion upon seclusion. There are various defenses to such a claim, including that the plaintiff did not intend to keep the information private; that under the circumstances the plaintiff did not have a reasonable expectation of privacy of the information; or that the plaintiff voluntarily and without any coercion consented to disclosure (footnotes omitted).[549] The tort of intrusion upon seclusion is similar to the tort for invasion of privacy, but the tort does not require a showing that a disclosure was made to the general public.[550] As held in an Arkansas case, the tort of intrusion requires "specific intrusive action as opposed to disclosing private information."[551]

In *Watkins* the plaintiffs also sued for intrusion upon seclusion. The court ruled, however, that the plaintiffs' knew they were being filmed.

> Intrusion on seclusion requires proof of (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person. …Liability does not turn on publication of any kind. The core of the tort of invasion of privacy is the offense of prying into the private domain of another, not the publicity that may result from such prying (citations omitted) (internal quotation marks omitted).[552]

Thus, under Texas law, the tort requires "some sort of intrusion" that did not exist in the *Watkins* case.

In *Rhoades*,[553] in which a high school administered a psychological assessment test to the plaintiff and other high school students, the court granted a summary judgment to the defendant school on the plaintiffs' intrusion claim. The court held that an intrusion claim requires physical contact or an invasion of a plaintiff's physical space.[554] Likewise, in *Steinberg*, in which the plaintiffs alleged that the defendants misused their confidential prescription information, the court held that there had been a voluntary disclosure of the information by the defendants. Likewise, under Pennsylvania law an intrusion claim cannot exist when "a defendant legitimately obtains information from a plaintiff."[555]

Another issue for an intrusion claim is whether a disclosure is sufficiently offensive. In *Cooney,* involving a firm's disclosure of personal information on former Chicago public school employees, the court, in ruling that there were no actionable claims, drew a distinction between personal information and private information. Names and

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[541] *Id.* at 23.

[542] *Cordts,* 369 Ill. App. 3d at 602, 860 N.E.2d at 446–47.

[543] To state a cause of action in Illinois for public disclosure of private facts, a plaintiff must plead that the defendants publicized the plaintiff's private not public life; that the matter publicized would be highly offensive to a reasonable person; and that the matter that was published was not one that had a legitimate public concern. *Cordts,* 369 Ill. App. 3d at 603, 860 N.E.2d at 447.

[544] 740 ILL. COMP. STAT. 110/1, *et seq*.

[545] *Cordts,* 369 Ill. App. 3d at 607, 860 N.E.2d at 450.

[546] *Id.,* 369 Ill. App. 3d at 607, 860 N.E.2d at 450.

[547] *Id.,* 369 Ill. App. 3d at 608, 860 N.E.2d at 451.

[548] *Id.,* 369 Ill. App. 3d at 610, 860 N.E.2d at 452.

[549] Ayres, *supra* note 42, at 995.

[550] *See Restatement* § 652(B). *See also* Reid v. Pierce County, 136 Wash. 2d 195, 206, 961 P. 2d 333, 339-340 (1998).

[551] Dunbar v. Cox Health Alliance, LLC, 446 B.R. 306, 313–14, 2011 Bankr. LEXIS 812 (E.D. Ark. 2011).

[552] *Watkins*, 2013 U.S. Dist. LEXIS 66376 at 21–22.

[553] 574 F. Supp. 2d 888 (N.D. Ind. 2008).

[554] *Rhoades,* 574 F. Supp. 2d at 907-908 N 3.

[555] *Steinberg,* 899 F. Supp. 2d at 342-343.

social security numbers may be personal information, but the court held that their disclosure was not "facially embarrassing and highly offensive…."[556] In *Doe v. Di Genova*,[557] involving a subpoena of the plaintiff's medical records maintained by the Veterans Administration, the court held that there is no claim for intrusion when an intrusion is reasonable under the circumstances or when an intrusion is not "serious.'" In *Brundage-Bone Concrete Pumping*, concerning the plaintiff's intrusion claim based on a hospital employee's divulgence of information to one of the defendant's managers, the information divulged was held not to be "highly offensive to a reasonable person."[558]

Finally, as stated in *Grant*, California law requires proof of an "intrusion into a private place, conversation or matter…in a manner highly offensive to a reasonable person."[559] Although the court agreed that plaintiff's allegations were sufficient to state a claim, the court dismissed the claim. The basis of the dismissal was that California's absolute litigation privilege immunized the defendants for a publication or broadcast made in connection with a judicial proceeding.[560] The court held that the "privilege applies to common law, statutory, and constitutional claims of invasion of privacy."[561]

#### *3. Claims for Misappropriation or False Light*

Because they are mentioned in the *Restatement*, privacy claims based on misappropriation or false light will be noted briefly. For a plaintiff to make a misappropriation claim, a transit agency must have committed "medical identity theft" and made a commercial use of the individual's "medical likeness" (footnote omitted).[562] For there to be a tort claim for false light against a transit agency, a plaintiff's health information would have to have been revealed to the public by the media, the same element that generally is required for a claim for a public disclosure of private facts (footnote omitted).[563]

### C. Other Common Law Tort Actions

Other possible state law claims for wrongful disclosure of health information include tort actions for negligence, negligent or intentional infliction of emotional distress, and breach of fiduciary duty and for breach of contract.[564]

#### *1. Negligence Claims for Privacy Violations*

Although a negligence claim may exist against a health care provider for breach of

> confidentiality (footnotes omitted),[565] there may not be necessarily such an action against a transit agency because of the absence of a relationship of trust such as exists between individuals and health care providers that may give rise to a duty to putative plaintiffs.[566]

For a negligence claim, a plaintiff has to establish that there was a breach of a duty owed by the defendant to the plaintiff that was the proximate cause of plaintiff's damages. In *Rhoades*, at the summary judgment stage the court did not dismiss the plaintiffs' claim that the defendant committed negligence in requiring students to take a psychological assessment test.[567] However, in both *Brundage-Bone Concrete Pumping*[568] and *Watkins*[569] the courts rejected the negligence claims.

Assuming there is a basis for a negligence claim under state law, even though there is no private right of action under HIPAA, it has been held that the HIPAA standards and requirements may serve as evidence of the standard of care applicable to the privacy and security of an individual's health information.[570]

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[556] *Cooney*, 407 Ill. App. 3d at 367, 943 N.E.2d at 32.

[557] Doe v. Di Genova, 642 F. Supp. 624, 632 (1986), (holding that under the Privacy Act (*see* discussion in App. A to this digest), Doe was entitled to an order prohibiting release of the records).

[558] *Brundage-Bone Concrete Pumping, Inc*, 2006 U.S. Dist. LEXIS 100042 at 11. *See also* Setzer v. Farmers Insurance Company, Inc., 185 Fed. Appx. 748 (10th Cir. 2006) (affirming summary judgment for defendant on invasion of privacy and intrusion of seclusion claims because the conduct at issue was not highly offensive).

[559] *Grant*, 2011 U.S. Dist. LEXIS 61833 at 20 (*citing* CAL. CIV. CODE § 47(b)).

[560] *Id.* at 22–23.

[561] *Id.* at 22–23, 24.

[562] Ayres, *supra* note 42, at 998.

[563] *Id*. at 1000.

[564] *Id*. at 1001.

[565] *Id*. at 1003–1004.

[566] *See* discussion in Section XVII.C.3 of this digest; *see also* Collins, *supra* note 341, at 231 (footnote omitted).

[567] *Rhoades,* 574 F. Supp. 2d at 905.

[568] *Brundage-Bone Concrete Pumping, Inc*, 2006 U.S. Dist. LEXIS 100042 at 18.

[569] *Watkins*, 2013 U.S. Dist. LEXIS 66376 at 12 (holding that claim for negligence *per se* claim failed because the claim could not be predicated on the nonpenal statutory sections at issue).

[570] Michael W. Drumke, A HIPAA PRIMER 37 BRIEF 38, 40 (2008), available at http://documents.jdsupra.com/44f508a0-bfa3-431d-87d8-f716a2c8b206.pdf, hereinafter referred to as "Drumke"

### 2. Infliction of Emotional Distress

Plaintiffs in privacy cases have claimed either negligent or intentional infliction of emotional distress because of the disclosure of their health information. A plaintiff must establish that a defendant engaged in extreme and outrageous conduct that negligently, intentionally, or recklessly caused the plaintiff to suffer severe emotional distress.[571] In *Cooney* the court dismissed a claim by the former public school employees, because he defendants had no duty to the plaintiffs not to disclose their personal information.[572] In *Brundage-Bone Concrete Pumping,* the court dismissed the plaintiff's claim for intentional infliction of emotional distress because the conduct in question "was not extreme and outrageous."[573]

Medical evidence may be required to make a case of infliction of emotional distress. In *Guthrie Clinic, Ltd*., the plaintiff failed to allege that he had suffered a physical manifestation of an emotional injury that is required for a claim for infliction of emotional distress.[574] In *Faison,* the court rejected the plaintiffs' claim for intentional infliction of emotional distress allegedly caused by the defendant's filming of the plaintiffs in part because of the absence of "competent medical evidence of causation and severity." Thus, expert medical testimony may be necessary to prove that a plaintiff suffered emotional distress.[575]

### 3. Breach of Fiduciary Duty

The required elements for a claim for breach of fiduciary duty are the existence of a fiduciary relationship and a knowing breach by the defendant of the fiduciary duty that was the proximate cause of the plaintiff's damages.[576] In the *Guthrie Clinic, Ltd*. case[577] involving a nurse's disclosure of the plaintiff's medical condition to his girlfriend, the court held that the clinic did not have a fiduciary duty to the plaintiff. The court held that a mere disclosure of health information is insufficient to establish a claim for a breach of fiduciary duty.[578]

## D. Breach of Contract Claims for Health Privacy Violations

Because of the contractual nature of the transportation services at issue, a transit agency should be aware of the possibility of a privacy claim based on a theory of a breach of express or implied contract.[579] However, for a breach of contract claim a plaintiff would have to establish that the plaintiff's health information was provided in exchange for a promise expressly or impliedly made by the defendant.[580] In *Guthrie Clinic, Ltd*., the court ruled that the defendants had not violated an "'implied contract' of good faith" when a nurse disclosed the plaintiff's medical condition. Equally important is that the court held that the nurse's conduct was not within the scope of her employment and thus was not attributable to her employer.[581]

Although transit agencies reported having procedures to keep health information confidential, the documents provided by transit agencies for this digest do not show that there is an express or implied contract for the privacy or security of health information.[582] Moreover, paratransit service is provided because of DOT and ADA nondiscrimination laws and other federal or state laws or programs, not because of an express or implied contract to protect a person's health information.[583] To the extent that a claim against a transit agency is based on HIPAA, there is no private

(*citing* Acosta v. Byrum, 180 N.C. App. 562, 638 S.E.2d 246, 253 (N.C. Ct. App. 2006)).

[571] *Rhoades,* 574 F. Supp. 2d at 908 (*citing* Branham v. Celadon Trucking Services, Inc*.,* 744 N.E.2d 514, 523 (Ind. Ct. App. 2001)).

[572] *Cooney*, 407 Ill. App. 3d at 363, 943 N.E.2d at 29.

[573] *Brundage-Bone Concrete Pumping, Inc*, 2006 U.S. Dist. LEXIS 100042 at 16.

[574] *Guthrie Clinic, Ltd.,* 2012 U.S. Dist. LEXIS 20507 at 21. In New York the elements of the claim are that the defendant engaged in "(1) extreme and outrageous conduct; (2) [with] intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Id*. at 21–22.

[575] *Faison,* 823 F. Supp. at 1206 (*quoting* Kazatsky v. King David Memorial Park, Inc*.,* 515 Pa. 183, 527 A.2d 988, 989 (1987) (internal quotation marks omitted)).

[576] *Guthrie Clinic, Ltd.,* 2012 U.S. Dist. LEXIS 20507 at 9 (internal quotation marks omitted).

[577] 2012 U.S. Dist. LEXIS 20507, at *1 (W.D. N.Y. 2012).

[578] *Cooney*, 407 Ill. App. 3d at 363, 943 N.E.2d at 29.

[579] *See* Pasternack, *supra* note 8, at 833.

[580] *Id*. at 834 (*citing* Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*, 5 VA. J.L. & TECH. 6, 113 (2000)); Sorenson v. Barbuto, 143 P. 3d 295, 299 (Utah App. 2006); and Acosta v. Byrum, 180 N. C. App. 562, 638 S.E.2d 246, 253 (2006)).

[581] The court also rejected any strict liability in tort based on the nurse's conduct. *Guthrie Clinic, Ltd.,* 2012 U.S. Dist. LEXIS 20507 at 16.

[582] *See* App. B of this digest.

[583] *See* Section XV.A of this digest.

right of action under HIPAA.[584] Finally, transit agencies responding to the survey did not report any claims in tort or contract having been brought against them by a patron concerning a disclosure of health information received or maintained by an agency.

## E. Defenses Asserted by Defendants

### *1. Immunity*

Although beyond the scope of this digest, transit agencies subject to a tort claims act or a governmental immunity act will want to determine whether they have immunity for tort claims involving the handling of patrons' health information. In *Di Genova*, the court ruled that even if a disclosure of the plaintiff's records was a tort under District of Columbia law, liability would be barred by the Federal Tort Claims Act (citations omitted).[585]

Individual defendants may be shielded as well from alleged violations of a constitutional right of privacy. For example, in *Rhoades*, the court dismissed claims against the individual defendants:

Governmental actors performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (citations omitted).[586]

The court held in *Rhoades* that the individual defendants were entitled to qualified immunity, because the defendants at the school where Rhoades was a student would not have known whether the constitutional right that was allegedly violated was a clearly established constitutional right.[587]

### *2. No Vicarious Liability*

Under applicable state law a transit agency may not be liable necessarily for the actions of an employee that were not foreseeable and that were not within the scope of the person's employment.[588] As held by a New York court, an employer is not vicariously liable for tortious action that an employee committed for personal motives that were unrelated to the furtherance of the employer's business.[589]

### *3. Absence of Compensable Damages*

Even if a claim in tort or contract is possible it may be difficult for a plaintiff to prove damages because of the difficulty in placing a value on an individual's health information or on the injury suffered by a plaintiff caused by an improper disclosure.[590] In *Steinberg,* one of the reasons for the dismissal of the claim was the failure to show that the information had a "compensable value."[591]

## XVIII. HIPAA AND TRANSIT REGISTRIES OR DATABASES FOR EMERGENCY PLANNING AND OPERATIONS

Another issue for transit agencies concerns the effect of HIPAA and emergency planning and operations that may require or result in the disclosure of a patron's health information during an emergency. Fourteen transit agencies having health information on patrons stated that they do not have a plan or policy for the handling of

[584] *See* Section XIII.B of this digest.

[585] *Di Genova*, 642 F. Supp. at 633 (holding that 28 U.S.C. § 2680(a) "excludes from FTCA coverage 'any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid'").

[586] *Rhoades,* 574 F. Supp. 2d at 911.

[587] *Id.*

[588] *Guthrie Clinic, Ltd.,* 2012 U.S. Dist. LEXIS 20507 at 10, 11–12 (*citing* Murray v. Watervliet City School Dist., 130 A.D. 2d 830, 515 N.Y.S.2d 150, 152 (N.Y. App. 1987); Ello v. Singh*,* 531 F. Supp. 2d 552,582 (S.D. N.Y. 2007); and Naegele v. Archdiocese of New York, 39 A.D. 3d 270, 833 N.Y.S.2d 79, 80 (N.Y. App. 2007)).

[589] Yildiz v. PJ Food Service, Inc., 82 A.D. 3d 971, 918 N.Y.S.2d 572, 574 (N.Y. App. 2011).

[590] Pasternack, *supra* note 8, at 837–38 (stating that "the value of one's private information [is] difficult to quantify").

[591] *Steinberg,* 899 F. Supp. 2d at 339 (*citing* La Court v. Specific Media, Inc., 2011 U.S. Dist. LEXIS 50543 (C.D. Cal. 2011) (holding that the defendant's practice of collecting the plaintiffs' Web browsing histories could not give rise to a finding of monetary injury as practice did not deprived the plaintiffs of information's economic value"); *In re JetBlue Airways Corp. Privacy Litig*., 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) (personal information of individual airline passengers has no "compensable value in the economy"); *In re DoubleClick Inc. Privacy Litig*., 154 F. Supp. 2d 497, 525 & N 35 (S.D.N.Y. 2001) ("[A]lthough demographic information is valued highly…, the value of its collection has never been considered an economic loss to the subject. …[W]e are unaware of any court that has held the value of this collected [demographic] information constitutes damage to consumers or unjust enrichment to collectors."). *See Steinberg,* 899 F. Supp. 2d at 340.

health information when providing patrons with transportation during an emergency.[592]

Guidelines issued by the Federal Emergency Management Agency (FEMA) set forth the means for coordinating federal assistance to supplement state and local resources when there is an emerging or existing health and medical emergency.[593] When local transportation assets are not sufficient to meet demand, requests for federal medical transportation assistance are coordinated with the Department of Homeland Security and FEMA, including accessible transportation for "medical needs populations."[594]

The DOT—in collaboration with the Department of Defense, the General Services Administration, and other agencies providing transportation—furnishes logistical and technical assistance for all types of transportation, including air, rail, marine, and motor vehicle and for accessible transportation, as well as other support (*e.g.*, supplies, equipment, blood supplies) from DOT resources.[595]

A question that has arisen is whether transit agencies may create and maintain a registry or database of patrons with medical needs or physical limitations who would require transportation during an emergency. One study states that there is "no generally accepted practice" on having a registry of patrons or others who would need assistance in an emergency.[596] However,

> [s]ome operators may find it useful to maintain data on customers who will have special needs during an emergency, while others may find it useful to work with other agencies on creating a registry of a wider population of people with disabilities. A registry established by a paratransit system should probably be limited in purpose to determining individuals who will need continuing urgent transportation during an emergency (e.g. for dialysis) assuming the paratransit system is able to continue functioning at a reduced level of operations.[597]

The same source cautions, however, that the creation of a registry may raise "issues of privacy, whether the information could be shared with other agencies involved in emergency response, and whether transit agencies are the appropriate entity to develop such registries."[598] Although "some transit agencies [in Florida] annually ask their paratransit customers about evacuation needs…others consider this an intrusion on customers' privacy," apparently out of concern caused by HIPAA's Privacy Rule.[599] As discussed below, based on information from HHS, another source concludes that the HIPAA Privacy Rule does not affect the ability of transit agencies to create a registry for use during an emergency.

A study on paratransit emergency planning notes that standard operating procedures adopted by the North County Transit District (NCTD) and the Metropolitan Transit System (MTS) in California recommend the creation of a centralized database.[600] The database would document the needs of patrons based on information from group homes, assisted living facilities, nursing homes, and other sources.[601] The study, which concludes that HIPAA is not an obstacle to developing a registry, relied on information provided by HHS. HHS explains that "[t]he Privacy Rule does not apply to all persons or entities that regularly use, disclose, or store individually identifiable health information. …For example, the Privacy Rule does not limit the disclosure of information by social service agencies…[or] paratransit authorities….[602] Thus, according to HHS, a "social services agency (that is not a covered entity) that maintains a list of names, addresses and limitations of persons with disabilities in an area may release the information to a transportation contractor without regard to the HIPAA Privacy

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[592] One agency reported that it did not provide "same day emergency transportation." Response of Utah Transit. Two agencies having health information on patrons did not respond to the question.

[593] FEDERAL EMERGENCY MANAGEMENT AGENCY, ANNEX #8, EMERGENCY SUPPORT FUNCTION–PUBLIC HEALTH AND MEDICAL SERVICES ANNEX, hereinafter referred to as "FEMA Emergency Support Annex," *available at* http://www.au.af.mil/au/awc/awcgate/frp/frpesf8.htm.

[594] *Id*.

[595] *Id*.

[596] Nelson\Nygaard Consulting Associates, *MTC/Bay Area Partnership Paratransit Technical Assistance Program, Guidance for Paratransit Emergency Planning*, at 22 (Sep. 2008), hereinafter referred to as "Guidance for Paratransit Emergency Planning," available at http://www.nelsonnygaard.com/Documents/Reports/Para-Emer-Plng-Guidance_REPORT.pdf.

[597] *Id*.

[598] *Id*. at 20.

[599] *Id*. at 20–21.

[600] *Id*. at 21. Attachment 1 to the study is the North County Transit District and Metropolitan Transit System (San Diego): Standard Operating Procedures: Disaster Awareness/Response Action Plan & Assessment of Need.

[601] *Id*. at 20.

[602] *Id*. at 21 (*citing* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, DISCLOSURES FOR EMERGENCY PREPAREDNESS–A DECISION TOOL, available at http://www.hhs.gov/ocr/hipaa/decisiontool).

Rule."[603] Likewise, FEMA provides information on emergency planning for "special needs" populations and for the use of registries.[604]

Lastly, to the extent that HIPAA is a concern, patrons could provide health information to transit agencies and/or sign an authorization for the release of information by covered entities or business associates (or others not covered by HIPAA but concerned that HIPAA applies to them) to enable transit agencies to create a registry or database. As discussed previously in this digest, covered entities and business associates also must disclose PHI when required by law.[605]

## XIX. INDUSTRY PRACTICES AND STANDARDS APPLICABLE TO TRANSIT AGENCIES HAVING HEALTH INFORMATION ON PATRONS

Transit agencies' procedures and practices, which appear to be quite consistent, regarding the privacy and security of patrons' health information are discussed throughout this digest. However, transit agencies responding to the survey also explained more generally the industry practices or standards that are applicable to transit agencies receiving and maintaining health information on their patrons. Copies of documents provided by transit agencies are included in Appendix C. Some of the transit documents assume that HIPAA applies to transit agencies. Moreover, the business associate and subcontractor agreements included in Appendix C stipulate that HIPAA applies to the agreements.

EBPC's response stated that the best industry practices and standards are for transit staff to understand that all health information on patrons must be treated confidentially; that the use of information in electronic files must be limited to trip requirements only; and that "print files" are to be kept in a secure location.

KAT stated that the information it receives and maintains is private, that its records are secured, and that "[o]perators are instructed not to share any information to anyone outside of KAT."

Kitsap advised that all passenger records are treated as confidential and only reviewed by staff as is necessary to provide safe transportation. "Appropriate database securities are in place to prevent access to these records by nonessential personnel or the general public."[606]

MATA stated that it only receives medical information from health care providers and that the information is only used for certifying that patrons qualify for paratransit service, information that is "filed and secured."[607]

Finally, as stated by other transit agencies, Whatcom advised that the best industry practices and standards dictate that confidential files must to be maintained in a secure physical setting and that computer files must be password protected.

In sum, based on the research and the survey responses it appears that transit agencies have procedures and practices to safeguard patrons' health information regardless of whether the agencies are subject to HIPAA. Moreover, some transit agencies have entered into business associate and subcontractor agreements, for example, to participate in a coordinated transportation services program, that obligate the agencies to comply with HIPAA.

## CONCLUSION

Of primary concern for this digest is whether the privacy and security rules established by HIPAA apply to transit agencies having health information on their patrons. However, HIPAA

[603] *Id*.

[604] FEMA, *Comprehensive Preparedness Guide 301 (CPG-301): Interim Emergency Management Planning Guide for Special Needs Populations, Federal Emergency Management Agency* (Aug. 15, 2008), hereinafter referred to as "FEMA Comprehensive Preparedness Guide," available at http://www2.ku.edu/~rrtcpbs/resources/pdf/FEMA_CPG301.pdf.

[605] *See* Sections VIII.B.2 and X of this digest.

[606] Response of Kitsap. Kitsap provided a copy of its Notice of Privacy Practices and of its Medical Verification Release Form. New Haven Transit provided a copy of its Request for Professional Verification, Authorization to Release Confidential Information, and Physician or Other Professional Information.

[607] *See also* Response of Riverside (stating that medical documentation is required to support a claim of disability under the ADA regulations for certification for paratransit service and that such information is "confidential[] and is treated as such in our process"); Response of Salem-Keizer (reporting that the information it receives "is functional (as far as ADA service eligibility) and eligibility data from the State of Oregon [is] covered by [a] confidentiality clause"); Response of Utah Transit (reiterating that any information received from a client is confidential and is not shared without a client's or a client's agent's written consent and that records are secured in a locked room); Response of Votran (stating that "[h]ealth information is not disclosed to parties other than the necessary staff responsible for processing paratransit eligibility applications or performing functional assessments").

does not apply to every health record keeper or to every health record. If a person's health information is not being maintained by a covered entity or by a business associate on behalf of a covered entity, the health information most likely is not protected by HIPAA. If a covered entity or its business associate discloses PHI to anyone who is not covered by HIPAA the information is no longer subject to HIPAA. Protected health information that is provided by a patron or pursuant to a patron's authorization to a transit agency is no longer subject to HIPAA.

Only if a transit agency is a business associate of a covered entity or a subcontractor of a business associate is a transit agency subject to HIPAA. However, it does not appear that a transit agency meets HIPAA's definition of a business associate. HHS clearly states that if a person or entity does not meet the criteria for a business associate then the person or entity is not subject to HIPAA. However, it also appears that transit agencies have entered into agreements that provide that PHI may be shared by covered entities with transit agencies as brokers, business associates, or subcontractors and that transit agencies thus agree to comply with HIPAA.

As noted in this digest, the law on the privacy of health information is highly fragmented. Appendix A discusses other federal laws that are applicable to the privacy of health information. Under HIPAA, covered entities and their business associates may only disclose PHI as permitted or mandated by the HIPAA regulations. However, HIPAA also authorizes a disclosure of PHI when another federal law requires a disclosure of PHI.

There are some state laws that are more restrictive than HIPAA. Even though health information may no longer be subject to HIPAA after being disclosed to a person or entity that is not subject to HIPAA, some state laws prohibit a further disclosure by a downstream recipient of an individual's health information unless the subject of the health information authorizes or reauthorizes a disclosure.

Persons who wrongfully use or disclose health information may be subject to civil claims under provisions of state constitutions or statutes for invasions of privacy and for other claims in tort or for breach of contract. However, in many of the cases discussed in this digest the courts dismissed the claims at the summary judgment stage. The plaintiffs often were unable to show that the defendant had a duty to the plaintiff or failed to demonstrate other required elements for a claim, including a plaintiff's failure to prove any damages resulting from a disclosure of health information.

Finally, notwithstanding some concerns, it does not appear that HIPAA presents any barrier to transit agencies that want to create a registry or database on patrons and their health requirements for use during emergency operations. Under HIPAA, covered entities or their business associates may use or disclose PHI only if a use or disclosure comes within one the permitted or mandatory uses or disclosures under the HIPAA regulations. Thus, a person or entity not covered by HIPAA may provide health information on an individual to a transit agency unless a disclosure is precluded by a confidentiality agreement or another federal or state law. In any event, a patron may furnish health information to a transit agency or authorize a covered entity such as a health care provider to provide whatever health information is needed by a transit agency for a registry or database that would assist in meeting a patron's transportation needs during an emergency.

## APPENDIX A—FEDERAL PRIVACY LAWS OTHER THAN HIPAA

Although transit agencies did not identify any federal laws applicable to them other than the ADA and DOT laws and regulations, Appendix A discusses other federal privacy statutes, including those identified by HHS, that restrict the disclosure of an individual's health information.[608]

**1. Patient Protection and Affordable Care Act**

In *National Federation of Independent Business v. Sebelius*[609] the Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (ACA)[610] in part on the basis that the individual mandate imposed by the ACA (*see* 26 U.S.C. § 5000A, Requirement to Maintain Minimum Essential Coverage, Appendix B to this digest) was within Congress's power to tax under the Taxing Clause[611] but held that the ACA's expansion of Medicaid violated the Constitution by threatening states with the loss of their existing Medicaid funding if they declined to comply with the expansion.[612]

In brief, the ACA imposed "administrative simplification" provisions that build on HIPAA.[613] The ACA includes requirements for operating rules for each of the HIPAA transactions; for the enumeration of a unique, standard Health Plan Identifier (HPID); for new standards for electronic funds transfer and electronic health care claims attachments; for health plans to certify compliance with the standards and operating rules; and for penalties for health plans that fail to comply or to certify their compliance with applicable standards and operating rules (quotation marks omitted).[614]

The ACA has

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[608] Also identified by HHS in its Final Rule published December 28, 2000 but not discussed herein are: the Public Health Service Act § 318(e)(5) and 42 C.F.R. § 51b.404 (program for prevention and control of sexually transmitted diseases funded under the Act); Public Health Service Act § 330 and 42 C.F.R. § 51c.110 (community health center program funded under the Act); Public Health Service Act, title X and 42 C.F.R. § 59.15 (grant program for family planning services under the Act); 30 U.S.C. § 437(a) and 42 C.F.R. § 55a.104 (grant program for black lung clinics funded); Public Service Act § 501 and 42 C.F.R. § 51a.6 (program of maternal and child health projects funded under the Act); and 42 C.F.R. § 37.80(a) (program of medical examinations of coal miners). 65 Fed. Reg. 82462, 82484 (*see* subpart entitled "Relationship to Other Federal Laws").

[609] 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

[610] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 9008(f)(2), 124 Stat. 119, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2503(a), 124 Stat. 1029, available at http://www.healthcare.gov/law/full/.

[611] *National Federation of Independent Business*, 132 S. Ct. at 2593-2600, 183 L. Ed. 2d at 483-490 (holding, *inter alia*, that "[o]ur precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'") (*Id*., 132 S. Ct. at 2598, 183 L. Ed. 2d at 487) (citation omitted)).

[612] *National Federation of Independent Business*, 132 S. Ct. at 2600-2608, 183 L. Ed. 2d at 490-498.

[613] United Health Care, "Administrative Simplification" ("The Administrative Simplification provision under Section 1104 of the Patient Protection and Affordable Care Act (the Act) intends to improve the standards for electronic transactions mandated by the Health Insurance Portability and Accountability Act (HIPAA)" and "[t]he intent of this provision is to reduce administrative costs by adopting a set of operating rules for each transaction and to create as much uniformity in implementing electronic standards as possible."), available at http://www.uhc.com/united_for_reform_resource_center/health_reform_provisions/administrative_simplification.htm.

[614] Centers for Medicare and Medicaid Services, available at http://www.cms.gov/Regulations-and-Guidance/HIPAA-Administrative-Simplification/Affordable-Care-Act/index.html?redirect=/Affordable-Care-Act/.

> privacy protections similar to the HIPAA privacy rule; requires security safeguards for data collection, analysis, and sharing; and protects against all inappropriate internal use by any entity that collects, stores, or receives the data, including use of such data in determinations of eligibility (or continued eligibility) in health plans, and from other inappropriate uses (to be defined by the Secretary) (internal quotation marks omitted).[615]

The ACA expands several aspects of HIPAA.[616] The ACA requires the Secretary of HHS to promulgate rules for each of the HIPAA covered transactions that enable point-of-care eligibility determinations; minimizes the need for paper attachments to claims submissions; and requires that all data elements be entered in unambiguous terms.[617] As stated, the ACA requires the creation of a unique, standard health plan identifier and a standard for electronic funds transfers.[618] In general, the objective is to enable the exchange of electronic data in a way that minimizes reliance on multiple formats.[619] The changes to HIPAA implemented by the ACA include increased security standards for the use and transfer of PHI by covered entities and business associates. The ACA does not apply to an individual or entity that could have PHI yet is not a covered entity or a business associate of one.

No transit agency responding to the survey stated that the ACA would have any effect on the agency's handling of any health information on their patrons. However, as noted, the ACA does include some new requirements for business associates.

**2. Department of Transportation Regulations**

DOT regulations apply to records generated by certain occupational health tests and examinations.[620] DOT advises that with respect to medical exams there are DOT "[r]egulatory requirements [that] take precedence over" HIPAA.[621] Any person who is designated in DOT regulations as a "safety-sensitive employee" is subject to DOT drug and alcohol testing.[622] Transportation employers have very detailed requirements for "transportation workplace drug and alcohol testing programs."[623] In general, service agents and employers may not release individual test results or medical information without an employee's specific written consent.[624] However, an employer may release

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[615] Joel Teitelbaum, Lara Cartwright-Smith & Sara Rosenbaum, *Translating Rights into Access: Language Access and the Affordable Care Act*, 38 AM. J. L. AND MED. 348, 368 (2012).

[616] American Medical Association, hereinafter referred to as "AMA Web site," available at http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act.page.

[617] Section 1104 of the ACA. *See* AMA Web site, *supra* note 616.

[618] AMA Web site, *supra* note 616.

[619] *Federal Register*, https://www.federalregister.gov/articles/2011/07/08/2011-16834/administrative-simplification-adoption-of-operating-rules-for-eligibility-for-a-health-plan-and.

[620] 49 C.F.R. § 40 (2013).

[621] U.S. DEP'T OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, available at http://nrcme.fmcsa.dot.gov/mehandbook/me_privacy.aspx.

[622] U.S. DEP'T OF TRANSPORTATION, OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE, WHAT EMPLOYEES NEED TO KNOW ABOUT DOT DRUG AND ALCOHOL TESTING, at 1, available at http://web.multco.us/sites/default/files/employee-labor-relations/documents/dot_employee_handbook.pdf.

[623] 49 C.F.R. § 40 (2013).

[624] 49 C.F.R. § 40.321 (2013) (stating that "'[b]lanket releases,' in which an employee agrees to a release of a category of information (*e.g.*, all test results) or to release information to a category of parties (*e.g.,* other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part"); *see id.* at § 40.27 (stating an employer may not require an employee to sign a "consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing

such information without an employee's consent pursuant to a legal action, grievance, or administrative proceeding that the employee brings as a result of a positive drug or alcohol test or a refusal to take a drug or alcohol test.[625] An employer may release such records to a court in lieu of a civil or criminal proceeding when the court determines that the results of a test are relevant because of an "employee's performance of safety-sensitive duties."[626] In any case, an employer must notify an employee in writing if the employer decides to disclose an employee's information under 49 C.F.R. § 40.323.[627]

Employers or service agents are required to release information to an employee (or former employee) who is the subject of the information upon an employee's request.[628] Additionally, upon request employers and service agents must provide DOT agents access to facilities used for DOT drug and alcohol functions and all "drug and alcohol program records and reports (including copies of name-specific records or reports)."[629] If the National Transportation Safety Board requests information as part of an accident investigation, an employer must furnish information about a drug or alcohol test the employer administered after the accident.[630] If a "Federal, state or local safety agency with regulatory authority over [an employer] or the employee" requests drug and alcohol test records concerning an employee, the employer must provide them.[631]

DOT advises that if such testing information is "viewed as protected" under HIPAA, it is not necessary to obtain written authorization from an employee when DOT regulations require the use or disclosure of health information otherwise protected under 49 C.F.R. part 40.[632] DOT has provided examples of when an employer or service agent in a DOT program may disclose information without an employee's written authorization.[633] For example, employers do not have to have written authorizations from employees for DOT tests.[634]

Although two transit agencies responding to the survey noted the applicability of DOT privacy provisions to their agencies, it appears that the agencies were referring to DOT and ADA requirements regarding paratransit service.[635]

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process covered by this part (including, but not limited to, collections, laboratory testing, MRO and SAP services").

[625] 49 C.F.R. § 40.323 (2013).

[626] 49 C.F.R. § 40.323(a)(2) (2013).

[627] 49 C.F.R. § 40.323(d) (2013).

[628] 49 C.F.R. § 40.331(a) (2013).

[629] 49 C.F.R. §§ 40.331(b)–(c) (2013).

[630] 49 C.F.R. § 40.331(d) (2013).

[631] 49 C.F.R. § 40.331(e) (2013).

[632] U.S. DEP'T OF TRANSPORTATION, GENERAL ISSUE UPDATE, DOT RULE 49 C.F.R. PART 40 SECTION 40.27 Q&A, hereinafter referred to as "DOT General Issue Update," available at http://www.dot.gov/odapc/part40QA/40_27.

[633] *Id*.

[634] *Id*.

[635] Response of Pierce Transit (stating that "DOT/ADA Rules require a paratransit eligibility process which has required Pierce Transit to handle HIPAA-related information"); Response of Whatcom (noting that its agency is subject to DOT and ADA laws and regulations regarding the "providing [of] complementary paratransit service for disabled passengers").

**3. Public Health Service Act and Records of Substance Abuse**

The confidentiality of patient records of substance abuse under § 543 of the Public Health Service Act[636] and its implementing regulations[637] interact with several of HIPAA's privacy provisions.[638] There are requirements that apply to patient records maintained by federally assisted specialized alcohol or drug abuse programs.[639] The law's provisions apply to a number of health care providers that must comply also with HIPAA requirements.[640] Generally, however, no conflict will exist in the simultaneous application of both of these statutes.[641]

Records of substance abuse, patients' identity, diagnosis, prognosis, or treatment, maintained in connection with programs assisted by the government must remain confidential unless a patient gives written consent.[642] However, the records may be disclosed to medical personnel, even if the patient does not provide written consent, in a medical emergency or to qualified personnel for the purposes of conducting scientific research, management or financial audits, or program evaluations.[643] In such cases, personnel may not identify an individual patient in any manner.[644] Records of patients' substance abuse must be disclosed pursuant to a court order regardless of a patient's prior written consent; however, "[u]pon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure."[645] Unless authorized by a court order, the records may not be used to investigate a patient or initiate or substantiate a criminal case against him or her.[646]

The privacy rule applies to anyone who has ever been a patient of such a substance abuse facility.[647] The privacy rule does not apply to an interchange of records within the uniformed services, within departments of the Veterans Administration (VA) providing health care, or between the uniformed services and the VA.[648] The rule also does not apply to reports to state officials under state law applicable to incidents of child abuse or neglect.[649]

Part 2 of title 42 of the C.F.R. provides more guidance on the implementation of privacy rules applicable to patient records of alcohol and drug abuse.[650] Part 2 establishes that the restriction on disclosure of records applies to any information, written or unwritten, that would identify a patient as a drug or alcohol user or that is information that was obtained in a federally-funded treatment program.[651] Moreover, there is an exception to the prohibition of record-sharing that allows "communi-

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[636] 42 U.S.C. § 290dd-2 (2013).
[637] 42 C.F.R. part 2 (2013).
[638] 65 Fed. Reg. at 82,481, 82,482 (2000).
[639] *Id*. at 82,482–82,483.
[640] *Id*. at 82,482.
[641] *Id*.
[642] 42 U.S.C. §§ 290dd-2(a) and (b)(1) (2013).
[643] 42 U.S.C. §§ 290dd-2(b)(2)(A)–(B) (2013).
[644] *Id*.
[645] 42 U.S.C. § 290dd-2(b)(2)(C) (2013).
[646] 42 U.S.C. § 290dd-2(c) (2013).
[647] 42 U.S.C. § 290dd-2(d) (2013).
[648] 42 U.S.C. § 290dd-2(e) (2013).
[649] *Id.*
[650] 42 C.F.R. pt. 2 (2013).
[651] 42 C.F.R. §§ 2.12(a) and 2.12(e)(1) (2013).

cations between a program and a qualified service organization of information needed by the organization to provide services to the program."[652] Under this rule, although no state law may permit disclosure of records that is prohibited by the rule, if a state law prohibits a disclosure that is allowed by the federal statute, a disclosure is not permitted.[653]

**4. Employee Retirement Income Security Act of 1974**

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted "to regulate pension and welfare employee benefit plans established by private sector employers, unions, or both, to provide benefits to their workers and dependents."[654] Employee welfare benefit plans are plans that provide medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, or death through the purchase of insurance or otherwise.[655]

Although ERISA may not be regulated directly by state law, HIPAA does not disturb "state privacy protections that would otherwise apply and that are more stringent than the federal privacy protections."[656] Except for state laws that regulate insurance,[657] § 514(a) of ERISA preempts all state laws that "relate to" any employee welfare benefit plan.[658] However, an ERISA plan is not to be considered an insurer for the purpose of state insurance laws.[659] Thus, ERISA plans are not subject to regulation by state law.[660] On the other hand, § 514(d) of ERISA provides that ERISA does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States."[661]

**5. Family Educational Rights and Privacy Act**

The Family Educational Rights and Privacy Act (FERPA) protects the privacy of student records maintained by federally funded educational agencies or institutions or persons acting on behalf of the agencies or institutions.[662] The federal government will not provide funds to schools or educational agencies that deny parents the right to inspect or review the educational records of their minor children.[663] Schools are prohibited from making available students' educational records or personally identifiable information to others without a parent's consent.[664]

Both HIPAA and FERPA may preempt state laws that provide less protection.[665] HIPAA does not apply to educational records because those records are covered by FERPA.[666] When applicable,

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[652] 42 C.F.R. § 2.12(c)(4) (2013).

[653] 42 C.F.R. § 2.20 (2013).

[654] 65 Fed. Reg. 82,483. *See* 29 U.S.C. § 1002(1) (2013).

[655] *Id*.

[656] *Id*. (*citing* HIPAA, § 264(c)(2)).

[657] ERISA, § 514(b) and 29 U.S.C. § 1144(b)(2)(A) (2013).

[658] 29 U.S.C. § 1144(a) (2013).

[659] ERISA, § 514(b)(2)(B) and 29 U.S.C. § 1144(b)(2)(B) (2103).

[660] 65 Fed. Reg. 82,483.

[661] 29 U.S.C. § 1144(d) (2013). *See* 65 Fed. Reg. 82,483.

[662] 20 U.S.C. § 1232g (2103).

[663] 20 U.S.C. §§ 1232(g)(a)(1)(A)–(B) and (d) (2013).

[664] 20 U.S.C. § 1232(b) (2013) (allowing release of documents, however, to school and government officials under various circumstances).

[665] Celina Munoz, *Privacy at the Cost of Public Safety: Reevaluating Mental Health Laws in the Wake of the Virginia Tech Shootings*, 18 *S.* CAL. INTERDIS. L.J. 161 (2008), hereinafter referred to as "Munoz."

FERPA provides parents with the right to review and inspect their children's educational records;[667] however, "[w]hen a student turns eighteen or attends any school beyond high school, the rights given to parents under FERPA transfer to that student, and [the student] becomes an 'eligible student.'"[668]

HHS advises that it has excluded education records covered by FERPA[669] from the definition of protected health information. Individually identifiable health information created by a nurse relating to students under the age of 18 in a primary or secondary school receiving federal funds and subject to FERPA is not protected health information. Instead, the information is an education record under FERPA that addresses how such information is to be protected.[670]

**6. Privacy Act of 1974**

The Privacy Act of 1974[671] applies only to government or government-controlled corporations and not to private entities.[672] The Act is applicable to privacy issues within federal agencies.[673] Under the Act when disclosing records no federal agency or its contractors may disclose individually identifiable information without the written consent of the subject of the record.[674] However, the agencies may publish records for "routine use" in the *Federal Register*.[675] These rules also apply to "certain federal contractors who operate Privacy Act systems of records on behalf of federal agencies."[676] If privacy regulations and the Privacy Act provide different standards, a federal agency must abide by whichever one allows the least disclosure.[677]

The Act requires each government agency to make certain information available to the public. Agencies must publish guidance about their rules, methods, and operations in the *Federal Register*.[678] Furthermore, they must make available opinions, orders, policies, and interpretations, staff manuals that affect the public, and records that are likely to be the subject of frequent requests for information.[679] When an agency makes records available pursuant to the statute, it may delete iden-

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[666] *Id.* at 175 (*citing* 45 C.F.R. § 160.103). The article notes that "[a]ny school receiving federal funding from the U.S. Department of Education is subject to the provisions in FERPA, meaning that all public elementary schools, secondary schools, and universities must comply." *Id*. (*citing* U.S. DEP'T OF EDUCATION, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html).

[667] *Id.* at 174 (*citing* U.S. Dep't of Education, Family Educational Rights and Privacy Act (FERPA)).

[668] *Id.* (*citing* 20 U.S.C. § 1232g).

[669] Also excluded from the definition of protected health information are records designated as education records under Parts B, C, and D of the Individuals with Disabilities Education Act Amendments of 1997.

[670] 65 Fed. Reg. 82,483.

[671] Privacy Act of 1974, §§ 2(a) and (b), Pub. L. No. 93-579, 88 Stat. 1896 (codified in part as amended at 5 U.S.C. § 552a (2013)).

[672] John M. Eden, *When Big Brother Privatizes: Commercial Surveillance, the Privacy Act of 1974, and the Future of RFID*, 4 DUKE L. AND TECH. REV. 20, P4 (2005) (*citing* 5 U.S.C. § 522(a) and (a)(1)), hereinafter referred to as "Eden."

[673] 5 U.S.C. §§ 552a(b)-(d) (2013).

[674] 65 Fed. Reg. 82,482.

[675] *Id.*

[676] *Id.*

[677] *Id.*

[678] 5 U.S.C. 522(a)(1) (2013).

[679] 5 U.S.C. 522(a)(2) (2013).

tifying information to prevent unwarranted invasion of personal privacy.[680] However in each case, the agency must explain fully in writing the reason for and scope of each deletion.[681]

Private entities "are not bound by the fair information practices, open-access rules, and data-ownership principles embodied in the Act."[682] On the other hand, the Act "requires notice to, and consent from, individuals when the government collects and shares information about them."[683] In general, unless governed by federal or state law, private companies may gather and share data without obtaining an individual's consent.[684]

DOT explains that the Privacy Act of 1974 sets forth "how the federal government should treat individuals and their information and imposes duties upon federal agencies regarding the collection, use, dissemination, and maintenance of personally identifiable information (PII)."[685] DOT also observes that § 208 of the E-Government Act of 2002 "establishes the requirement for agencies to conduct privacy impact assessments (PIAs) for electronic information systems and collections."[686]

**7. Medicare and Medicaid**

Congress explicitly subjected Medicare and Medicaid to HIPAA's privacy regulation.[687] Medicare and Medicaid programs must comply both with HIPAA and the Privacy Act.[688] There may be situations when the Privacy Act authorizes a disclosure but HIPAA regulations do not permit disclosure.[689]

**8. Genetic Information Nondiscrimination Act**

In 2008, Congress enacted the Genetic Information Nondiscrimination Act (GINA).[690] Although "characterized as civil rights legislation, GINA represents a major departure from every antidis-

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[680] 5 U.S.C. 522(a)(2)(E) (2013) (stating that "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D)" and further stating that

> in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made).

[681] 5 U.S.C. § 522(a)(2)(E) (2013).

[682] Eden, *supra* note 672, at P4.

[683] James X. Dempsey & Lara M. Flint, *Surveillance, Records & Computers: Commercial Data and National Security*, 72 GEO. WASH. L. REV. 1459, 1474 (2004).

[684] Eden, *supra* note 672, at P5 (article addresses the use of radio frequency identification technology or RFID used by some commercial retailers, not the collection and dissemination of health information). *Id*. at 1.

[685] U.S. DEP'T OF TRANSPORTATION, PRIVACY IMPACT ASSESSMENT (UPDATE) NATIONAL REGISTRY OF CERTIFIED MEDICAL EXAMINERS (NATIONAL REGISTRY), Aug. 20, 2012, hereinafter referred to as "DOT Privacy Impact Assessment," available at http://www.dot.gov/sites/dot.dev/files/docs/FMCSA_PIA_National_Registry_082012.pdf.

[686] *Id*. at 1.

[687] 65 Fed. Reg. 82,484.

[688] 5 U.S.C. § 552a (2013).

[689] 65 Fed. Reg. 82,482 (explaining that "if the privacy regulation permits a disclosure, but the disclosure is not permitted under the Privacy Act, the federal agency may not make the disclosure. If, however, the Privacy Act allows a federal agency the discretion to make a routine use disclosure, but the privacy regulation prohibits the disclosure, the federal agency will have to apply its discretion in a way that complies with the regulation").

[690] 42 U.S.C.A. § 2000ff-1 (2013).

crimination statute preceding it" because it is prospective:[691] "GINA prohibits health insurers and employers from making decisions based on genetic information" even though there was "scant evidence" of a "significant history of genetic-information discrimination."[692] It is now "unlawful for employers to discharge, refuse to hire, or make employment decisions relating to compensation or the terms and privileges of employment based on an employee's genetic information."[693]

Under 42 U.S.C. § 2000ff(b) it is generally an "unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee…." However, there are several exceptions, such as when an "employer inadvertently requests or requires family medical history of the employee or family member of the employee" or when "health or genetic services are offered by the employer, including such services offered as part of a wellness program" and "the employee provides prior, knowing, voluntary, and written authorization…."[694]

**9. Other Federal Privacy Laws**

According to one source,[695] other privacy laws that may apply to the use or disclosure of personal health information include the Electronic Communications Privacy Act;[696] Telecommunications Act;[697] Cable Communications Act;[698] Child Online Protection Act;[699] Gramm-Leach-Bliley Act;[700] Sarbanes-Oxley Act;[701] and the Fair Credit Reporting Act.[702]

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[691] Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act,* 63 VAND. L. REV. 439, 440 (2010), hereinafter referred to as "Roberts."

[692] *Id*. at 441.

[693] Sharona Hoffman, *Employing E-Health: The Impact of Electronic Health Records on the Workplace*, 19 KAN. J.L. & PUB. POL'Y 409, 417 (2010) (*citing* 42 U.S.C.A. § 2000ff-1 (2010)).

[694] 42 U.S.C. §§ 2000ff(b)(1) and (2). There are other exceptions included in subsection (b).

[695] Ayres, *supra* note 42, at 990 (2013).

[696] 18 U.S.C. §§ 2511(1)(a)-(b) (2013).

[697] 47 U.S.C. §§ 222(a)-(c) (2013).

[698] 47 U.S.C. § 551 (2013).

[699] 15 U.S.C. §§ 6501(4) and (8) (2013).

[700] 15 U.S.C. §§ 6801(a)-(b) (2013).

[701] 15 U.S.C. § 7262 (2013).

[702] 15 U.S.C. § 1681 (2013).

# APPENDIX B

**AFFORDABLE CARE ACT**

**26 USC § 5000A - REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE**

**(a) Requirement to maintain minimum essential coverage**

An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

**(b) Shared responsibility payment**

**(1) In general**

If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

**(2) Inclusion with return**

Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

**(3) Payment of penalty**

If an individual with respect to whom a penalty is imposed by this section for any month—

**(A)** is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

**(B)** files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

**(c) Amount of penalty**

**(1) In general**

The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

**(A)** the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

**(B)** an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

**(2) Monthly penalty amounts**

For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

**(A) Flat dollar amount**

An amount equal to the lesser of—

**(i)** the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

**(ii)** 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

**(B) Percentage of income**

An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012 (a)(1) with respect to the taxpayer for the taxable year:

**(i)** 1.0 percent for taxable years beginning in 2014.

**(ii)** 2.0 percent for taxable years beginning in 2015.

**(iii)** 2.5 percent for taxable years beginning after 2015.

**(3) Applicable dollar amount**

For purposes of paragraph (1)—

**(A) In general**

Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

**(B) Phase in**

The applicable dollar amount is $95 for 2014 and $325 for 2015.

**(C) Special rule for individuals under age 18**

If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

**(D) Indexing of amount**

In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

**(i)** $695, multiplied by

**(ii)** the cost-of-living adjustment determined under section 1 (f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

**(4) Terms relating to income and families**

For purposes of this section—

**(A) Family size**

The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

**(B) Household income**

The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

**(i)** the modified adjusted gross income of the taxpayer, plus

**(ii)** the aggregate modified adjusted gross incomes of all other individuals who—

**(I)** were taken into account in determining the taxpayer's family size under paragraph (1), and

**(II)** were required to file a return of tax imposed by section 1 for the taxable year.

**(C) Modified adjusted gross income**

The term "modified adjusted gross income" means adjusted gross income increased by—

**(i)** any amount excluded from gross income under section 911, and

**(ii)** any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

**(d) Applicable individual**

For purposes of this section—

**(1) In general**

The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

**(2) Religious exemptions**

**(A) Religious conscience exemption**

Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

**(i)** a member of a recognized religious sect or division thereof which is described in section 1402 (g)(1), and

**(ii)** an adherent of established tenets or teachings of such sect or division as described in such section.

**(B) Health care sharing ministry**

**(i)** In general Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

**(ii)** Health care sharing ministry The term "health care sharing ministry" means an organization—

**(I)** which is described in section 501 (c)(3) and is exempt from taxation under section 501 (a),

**(II)** members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

**(III)** members of which retain membership even after they develop a medical condition,

**(IV)** which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

**(V)** which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

**(3) Individuals not lawfully present**

Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

**(4) Incarcerated individuals**

Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

**(e) Exemptions**

No penalty shall be imposed under subsection (a) with respect to—

**(1) Individuals who cannot afford coverage**

**(A) In general**

Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

**(B) Required contribution**

For purposes of this paragraph, the term "required contribution" means—

**(i)** in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

**(ii)** in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

**(C) Special rules for individuals related to employees**

For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to [1] required contribution of the employee.

**(D) Indexing**

In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

**(2) Taxpayers with income below filing threshold**

Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012 (a)(1) with respect to the taxpayer.

**(3) Members of Indian tribes**

Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A (c)(6)).

**(4) Months during short coverage gaps**

**(A) In general**

Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

**(B) Special rules**

For purposes of applying this paragraph—

**(i)** the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

**(ii)** if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

**(iii)** if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

**(5) Hardships**

Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311 (d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

**(f) Minimum essential coverage**

For purposes of this section—

**(1) In general**

The term "minimum essential coverage" means any of the following:

**(A) Government sponsored programs**

Coverage under—

**(i)** the Medicare program under part A of title XVIII of the Social Security Act,

**(ii)** the Medicaid program under title XIX of the Social Security Act,

**(iii)** the CHIP program under title XXI of the Social Security Act,

**(iv)** medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program; [2]

**(v)** a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

**(vi)** a health plan under section 2504 (e) of title 22, United States Code (relating to Peace Corps volunteers); [2] or

**(vii)** the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103–337; 10 U.S.C. 1587 note).

**(B) Employer-sponsored plan**

Coverage under an eligible employer-sponsored plan.

**(C) Plans in the individual market**

Coverage under a health plan offered in the individual market within a State.

**(D) Grandfathered health plan**

Coverage under a grandfathered health plan.

**(E) Other coverage**

Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

**(2) Eligible employer-sponsored plan**

The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

**(A)** a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

**(B)** any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

**(3) Excepted benefits not treated as minimum essential coverage**

The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

**(A)** described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

**(B)** described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

**(4) Individuals residing outside United States or residents of territories**

Any applicable individual shall be treated as having minimum essential coverage for any month—

**(A)** if such month occurs during any period described in subparagraph (A) or (B) of section 911 (d)(1) which is applicable to the individual, or

**(B)** if such individual is a bona fide resident of any possession of the United States (as determined under section 937 (a)) for such month.

**(5) Insurance-related terms**

Any term used in this section, which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

**(g) Administration and procedure**

**(1) In general**

The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

**(2) Special rules**

Notwithstanding any other provision of law—

**(A) Waiver of criminal penalties**

In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

**(B) Limitations on liens and levies**

The Secretary shall not—

**(i)** file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

**(ii)** levy on any such property with respect to such failure.

# APPENDIX C—BUSINESS ASSOCIATE AGREEMENTS, GUIDES, NOTICES, POLICIES, PRACTICES, AND PROCEDURES PROVIDED BY TRANSIT AGENCIES

| File | Source | Document |
|---|---|---|
| **1: Page 73** | Department of Health and Human Services, Washington, DC | Business Associate Agreement (sample with provisions highlighted) |
| **2: Page 81** | Dallas Area Rapid Transit | ADA Paratransit Eligibility Certification Applications |
| **3: Page 88** | Greater Attleboro-Taunton Regional Transit Authority | **3.a** - GATRA Internal Operating Procedure<br>**3.b.** - Commonwealth of Massachusetts—Standard Contract Form<br>**3.c** - Human Service Transportation Broker Services (Amendment #9 to contract between GATRA and Executive Office Health Human Services) |
| **4: Page 119** | Greater New Haven Transit District | **4.a** - Authorization to Release Confidential Information<br>**4.b** - Physician or other Professional Information<br>**4.c** - Request for Professional Verification |
| **5: Page 122** | Kitsap Transit | **5.a** - Medical Verification Release Form<br>**5.b** - Notice of Privacy Practices |
| **6: Page 124** | Omnitrans, San Bernardino, CA | Application for ADA Paratransit Service Certification |
| **7: Page 134** | Pierce Transit | Notice of Privacy Practices |
| **8: Page 138** | Salem-Keizer Transit | **8.a** - Blanket Purchase Agreement<br>**8.b** - Provider Enrollment Agreement (Oregon Health Authority)<br>**8.c** - Subcontractor Agreement (sample) |
| **9: Page 215** | TriMet Transit Mobility Center | **9.a** - Application for TriMet Lift Service<br>**9.b** - Lift Eligibility Process Instructions |

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**SAMPLE BUSINESS ASSOCIATE AGREEMENT PROVISIONS**
(Published January 25, 2013)

## Introduction

A "business associate" is a person or entity, other than a member of the workforce of a covered entity, who performs functions or activities on behalf of, or provides certain services to, a covered entity that involve access by the business associate to protected health information. A "business associate" also is a subcontractor that creates, receives, maintains, or transmits protected health information on behalf of another business associate. The HIPAA Rules generally require that covered entities and business associates enter into contracts with their business associates to ensure that the business associates will appropriately safeguard protected health information. The business associate contract also serves to clarify and limit, as appropriate, the permissible uses and disclosures of protected health information by the business associate, based on the relationship between the parties and the activities or services being performed by the business associate. **A business associate may use or disclose protected health information only as permitted or required by its business associate contract or as required by law. A business associate 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 its contract or required by law. A business associate also is directly liable and subject to civil penalties for failing to safeguard electronic protected health information in accordance with the HIPAA Security Rule**.

A written contract between a covered entity and a business associate must: (1) establish the permitted and required uses and disclosures of protected health information by the business associate; (2) **provide that the business associate will not use or further disclose the information other than as permitted or required by the contract or as required by law**; (3) require the business associate to implement appropriate safeguards to prevent unauthorized use or disclosure of the information, including implementing requirements of the HIPAA Security Rule with regard to electronic protected health information; (4) require the business associate to report to the covered entity any use or disclosure of the information not provided for by its contract, including incidents that constitute breaches of unsecured protected health information; (5) require the business associate to disclose protected health information as specified in its contract to satisfy a covered entity's obligation with respect to individuals' requests for copies of their protected health information, as well as make available protected health information for amendments (and incorporate any amendments, if required) and accountings; (6) to the extent the business associate is to carry out a covered entity's obligation under the Privacy Rule, require the business associate to comply with the requirements applicable to the obligation; (7) require the business associate to make available to HHS its internal practices, books, and records relating to the use and disclosure of protected health information received from, or created or received by the business associate on behalf of, the covered entity for purposes of HHS determining the covered entity's compliance with the HIPAA Privacy Rule; (8) at termination of the contract, if feasible, require the business associate to return or destroy all protected health information

received from, or created or received by the business associate on behalf of, the covered entity; (9) require the business associate to ensure that any subcontractors it may engage on its behalf that will have access to protected health information agree to the same restrictions and conditions that apply to the business associate with respect to such information; and (10) authorize termination of the contract by the covered entity if the business associate violates a material term of the contract. Contracts between business associates and business associates that are subcontractors are subject to these same requirements.

This document includes sample business associate agreement provisions to help covered entities and business associates more easily comply with the business associate contract requirements. While these sample provisions are written for the purposes of the contract between a covered entity and its business associate, the language may be adapted for purposes of the contract between a business associate and subcontractor.

This is only sample language and use of these sample provisions is not required for compliance with the HIPAA Rules. The language may be changed to more accurately reflect business arrangements between a covered entity and business associate or business associate and subcontractor. In addition, these or similar provisions may be incorporated into an agreement for the provision of services between a covered entity and business associate or business associate and subcontractor, or they may be incorporated into a separate business associate agreement. These provisions address only concepts and requirements set forth in the HIPAA Privacy, Security, Breach Notification, and Enforcement Rules, and alone may not be sufficient to result in a binding contract under State law. They do not include many formalities and substantive provisions that may be required or typically included in a valid contract. Reliance on this sample may not be sufficient for compliance with State law, and does not replace consultation with a lawyer or negotiations between the parties to the contract.

**Sample Business Associate Agreement Provisions**

Words or phrases contained in brackets are intended as either optional language or as instructions to the users of these sample provisions.

**Definitions**

Catch-all definition:

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

Specific definitions:

(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 party to this agreement, shall mean [Insert Name of Business Associate].

(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 [Insert Name of Covered Entity].

(c) HIPAA Rules. "HIPAA Rules" shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.

**Obligations and Activities of Business Associate**

Business Associate agrees to:

**(a) Not use or disclose protected health information other than as permitted or required by the Agreement or as required by law**;

(b) Use appropriate safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by the Agreement;

(c) Report to covered entity any use or disclosure of protected health information not provided for by the Agreement of which it becomes aware, including breaches of unsecured protected health information as required at 45 CFR 164.410, and any security incident of which it becomes aware;

[The parties may wish to add additional specificity regarding the breach notification obligations of the business associate, such as a stricter timeframe for the business associate to report a potential breach to the covered entity and/or whether the business associate will handle breach notifications to individuals, the HHS Office for Civil Rights (OCR), and potentially the media, on behalf of the covered entity.]

(d) In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit protected health information on behalf of the business associate agree to the same restrictions, conditions, and requirements that apply to the business associate with respect to such information;

(e) Make available protected health information in a designated record set to the [Choose either "covered entity" or "individual or the individual's designee"] as necessary to satisfy covered entity's obligations under 45 CFR 164.524;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for access that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to provide

the requested access or whether the business associate will forward the individual's request to the covered entity to fulfill) and the timeframe for the business associate to provide the information to the covered entity.]

(f) Make any amendment(s) to protected health information in a designated record set as directed or agreed to by the covered entity pursuant to 45 CFR 164.526, or take other measures as necessary to satisfy covered entity's obligations under 45 CFR 164.526;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for amendment that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to act on the request for amendment or whether the business associate will forward the individual's request to the covered entity) and the timeframe for the business associate to incorporate any amendments to the information in the designated record set.]

(g) Maintain and make available the information required to provide an accounting of disclosures to the [Choose either "covered entity" or "individual"] as necessary to satisfy covered entity's obligations under 45 CFR 164.528;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for an accounting of disclosures that the business associate receives directly from the individual (such as whether and in what time and manner the business associate is to provide the accounting of disclosures to the individual or whether the business associate will forward the request to the covered entity) and the timeframe for the business associate to provide information to the covered entity.]

(h) To the extent the business associate is to carry out one or more of covered entity's obligation(s) under Subpart E of 45 CFR Part 164, comply with the requirements of Subpart E that apply to the covered entity in the performance of such obligation(s); and

(i) Make its internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

**Permitted Uses and Disclosures by Business Associate**

(a) Business associate may only use or disclose protected health information

[Option 1 – Provide a specific list of permissible purposes.]

[Option 2 – Reference an underlying service agreement, such as "as necessary to perform the services set forth in Service Agreement."]

[In addition to other permissible purposes, the parties should specify whether the business associate is authorized to use protected health information to de-identify the information in accordance with 45 CFR 164.514(a)-(c). The parties also may wish to specify the manner in

which the business associate will de-identify the information and the permitted uses and disclosures by the business associate of the de-identified information.]

**(b) Business associate may use or disclose protected health information as required by law.**

(c) Business associate agrees to make uses and disclosures and requests for protected health information

[Option 1] consistent with covered entity's minimum necessary policies and procedures.

[Option 2] subject to the following minimum necessary requirements: [Include specific minimum necessary provisions that are consistent with the covered entity's minimum necessary policies 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 if done by covered entity [if the Agreement permits the business associate to use or disclose protected health information for its own management and administration and legal responsibilities or for data aggregation services as set forth in optional provisions (e), (f), or (g) below, then add ", except for the specific uses and disclosures set forth below."]

(e) [Optional] Business associate may use protected health information for the proper management and administration of the business associate or to carry out the legal responsibilities of the business associate.

**(f) [Optional] Business associate may disclose protected health information for the proper management and administration of business associate or to carry out the legal responsibilities of the business associate, provided the disclosures are required by law, or business associate obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person, and the person notifies business associate of any instances of which it is aware in which the confidentiality of the information has been breached.**

(g) [Optional] Business associate may provide data aggregation services relating to the health care operations of the covered entity.

**Provisions for Covered Entity to Inform Business Associate of Privacy Practices and Restrictions**

(a) [Optional] Covered entity shall notify business associate of any limitation(s) in the notice of privacy practices of covered entity under 45 CFR 164.520, to the extent that such limitation may affect business associate's use or disclosure of protected health information.

(b) [Optional] Covered entity shall notify business associate of any changes in, or revocation of, the permission by an individual to use or disclose his or her protected health information, to the extent that such changes may affect business associate's use or disclosure of protected health information.

(c) [Optional] Covered entity shall notify business associate of any restriction on the use or disclosure of protected health information that covered entity has agreed to or is required to abide by under 45 CFR 164.522, to the extent that such restriction may affect business associate's use or disclosure of protected health information.

**Permissible Requests by Covered Entity**

[Optional] Covered entity shall not request business associate to use or disclose protected health information in any manner that would not be permissible under Subpart E of 45 CFR Part 164 if done by covered entity. [Include an exception if the business associate will use or disclose protected health information for, and the agreement includes provisions for, data aggregation or management and administration and legal responsibilities of the business associate.]

**Term and Termination**

(a) Term. The Term of this Agreement shall be effective as of [Insert effective date], and shall terminate on [Insert termination date or event] or on the date covered entity terminates for cause as authorized in paragraph (b) of this Section, whichever is sooner.

(b) Termination for Cause. Business associate authorizes termination of this Agreement by covered entity, if covered entity determines business associate has violated a material term of the Agreement [and business associate has not cured the breach or ended the violation within the time specified by covered entity]. [Bracketed language may be added if the covered entity wishes to provide the business associate with an opportunity to cure a violation or breach of the contract before termination for cause.]

(c) Obligations of Business Associate Upon Termination.

[Option 1 – if the business associate is to return or destroy all protected health information upon termination of the agreement]

Upon termination of this Agreement for any reason, business associate shall return to covered entity [or, if agreed to by covered entity, destroy] all protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, that the business associate still maintains in any form. Business associate shall retain no copies of the protected health information.

[Option 2—if the agreement authorizes the business associate to use or disclose protected health information for its own management and administration or to carry out its legal

responsibilities and the business associate needs to retain protected health information for such purposes after termination of the agreement]

Upon termination of this Agreement for any reason, business associate, with respect to protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, shall:

1.
    1. Retain only that protected health information which is necessary for business associate to continue its proper management and administration or to carry out its legal responsibilities;
    2. Return to covered entity [or, if agreed to by covered entity, destroy] the remaining protected health information that the business associate still maintains in any form;
    3. Continue to use appropriate safeguards and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information to prevent use or disclosure of the protected health information, other than as provided for in this Section, for as long as business associate retains the protected health information;
    4. Not use or disclose the protected health information retained by business associate other than for the purposes for which such protected health information was retained and subject to the same conditions set out at [Insert section number related to paragraphs (e) and (f) above under "Permitted Uses and Disclosures By Business Associate"] which applied prior to termination; and
    5. Return to covered entity [or, if agreed to by covered entity, destroy] the protected health information retained by business associate when it is no longer needed by business associate for its proper management and administration or to carry out its legal responsibilities.

[The agreement also could provide that the business associate will transmit the protected health information to another business associate of the covered entity at termination, and/or could add terms regarding a business associate's obligations to obtain or ensure the destruction of protected health information created, received, or maintained by subcontractors.]

(d) Survival. The obligations of business associate under this Section shall survive the termination of this Agreement.

**Miscellaneous [Optional]**

(a) [Optional] Regulatory References. A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.

(b) [Optional] Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other applicable law.

(c) [Optional] Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA Rules.

Office Use Only 81
DART NO _____
Exp. Date _____
Format: _____

DART

Paratransit Services
P.O Box 660163
Dallas, TX 75266-7271
Phone (214) 515-7272

# DALLAS AREA RAPID TRANSIT
# ADA PARATRANSIT ELIGIBILITY
# CERTIFICATION APPLICATIONS

This certification form will be used to determine your eligibility for Dallas Area Rapid Transit Paratransit Services. Paratransit Services is a curb-to-curb public transportation service for individuals with disabilities who are prevented from using DART's fixed-route transportation services. Fixed-route services include bus, light and commuter rail transit. DART rail services are fully accessible to individuals with disabilities.

You must complete the entire form. Answer every question. Incomplete forms will be returned. A physician must verify your disability, prognosis and date of occurrence. Verification can be obtained directly from your physician or from an agency that has record of the physician statement on file. This information must be submitted with the application and on the enclosed form. The information you provide is confidential. It will only be shared with persons involved with DART's eligibility determination process and other transit providers to facilitate travel in those areas, and will not be provided to any other person or agency, except as provided by the Texas Public Information Act.

82 Please read the following statements and check those which best describe what you believe is your ability to use DART bus or rail services without assistance. You may select more than one.

When are you unable to independently use DART bus or rail services?

- ☐ I can use DART bus or rail service for some trips, but not other times because there are barriers that prevent me from using the system.
- ☐ I use the bus or rail service frequently.
- ☐ I have difficulty understanding and remembering all of the things that I would have to do to find my way to and from the bus.
- ☐ I believe I could learn to ride the bus, if someone taught me.
- ☐ I have difficulty or cannot climb stairs and can only board a DART vehicle if it has a lift.
- ☐ I have a visual disability which prevents me from getting to and from the bus, even with training.
- ☐ The severity of my disability can change from day to day. I can ride the bus only when I am feeling well.
- ☐ I can never use the bus by myself.
- ☐ I can get to and from the bus if the distance is not too great, and the route is barrier-free.
- ☐ I am not able to use the bus or rail for other reasons. (Please explain):

_____

_____

_____

## PART I - General Information to be completed by applicant
(please print or type)

Last Name | First Name | Mid. Initial | Male/Female

Social Security # | Date of Birth

Street Address | Building/Apt. No. | Apartment Name

City or Town | State | Zip

Home Phone | Work Phone

If this is a "Gated Community," please provide gate code_____

If you have a Paratransit I.D. Card, please provide I.D. number _____

## In case of emergency notify:

Name | Relationship | Home phone | Work Phone

Address | City | State | Zip

## PART II - Information on disability and mobility equipment

How does your disability prevent you from using DART's bus or rail services?

_____

_____

_____

Is your disability permanent? ☐ Yes ☐ No

If not, expected duration of your disability ____/____/____

Have you ever had a seizure?

☐ Yes
☐ No

If yes, what type? _____ How often? _____

Are seizures controlled with medication?

☐ Yes
☐ No

Do you use any of the following mobility aids? (Check all that apply)

☐ Manual Wheelchair
☐ Powered Wheelchair
☐ Powered Scooter
☐ Prosthesis
☐ Walker
☐ Cane
☐ Braces
☐ Other _____
☐ Service Animal
☐ Portable Oxygen
☐ Crutches

## PART III - Questions on using bus or rail services

1. Have you ever used DART's bus or rail services?

☐ Yes
☐ No

2. Have you participated in DART's Reduced Fare Program (i.e. Disabled, Senior, Student)?

☐ Yes
☐ No

3. Does your physical condition change from day to day where it may be difficult to use bus or rail services?

☐ Yes, my physical condition is good on some days and bad on others
☐ No, my physical condition does not change from day to day
☐ Not sure
☐ Other reasons _____

4. On days when your physical condition is good can you, on your own, or using a mobility aid:(i.e. Wheelchair, scooter, walker, crutches, service animal, etc.)
   - ☐ Get to the curb in front of your house
   - ☐ Travel up to 1 block
   - ☐ Travel up to 4 blocks
   - ☐ Travel up to 6 blocks
   - ☐ Can't travel outside your house. Please explain _____

   _____

5. On days when your physical condition is bad can you, on your own, or using a mobility aid:
   - ☐ Get to the curb in front of your house
   - ☐ Travel up to 1 block
   - ☐ Travel up to 4 blocks
   - ☐ Travel up to 6 blocks
   - ☐ Can't travel outside your house. Please explain _____

   _____

6. Does the weather have an affect on your ability to use bus or rail services?
   - ☐ Yes
   - ☐ No
   - ☐ I don't know

7. If you answered yes to question number 6, how does the weather affect your ability to use bus or rail service?

   _____

   _____

8. Are you currently using DART's bus or rail services?
   - ☐ Yes
   - ☐ No
   - ☐ If yes, name route(s) you use _____

9. Can you transfer from one bus or rail vehicle to another?
   - ☐ Yes
   - ☐ No (please explain why) _____

   _____

10. Are you able to, on your own, use the telephone to obtain bus or rail information?
    - ☐ Yes
    - ☐ No (please explain why) _____

    _____

11. Are you able to follow written or oral instructions to use bus or rail services?
- ☐ Yes
- ☐ No (please explain why) _____

_____

12. Can you without assistance of another person, get to or from the stop or station nearest your home?
- ☐ Yes
- ☐ Not sure
- ☐ No (please explain why) _____

_____

13. Can you wait 10 minutes at a stop or station that has a seat and a shelter?
- ☐ Yes
- ☐ Not sure
- ☐ No (please explain why) _____

_____

14. Can you wait 10 minutes at a stop or station that does not have a seat and a shelter?
- ☐ Yes
- ☐ Not sure
- ☐ No (please explain why) _____

_____

15. Are you able to get on or off a bus or rail vehicle if it had a passenger lift?
- ☐ Yes
- ☐ Not sure
- ☐ No (please explain why) _____

_____

16. Are you able to follow written or oral instructions to pay your bus or rail fares?
- ☐ Yes
- ☐ No (please explain why) _____

_____

17. Are you able to recognize when it is time to get on and off the bus or rail vehicle?
- ☐ Yes
- ☐ Not sure
- ☐ No (please explain why) _____

_____

I verify that all statements are true and correct to the best of my knowledge. I understand that supplying false information can disqualify my application and/or subsequent registration. I authorize DART to obtain verification of any information given in this application and to obtain essential medical information necessary for determination of paratransit eligibility. I also agree to submit myself for an in-person evaluation by DART and/or its acting agency for determination of paratransit eligibility.

Applicant's Signature Date

**If completed by someone other than applicant:**

Name Relationship Date

Signature Date

GREATER ATTLEBORO TAUNTON REGIONAL TRANSIT AUTHORITY

## GATRA INTERNAL OPERATING PROCEDURE

## PROCEDURE: GATRA HIPAA COMPLIANCE PLAN

**Responsibility:** Physical, Electronic including Telephonic Responsibility for GATRA Operations in HIPAA compliance is the shared responsibility of all GATRA's Staff. Staff Members with access to Personal Information (PI) are responsible to act in conformance with training and ongoing support these staff have been provided.

**Monitoring**: Monitoring of HIPAA qualified Personal Information (PI) is the direct responsibility of the following GATRA Senior Staff.

- Director, Information Technology
- Director, Programs and Planning
- GATRA Administrator

**Training Qualification:** Proper handling of HIPAA qualified Personal Information (PI) is the direct responsibility of all GATRA Brokerage Staff.

- Personal information (PI) exchanged with Public and State Agencies, MassHealth, Human Service Transportation Offices (HST) and Contractors is conducted by GATRA staff that has signed HIPAA confidentiality training and acknowledgements on file in GATRA's Human Resource Department. HIPAA training is conducted at least annually and may include the training packet and sign off sheet attached below. The following site is also used in HIPAA Training and as a resource should any questions arise.

  - http://www.hhs.gov/ocr/privacy/hipaa/faq/index.html


HIPAA Training Documents.pdf


GATRA HIPAA Employee Sign off..dc

## PERSONAL INFORMATION AND DATA SECURITY POLICIES/PRACTICES:

The GATRA policy regarding personal information (PI) and data security as it applies to all the HIPAA information and agency data, employees, GATRA bus passengers, all consumers of state and local agencies, Business Associates, and contractors that GATRA works with in conducting organizational operations. This policy is designed to assure compliance with MGL 93H, 66A, 201 CMR 17.05, and related Federal Law including 45 CFR Parts 160,162, and 164 in the area of HIPAA Compliance. See References Below:


201 CMR 17.00.pdf


45 CFR Parts 160,162,164.pdf

**http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter93h**
**http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleX/Chapter66A**

**Personal Information**:

The following communication methods are utilized in Personal Information exchange.

- Faxed and Written Documents are stored in a cabinets and areas that are accessible by GATRA HIPAA qualified staff only. Keys to these areas are controlled by the same PI qualified individuals.

- Secure Encrypted Electronic File Transfer Protocol (FTP SSL). PT1 downloads are conducted between GATRA and MassHealth utilizing this secure and protected protocol. Link follows:

- GATRA's Secure Encrypted Portal is used by Contractors, HST, and GATRA staff as necessary to the exchange of PI and is addressed under the terms of GATRA's Business Associate agreement and is also contained in all of GATRA's executed contracts. HIPAA Contract compliance by vendors is reviewed during all annual Desk Audits. See Agreement and link below:

https://www.ptmsweb.com/gatra/default.htm


GATRA Business Associate Agreement

- Telephonic information of individual PI is only exchanged to the extent necessary to the provision of transportation services. This standard is in effect with all entities noted above and includes MassHealth Members, customers and/or designees.

## SECURITY OF PERSONAL INFORMATION:

PI sensitive areas within GATRA operations and safeguards employed are as follows:

### Electronic Data Management

- GATRA's Enterprise Servers are secured in a locked room with access restricted to necessary and qualified staff only.
- Off-site transport or transmission of electronic PI requires the prior approval of the Director of IT, Director of Programs or GATRA's Administrator.
- GATRA maintains electronic backup's daily and additional protocols as part of its Continuity of Operations Plan (COOP) in the event of catastrophic events. See Below:

GATRA COOP Plan

- GATRA Maintains Operational and backup capabilities currently of five Terabytes with capability of expansion if needed.
- GATRA servers and computers are monitored daily for any security compromise.
- All Internet connected Servers and Computers are protected by:
    - Sonicwall firewall protection, which provides updates and patches hourly.
    - Symantec EndPoint virus protection which also provides updates and patches hourly.
    - Windows Patches and other updates are conducted daily for any identified security vulnerabilities.
- Computer privacy screens are used in all quasi-public or window exposed areas with a potential for compromise of PI.
- Portable storage devices (flash drives, CDs, DVD etc) are not allowed on GATRA equipment without prior approval of the Director of IT, Director of Programs or GATRA's Administrator.

- Staff logons also provide for limitations of access to documents and files as needed to job function within the server enterprise and are based on job responsibilities and duties. These parameters within the enterprise are managed by the IT department.

- GATRA maintains individual passwords for all staff members. Passwords include eight characters and require numeric and capital letter utilization. Passwords require changing every thirty days to further insure system integrity.

- After three failed log on attempts, users are locked out of the system and require reset by IT .

- Electronic Billing is conducted utilizing the EOHHS Virtual Gateway and within the provisions set forth by that office.

- GATRA's vendor portal is managed by Advanced Business Solutions (ABS) of Pennsylvania under Business Associate Agreement with GATRA. ABS is contracted with a number of Brokerage operations nationwide and maintains HIPAA compliant protocols for GATRA's Vendor Portal and Secure Web Mail System.


GATRA HIPAA Compliant Email.doc


GATRA HIPAA EIP Compliant Communica

**Physical Data Management**

- Offsite transport of HIPAA qualified information electronic or paper documents requires the prior approval of the Director of IT, Director of Programs or GATRA's Administrator.

- Access to any office or storage area containing HIPAA qualified information is posted and restricted to qualified staff members only.

- HIPAA communication and logistical requirements are assessed in the course of all computer, server enterprise or physical office changes for all projects undertaken by GATRA.

- Disposal/shredding of paper documents containing PI is conducted by a qualified vendor for such purposes and overseen by qualified GATRA staff.

- Screen savers option with secure re-log on is engaged on all Computers to further protect PI.

HIPAA Screen Saver Option.doc

**Management of HIPAA Protocols**

- Any changes or updates in HIPAA regulations or provisions are provided to all HIPAA qualified staff, vendors, Business Associates etc, to assure continued compliance within the organization.

- Staff are notified that, any questionable areas regarding PI encountered should be referred to their supervisor.

- Under GATRA's Whistleblower protection policy staff are also encouraged to report any specific breaches of the law including HIPAA within operations. See Below:

WHISTLEBLOWER PROTECTION POLICY

- All existing employees with access to Personal Information are trained in HIPAA compliance. New employees with access to Personal Information are immediately trained in HIPAA compliance and sign an acknowledgement of training upon hire. These documents are on file in GATRA's Human Resource Department.

- Any violation to HIPAA protocols on the part of GATRA's Business Partners are addressed within the associated actions identified in GATRA Contracts and Business Associate Agreements. Any additional follow-up is conducted in accordance with Federal and State regulation.

- Any violation to HIPAA policy on the part of a GATRA staff member is addressed within GATRA's Employee Policy Manual. The manual maintains disciplinary actions for staff failing to follow GATRA's Policy and Practices. Potential disciplinary actions include verbal and written warnings, suspension and termination of employment. Disciplinary actions are conducted in accordance with Human Resource Law and the HR practices of the Authority. Any additional follow-up is conducted in accordance with Federal and State regulation.

Gatra Diciplinary Code.doc

- Upon termination of an employee, user accounts are closed by IT Operations, The building access card and keys are also surrendered.

# COMMONWEALTH OF MASSACHUSETTS ~ STANDARD CONTRACT FORM

This form is jointly issued and published by the Executive Office for Administration and Finance (ANF), the Office of the Comptroller (CTR) and the Operational Services Division (OSD) as the default contract for all Commonwealth Departments when another form is not prescribed by regulation or policy. Any changes to the official printed language of this form shall be void. Additional non-conflicting terms may be added by Attachment. Contractors may not require any additional agreements, engagement letters, contract forms or other additional terms as part of this Contract without prior Department approval. Click on hyperlinks for definitions, instructions and legal requirements that are incorporated by reference into this Contract. An electronic copy of this form is available at www.mass.gov/osc under Guidance For Vendors - Forms or www.mass.gov/osd under OSD Forms.

| | |
|---|---|
| CONTRACTOR LEGAL NAME: **Greater Attleboro/Taunton Regional Transit Authority** (and d/b/a): | COMMONWEALTH DEPARTMENT NAME: **Executive Office Health Human Services**<br>MMARS Department Code: EHS |
| Legal Address: (W-9): **Ten Oak St., Suite 2, Taunton MA 02780-3950** | Business Mailing Address: **100 Hancock St., Quincy MA 02171** |
| Contract Manager: **Francis J. Gay, Administrator** | Billing Address (if different): |
| E-Mail: **fgay@gatra.org** | Contract Manager: Christine Newhall |
| Phone: **774-226-1220** Fax: **508-824-3754** | E-Mail: **Christine.newhall@state.ma.us** |
| Contractor Vendor Code: **VC6000165256** | Phone: **617-847-6560** Fax: |
| Vendor Code Address ID (e.g. "AD001"): AD001.<br>(Note: The Address Id Must be set up for EFT payments.) | MMARS Doc ID(s): RPO EHS 8GREATERATTLEBORO0CB |
| | RFR/Procurement or Other ID Number: **EHS122706001** |

| | |
|---|---|
| ___ NEW CONTRACT<br>PROCUREMENT OR EXCEPTION TYPE: (Check one option only)<br>__ Statewide Contract (OSD or an OSD-designated Department)<br>__ Collective Purchase (Attach OSD approval, scope, budget)<br>__ Department Procurement (includes State or Federal grants 815 CMR 2.00) (Attach RFR and Response or other procurement supporting documentation)<br>__ Emergency Contract (Attach justification for emergency, scope, budget)<br>__ Contract Employee (Attach Employment Status Form, scope, budget)<br>__ Legislative/Legal or Other: (Attach authorizing language/justification, scope and budget) | _X_ CONTRACT AMENDMENT<br>Enter Current Contract End Date *Prior* to Amendment: **06/30/2013**<br>Enter Amendment Amount: $ _____. (or "no change")<br>AMENDMENT TYPE: (Check one option only. Attach details of Amendment changes.)<br>_X_ Amendment to Scope or Budget (Attach updated scope and budget)<br>__ Interim Contract (Attach justification for Interim Contract and updated scope/budget)<br>__ Contract Employee (Attach any updates to scope or budget)<br>__ Legislative/Legal or Other: (Attach authorizing language/justification and updated scope and budget) |

The following COMMONWEALTH TERMS AND CONDITIONS (T&C) has been executed, filed with CTR and is incorporated by reference into this Contract.
_X_ Commonwealth Terms and Conditions __ Commonwealth Terms and Conditions For Human and Social Services

COMPENSATION: (Check ONE option): The Department certifies that payments for authorized performance accepted in accordance with the terms of this Contract will be supported in the state accounting system by sufficient appropriations or other non-appropriated funds, subject to intercept for Commonwealth owed debts under 815 CMR 9.00.
_X_ Rate Contract (No Maximum Obligation. Attach details of all rates, units, calculations, conditions or terms and any changes if rates or terms are being amended.)
__ Maximum Obligation Contract Enter Total Maximum Obligation for total duration of this Contract (or *new* Total if Contract is being amended). $ _____.

PROMPT PAYMENT DISCOUNTS (PPD): Commonwealth payments are issued through EFT 45 days from invoice receipt. Contractors requesting **accelerated** payments must identify a PPD as follows: Payment issued within 10 days _0_% PPD; Payment issued within 15 days _0_ % PPD; Payment issued within 20 days _0_ % PPD; Payment issued within 30 days _0_% PPD. If PPD percentages are left blank, identify reason: __agree to standard 45 day cycle __ statutory/legal or Ready Payments (G.L. c. 29, § 23A); __ only initial payment (subsequent payments scheduled to support standard EFT 45 day payment cycle. See Prompt Pay Discounts Policy.)

BRIEF DESCRIPTION OF CONTRACT PERFORMANCE or REASON FOR AMENDMENT: (Enter the Contract title, purpose, fiscal year(s) and a detailed description of the scope of performance or what is being amended for a Contract Amendment. Attach all supporting documentation and justifications.) This Amendment 9 (i) renews the contract for one additional year beginning July 1, 2013 and ending June 30, 2014; (ii) incorporates rates effective July 1, 2013; (iii) incorporates the Department of Mental Health (Clubhouse program) as an additional Agency, effective July 1, 2013; and (iv) updates provisions to reflect requirements or changes in law or regulation and certain programmatic updates; and makes other clarifications to the Contract.

ANTICIPATED START DATE: (Complete ONE option only) The Department and Contractor certify for this Contract, or Contract Amendment, that Contract obligations:
_X_ 1. may be incurred as of the Effective Date (latest signature date below) and no obligations have been incurred prior to the Effective Date.
__ 2. may be incurred as of _____, 20___, a date LATER than the Effective Date below and no obligations have been incurred prior to the Effective Date.
__3. were incurred as of _____, 20___ , a date PRIOR to the Effective Date below, and the parties agree that payments for any obligations incurred prior to the Effective Date are authorized to be made either as settlement payments or as authorized reimbursement payments, and that the details and circumstances of all obligations under this Contract are attached and incorporated into this Contract. Acceptance of payments forever releases the Commonwealth from further claims related to these obligations.

CONTRACT END DATE: Contract performance shall terminate as of **06/30/2014**, with no new obligations being incurred after this date unless the Contract is properly amended, provided that the terms of this Contract and performance expectations and obligations shall survive its termination for the purpose of resolving any claim or dispute, for completing any negotiated terms and warranties, to allow any close out or transition performance, reporting, invoicing or final payments, or during any lapse between amendments.

CERTIFICATIONS: Notwithstanding verbal or other representations by the parties, the "**Effective Date**" of this Contract or Amendment shall be the latest date that this Contract or Amendment has been executed by an authorized signatory of the Contractor, the Department, or a later Contract or Amendment Start Date specified above, subject to any required approvals. The Contractor makes all certifications required under the attached Contractor Certifications (incorporated by reference if not attached hereto) under the pains and penalties of perjury, agrees to provide any required documentation upon request to support compliance, and agrees that all terms governing performance of this Contract and doing business in Massachusetts are attached or incorporated by reference herein according to the following hierarchy of document precedence, the applicable Commonwealth Terms and Conditions, this Standard Contract Form including the Instructions and Contractor Certifications, the Request for Response (RFR) or other solicitation, the Contractor's Response, and additional negotiated terms, provided that additional negotiated terms will take precedence over the relevant terms in the RFR and the Contractor's Response only if made using the process outlined in 801 CMR 21.07, incorporated herein, provided that any amended RFR or Response terms result in best value, lower costs, or a more cost effective Contract.

| | |
|---|---|
| AUTHORIZING SIGNATURE FOR THE CONTRACTOR:<br>X: _____. Date: _____.<br>(Signature and Date Must Be Handwritten At Time of Signature)<br>Print Name: **Francis J. Gay**<br>Print Title: **Administrator** | AUTHORIZING SIGNATURE FOR THE COMMONWEALTH:<br>X: _____. Date: _____.<br>(Signature and Date Must Be Handwritten At Time of Signature)<br>Print Name: **Stephen Barnard**<br>Print Title: **Chief Financial Officer** |

# COMMONWEALTH OF MASSACHUSETTS ~ STANDARD CONTRACT FORM



## INSTRUCTIONS AND CONTRACTOR CERTIFICATIONS

The following instructions and terms are incorporated by reference and apply to this Standard Contract Form. Text that appears underlined indicates a "hyperlink" to an Internet or bookmarked site and are unofficial versions of these documents and Departments and Contractors should consult with their legal counsel to ensure compliance with all legal requirements. Using the Web Toolbar will make navigation between the form and the hyperlinks easier. Please note that not all applicable laws have been cited.

**CONTRACTOR LEGAL NAME (AND D/B/A):** Enter the **Full Legal Name** of the Contractor's business as it appears on the Contractor's W-9 or W-4 Form (Contract Employees only) **and** the applicable Commonwealth Terms and Conditions If Contractor also has a "doing business as" (d/b/a) name, BOTH the legal name and the "d/b/a" name must appear in this section.

**Contractor Legal Address:** Enter the Legal Address of the Contractor as it appears on the Contractor's W-9 or W-4 Form (Contract Employees only) **and** the applicable Commonwealth Terms and Conditions, which must match the legal address on the 1099I table in MMARS (or the Legal Address in HR/CMS for Contract Employee).

**Contractor Contract Manager:** Enter the authorized Contract Manager who will be responsible for managing the Contract. The Contract Manager should be an Authorized Signatory or, at a minimum, a person designated by the Contractor to represent the Contractor, receive legal notices and negotiate ongoing Contract issues. The Contract Manager is considered "Key Personnel" and may not be changed without the prior written approval of the Department. If the Contract is posted on Comm-PASS, the Contract Manager must be listed on the Vendor Section tab.

**Contractor E-Mail Address/Phone/Fax:** Enter the electronic mail (e-mail) address, phone and fax number of the Contractor Contract Manager. This information must be kept current by the Contractor to ensure that the Department can contact the Contractor and provide any required legal notices. Notice received by the Contract Manager (with confirmation of actual receipt) through the listed address, fax number(s) or electronic mail address will meet any written legal notice requirements.

**Contractor Vendor Code:** The Department must enter the MMARS Vendor Code assigned by the Commonwealth. If a Vendor Code has not yet been assigned, leave this space blank and the Department will complete this section when a Vendor Code has been assigned. The Department is responsible under the Vendor File and W-9s Policy for verifying with authorized signatories of the Contractor, as part of contract execution, that the legal name, address and Federal Tax Identification Number (TIN) in the Contract documents match the state accounting system.

**Vendor Code Address ID:** (e.g., "AD001") The Department must enter the MMARS Vendor Code Address Id identifying the payment remittance address for Contract payments, which MUST be set up for EFT payments PRIOR to the first payment under the Contract in accordance with the Bill Paying and Vendor File and W-9 policies.

**COMMONWEALTH DEPARTMENT NAME:** Enter the full Department name with the authority to obligate funds encumbered for the Contract.

**Commonwealth MMARS Alpha Department Code:** Enter the three (3) letter MMARS Code assigned to this Commonwealth Department in the state accounting system.

**Department Business Mailing Address:** Enter the address where all formal correspondence to the Department must be sent. Unless otherwise specified in the Contract, legal notice sent or received by the Department's Contract Manager (with confirmation of actual receipt) through the listed address, fax number(s) or electronic mail address for the Contract Manager will meet any requirements for legal notice.

**Department Billing Address:** Enter the Billing Address or email address if invoices must be sent to a different location. Billing or confirmation of delivery of performance issues should be resolved through the listed Contract Managers.

**Department Contract Manager:** Identify the authorized Contract Manager who will be responsible for managing the Contract, who should be an authorized signatory or an employee designated by the Department to represent the Department to receive legal notices and negotiate ongoing Contract issues.

**Department E-Mail Address/Phone/Fax:** Enter the electronic mail (e-mail) address, phone and fax number of the Department Contract Manager. Unless otherwise specified in the Contract, legal notice sent or received by the Contract Manager (with confirmation of actual receipt) through the listed address, fax number(s) or electronic mail address will meet any requirements for written notice under the Contract.

**MMARS Document ID(s):** Enter the MMARS 20 character encumbrance transaction number associated with this Contract which must remain the same for the life of the Contract. If multiple numbers exist for this Contract, identify all Doc Ids.

**RFR/Procurement or Other ID Number or Name:** Enter the Request for Response (RFR) or other Procurement Reference number, Contract ID Number or other reference/tracking number for this Contract or Amendment and will be entered into the Board Award Field in the MMARS encumbrance transaction for this Contract.

## NEW CONTRACTS (left side of Form):

**Complete this section ONLY if this Contract is brand new. (Complete the CONTRACT AMENDMENT section for any material changes to an existing or an expired Contract, and for exercising options to renew or annual contracts under a multi-year procurement or grant program.)**

**PROCUREMENT OR EXCEPTION TYPE:** Check the appropriate type of procurement or exception for this Contract. Only one option can be selected. See State Finance Law and General Requirements, Acquisition Policy and Fixed Assets, the Commodities and Services Policy and the Procurement Information Center (Department Contract Guidance) for details.

**Statewide Contract (OSD or an OSD-designated Department).** Check this option for a Statewide Contract under OSD, or by an OSD-designated Department.

**Collective Purchase approved by OSD.** Check this option for Contracts approved by OSD for collective purchases through federal, state, local government or other entities.

**Department Contract Procurement.** Check this option for a Department procurement including state grants and federal sub-grants under 815 CMR 2.00 and State Grants and Federal Subgrants Policy, Departmental Master Agreements (MA). If multi-Department user Contract, identify multi-Department use is allowable in Brief Description.

**Emergency Contract.** Check this option when the Department has determined that an unforeseen crisis or incident has arisen which requires or mandates immediate purchases to avoid substantial harm to the functioning of government or the provision of necessary or mandated services or whenever the health, welfare or safety of clients or other persons or serious damage to property is threatened.

**Contract Employee.** Check this option when the Department requires the performance of an Individual Contractor, and when the planned Contract performance with an Individual has been classified using the Employment Status Form (prior to the Contractor's selection) as work of a Contract Employee and not that of an Independent Contractor.

**Legislative/Legal or Other.** Check this option when legislation, an existing legal obligation, prohibition or other circumstance exempts or prohibits a Contract from being competitively procured, or identify any other procurement exception not already listed. Legislative "earmarks" exempt the Contract solely from procurement requirements, and all other Contract and state finance laws and policies apply. Supporting documentation must be attached to explain and justify the exemption.

## CONTRACT AMENDMENT (Right Side of Form)

Complete this section for any Contract being renewed, amended or to continue a lapsed Contract. All Contracts with available options to renew must be amended referencing the original procurement and Contract doc ids, since all continuing contracts must be maintained in the same Contract file (even if the underlying appropriation changes each fiscal year.) "See Amendments, Suspensions, and Termination Policy.)

**Enter Current Contract End Date:** Enter the termination date of the Current Contract being amended, even if this date has already passed. (Note: Current Start Date is not requested since this date does not change and is already recorded in MMARS.)

**Enter Amendment Amount:** Enter the amount of the Amendment increase or decrease to a Maximum Obligation Contract. Enter "no change" for Rate Contracts or if no change.

**AMENDMENT TYPE:** Identify the type of Amendment being done. Documentation supporting the updates to performance and budget must be attached. **Amendment to Scope or Budget.** Check this option when renewing a Contract or executing any Amendment ("material change" in Contract terms) even if the Contract has lapsed. The parties may negotiate a change in any element of Contract performance or cost identified in the RFR or the Contractor's response which results in lower costs, or a more cost-effective or better value performance than was presented in the original selected response, provided the negotiation results in a better value within the scope of the RFR than what was proposed by the Contractor in the original selected response. Any "material" change in the Contract terms must be memorialized in a formal Amendment even if a corresponding MMARS transaction is not needed to support the change. Additional negotiated terms will take precedence over the relevant terms in the RFR and the Contractor's Response only if made using the process outlined in 801 CMR 21.07, incorporated herein, provided that any amended RFR or Response terms result in best value, lower costs, or a more cost effective Contract.

**Interim Contracts.** Check this option for an Interim Contract to prevent a lapse of Contract performance whenever an existing Contract is being re-procured but the new procurement has not been completed, to bridge the gap during implementation between an expiring and a new procurement, or to contract with an interim Contractor when a current Contractor is unable to complete full performance under a Contract.

**Contract Employee.** Check this option when the Department requires a renewal or other amendment to the performance of a Contract Employee.

**Legislative/Legal or Other.** Check this option when legislation, an existing legal obligation, prohibition or other circumstance exempts or prohibits a Contract from being competitively procured, or identify any other procurement exception not already listed. Legislative "earmarks" exempt the Contract solely from procurement requirements, and all other Contract and state finance laws and policies apply. Attach supporting documentation to explain and justify the exemption and whether Contractor selection has been publicly posted.

# COMMONWEALTH OF MASSACHUSETTS ~ STANDARD CONTRACT FORM

## COMMONWEALTH TERMS AND CONDITIONS

Identify which Commonwealth Terms and Conditions the Contractor has executed and is incorporated by reference into this Contract. This Form is signed only once and recorded on the Vendor Customer File (VCUST). See Vendor File and W-9s Policy.

## COMPENSATION

Identify if the Contract is a **Rate Contract** (with no stated Maximum Obligation) or a **Maximum Obligation Contract** (with a stated Maximum Obligation) and identify the Maximum Obligation. If the Contract is being amended, enter the new Maximum Obligation based upon the increase or decreasing Amendment. The Total Maximum Obligation must reflect the total funding for the dates of service under the contract, including the Amendment amount if the Contract is being amended. The Maximum Obligation must match the MMARS encumbrance. Funding and allotments must be verified as available and encumbered prior to incurring obligations. If a Contract includes both a Maximum Obligation component and Rate Contract component, check off both, specific Maximum Obligation amounts or amended amounts and Attachments must clearly outline the Contract breakdown to match the encumbrance.

## PAYMENTS AND PROMPT PAY DISCOUNTS

Payments are processed within a 45 day payment cycle through EFT in accordance with the Commonwealth Bill Paying Policy for investment and cash flow purposes. Departments may NOT negotiate accelerated payments and Payees are NOT entitled to accelerated payments UNLESS a prompt payment discount (PPD) is provided to support the Commonwealth's loss of investment earnings for this earlier payment, or unless a payments is legally mandated to be made in less than 45 days (e.g., construction contracts, Ready Payments under G.L. c. 29, s. 23A). See Prompt Pay Discounts Policy. PPD are identified as a percentage discount which will be automatically deducted when an accelerated payment is made. Reduced contracts rates may not be negotiated to replace a PPD. If PPD fields are left blank please identify that the Contractor agrees to the standard 45 day cycle; a statutory/legal exemption such as Ready Payments (G.L. c. 29, § 23A); or only an initial accelerated payment for reimbursements or start up costs for a grant, with subsequent payments scheduled to support standard EFT 45 day payment cycle. Financial hardship is not a sufficient justification to accelerate cash flow for *all* payments under a Contract. Initial grant or contract payments may be accelerated for the *first* invoice or initial grant installment, but subsequent periodic installments or invoice payments should be scheduled to support the Payee cash flow needs and the standard 45 day EFT payment cycle in accordance with the Bill Paying Policy. Any accelerated payment that does not provide for a PPD must have a legal justification in Contract file for audit purposes explaining why accelerated payments were allowable without a PPD.

## BRIEF DESCRIPTION OF CONTRACT PERFORMANCE

Enter a brief description of the Contract performance, project name and/or other identifying information for the Contract to specifically identify the Contract performance, match the Contract with attachments, determine the appropriate expenditure code (as listed in the Expenditure Classification Handbook) or to identify or clarify important information related to the Contract such as the Fiscal Year(s) of performance (ex. "FY2012" or "FY2012-14"). Identify settlements or other exceptions and attach more detailed justification and supporting documents. Enter "Multi-Department Use" if other Departments can access procurement. For Amendments, identify the purpose and what items are being amended. Merely stating "see attached" or referencing attachments without a narrative description of performance is insufficient.

## ANTICIPATED START DATE

The Department and Contractor must certify WHEN obligations under this Contract/Amendment may be incurred. Option 1 is the default option when performance may begin as of the Effective Date (latest signature date and any required approvals). If the parties want a new Contract or renewal to begin as of the upcoming fiscal year then list the fiscal year(s) (ex. "FY2012" or "FY2012-14") in the Brief Description section. Performance starts and encumbrances reflect the default Effective Date (if no FY is listed) or the later FY start date (if a FY is listed). Use Option 2 only when the Contract will be signed well in advance of the start date and identify a specific future start date. Do not use Option 2 for a fiscal year start unless it is certain that the Contract will be signed prior to fiscal year. Option 3 is used in lieu of the Settlement and Release Form when the Contract/Amendment is signed late, and obligations have already been incurred by the Contractor prior to the Effective Date for which the Department has either requested, accepted or deemed legally eligible for reimbursement, and the Contract includes supporting documents justifying the performance or proof of eligibility, and approximate costs. Any obligations incurred outside the scope of the Effective Date under any Option listed, even if the incorrect Option is selected, shall be automatically deemed a settlement included under the terms of the Contract and upon payment to the Contractor will release the Commonwealth from further obligations for the identified performance. All settlement payments require justification and must be under same encumbrance and object codes as the Contract payments. Performance dates are subject to G.L. c.4, § 9.

## CONTRACT END DATE

The Department must enter the date that Contract performance will terminate. **If the Contract is being amended and the Contract End Date is not changing, this date must be re-entered again here.** A Contract must be signed for at least the initial duration but not longer than the period of procurement listed in the RFR, or other solicitation document (if applicable). No new performance is allowable beyond the end date without an amendment, but the Department may allow a Contractor to complete minimal close out performance obligations if substantial performance has been made prior to the termination date of the Contract and prior to the end of the fiscal year in which payments are appropriated, provided that any close out performance is subject to appropriation and funding limits under state finance law, and CTR may adjust encumbrances and payments in the state accounting system to enable final close out payments. Performance dates are subject to G.L. c.4, § 9.

## CERTIFICATIONS AND EXECUTION

See Department Head Signature Authorization Policy and the Contractor Authorized Signatory Listing for policies on Contractor and Department signatures.

Authorizing Signature for Contractor/Date: The Authorized Contractor Signatory must (in their own handwriting and in ink) sign AND enter the date the Contract is signed. See section above under "Anticipated Contract Start Date". Acceptance of payment by the Contractor shall waive any right of the Contractor to claim the Contract/Amendment is not valid and the Contractor may not void the Contract. **Rubber stamps, typed or other images are not acceptable.** Proof of Contractor signature authorization on a Contractor Authorized Signatory Listing may be required by the Department if not already on file.

Contractor Name /Title: The Contractor Authorized Signatory's name and title must appear legibly as it appears on the Contractor Authorized Signatory Listing.

Authorizing Signature For Commonwealth/Date: The Authorized Department Signatory must (in their own handwriting and in ink) sign AND enter the date the Contract is signed. See section above under "Anticipated Start Date". **Rubber stamps, typed or other images are not accepted.** The Authorized Signatory must be an employee within the Department legally responsible for the Contract. See Department Head Signature Authorization. The Department must have the legislative funding appropriated for all the costs of this Contract or funding allocated under an approved Interdepartmental Service Agreement (ISA). A Department may not contract for performance to be delivered to or by another state department without specific legislative authorization (unless this Contract is a Statewide Contract). For Contracts requiring Secretariat signoff, evidence of Secretariat signoff must be included in the Contract file.

Department Name /Title: Enter the Authorized Signatory's name and title legibly.

## CONTRACTOR CERTIFICATIONS AND LEGAL REFERENCES

Notwithstanding verbal or other representations by the parties, the "Effective Date" of this Contract or Amendment shall be the latest date that this Contract or Amendment has been executed by an authorized signatory of the Contractor, the Department, or a later Contract or Amendment Start Date specified, subject to any required approvals. The Contractor makes all certifications required under this Contract under the pains and penalties of perjury, and agrees to provide any required documentation upon request to support compliance, and agrees that all terms governing performance of this Contract and doing business in Massachusetts are attached or incorporated by reference herein:

Commonwealth and Contractor Ownership Rights. The Contractor certifies and agrees that the Commonwealth is entitled to ownership and possession of all "deliverables" purchased or developed with Contract funds. A Department may not relinquish Commonwealth rights to deliverables nor may Contractors sell products developed with Commonwealth resources without just compensation. The Contract should detail all Commonwealth deliverables and ownership rights and any Contractor proprietary rights.

Qualifications. The Contractor certifies it is qualified and shall at all times remain qualified to perform this Contract; that performance shall be timely and meet or exceed industry standards for the performance required, including obtaining requisite licenses, registrations, permits, resources for performance, and sufficient professional, liability; and other appropriate insurance to cover the performance. If the Contractor is a business, the Contractor certifies that it is listed under the Secretary of State's website as licensed to do business in Massachusetts, as required by law.

Business Ethics and Fraud, Waste and Abuse Prevention. The Contractor certifies that performance under this Contract, in addition to meeting the terms of the Contract, will be made using ethical business standards and good stewardship of taxpayer and other public funding and resources to prevent fraud, waste and abuse.

Collusion. The Contractor certifies that this Contract has been offered in good faith and without collusion, fraud or unfair trade practices with any other person, that any actions to avoid or frustrate fair and open competition are prohibited by law, and shall be grounds for rejection or disqualification of a Response or termination of this Contract.

Public Records and Access The Contractor shall provide full access to records related to performance and compliance to the Department and officials listed under Executive Order 195 and G.L. c. 11, s.12 seven (7) years beginning on the first day after the final payment under this Contract or such longer period necessary for the resolution of any litigation, claim, negotiation, audit or other inquiry involving this Contract. Access to view Contractor

records related to any breach or allegation of fraud, waste and/or abuse may not be denied and Contractor can not claim confidentiality or trade secret protections solely for viewing but not retaining documents. Routine Contract performance compliance reports or documents related to any alleged breach or allegation of non-compliance, fraud, waste, abuse or collusion may be provided electronically and shall be provided at Contractor's own expense. Reasonable costs for copies of non-routine Contract related records shall not exceed the rates for public records under 950 C.M.R. 32.00.

**Debarment.** The Contractor certifies that neither it nor any of its subcontractors are currently debarred or suspended by the federal or state government under any law or regulation including, Executive Order 147; G.L. c. 29, s. 29F G.L. c.30, § 39R, G.L. c.149, § 27C, G.L. c.149, § 44C, G.L. c.149, § 148B and G.L. c. 152, s. 25C.

**Applicable Laws.** The Contractor shall comply with all applicable state laws and regulations including but not limited to the applicable Massachusetts General Laws; the Official Code of Massachusetts Regulations; Code of Massachusetts Regulations (unofficial); 801 CMR 21.00 (Procurement of Commodity and Service Procurements, Including Human and Social Services); 815 CMR 2.00 (Grants and Subsidies); 808 CMR 1.00 (Compliance, Reporting and Auditing for Human And Social Services); AICPA Standards; confidentiality of Department records under G.L. c. 66A; and the Massachusetts Constitution Article XVIII if applicable.

**Invoices.** The Contractor must submit invoices in accordance with the terms of the Contract and the Commonwealth Bill Paying Policy. Contractors must be able to reconcile and properly attribute concurrent payments from multiple Departments. Final invoices in any fiscal year must be submitted no later than August 15th for performance made and received (goods delivered, services completed) prior to June 30th, in order to make payment for that performance prior to the close of the fiscal year to prevent reversion of appropriated funds. Failure to submit timely invoices by August 15th or other date listed in the Contract shall authorize the Department to issue an estimated payment based upon the Department's determination of performance delivered and accepted. The Contractor's acceptance of this estimated payment releases the Commonwealth from further claims for these invoices. If budgetary funds revert due to the Contractor's failure to submit timely final invoices, or for disputing an estimated payment, the Department may deduct a penalty up to 10% from any final payment in the next fiscal year for failure to submit timely invoices.

**Payments Subject To Appropriation.** Pursuant to G.L. c. 29 § 26, § 27 and § 29, Departments are required to expend funds only for the purposes set forth by the Legislature and within the funding limits established through appropriation, allotment and subsidiary, including mandated allotment reductions triggered by G.L. c. 29, § 9C. A Department cannot authorize or accept performance in excess of an existing appropriation and allotment, or sufficient non-appropriated available funds. Any oral or written representations, commitments, or assurances made by the Department or any other Commonwealth representative are not binding. The Commonwealth has no legal obligation to compensate a Contractor for performance that is not requested and is intentionally delivered by a Contractor outside the scope of a Contract. Contractors should verify funding prior to beginning performance.

**Intercept.** Contractors may be registered as Customers in the Vendor file if the Contractor owes a Commonwealth debt. Unresolved and undisputed debts, and overpayments of Contract payments that are not reimbursed timely shall be subject to intercept pursuant to G.L. c. 7A, s. 3 and 815 CMR 9.00. Contract overpayments will be subject to immediate intercept or payment offset. The Contractor may not penalize any state Department or assess late fees, cancel a Contract or other services if amounts are intercepted or offset due to recoupment of an overpayment, outstanding taxes, child support, other overdue debts or Contract overpayments.

**Tax Law Compliance.** The Contractor certifies under the pains and penalties of perjury tax compliance with Federal tax laws; State tax laws including but not limited to G.L. c. 62C, G.L. c. 62C, s. 49A; compliance with all state tax laws, reporting of employees and contractors, withholding and remitting of tax withholdings and child support and is in good standing with respect to all state taxes and returns due; reporting of employees and contractors under G.L. c. 62E, withholding and remitting child support including G.L. c. 119A, s. 12; TIR 05-11; New Independent Contractor Provisions and applicable TIRs.

**Bankruptcy, Judgments, Potential Structural Changes, Pending Legal Matters and Conflicts.** The Contractor certifies it has not been in bankruptcy and/or receivership within the last three calendar years, and the Contractor certifies that it will immediately notify the Department in writing **at least 45 days prior** to filing for bankruptcy and/or receivership, any potential structural change in its organization, or if there is **any risk** to the solvency of the Contractor that may impact the Contractor's ability to timely fulfill the terms of this Contract or Amendment. The Contractor certifies that at any time during the period of the Contract the Contractor is required to affirmatively disclose in writing to the Department Contract Manager the details of any judgment, criminal conviction, investigation or litigation pending against the Contractor or any of its officers, directors, employees, agents, or subcontractors, including any potential conflicts of interest of which the Contractor has knowledge, or learns of during the Contract term. Law firms or Attorneys providing legal services are required to identify any potential conflict with representation of any Department client in accordance with Massachusetts Board of Bar Overseers (BBO) rules.

**Federal Anti-Lobbying and Other Federal Requirements.** If receiving federal funds, the Contractor certifies compliance with federal anti-lobbying requirements including 31 USC 1352; other federal requirements; Executive Order 11246; Air Pollution Act; Federal Water Pollution Control Act and Federal Employment Laws.

**Protection of Personal Data and Information.** The Contractor certifies that all steps will be taken to ensure the security and confidentiality of all Commonwealth data for which the Contractor becomes a holder, either as part of performance or inadvertently during performance, with special attention to restricting access, use and disbursement of personal data and information under G.L. c. 93H and c. 66A and Executive Order 504. The Contractor is required to comply with G.L. c. 93I for the proper disposal of all paper and electronic media, backups or systems containing personal data and information, provided further that the Contractor is required to ensure that any personal data or information transmitted electronically or through a portable device be properly encrypted using (at a minimum) Information Technology Division (ITD) Protection of Sensitive Information, provided further that any Contractor having access to credit card or banking information of Commonwealth customers certifies that the Contractor is PCI compliant in accordance with the Payment Card Industry Council Standards and shall provide confirmation compliance during the Contract, provide further that the Contractor shall immediately notify the Department in the event of any security breach including the unauthorized access, disbursement, use or disposal of personal data or information, and in the event of a security breach, the Contractor shall cooperate fully with the Commonwealth and provide access to any information necessary for the Commonwealth to respond to the security breach and shall be fully responsible for any damages associated with the Contractor's breach including but not limited to G.L. c. 214, s. 3B.

**Corporate and Business Filings and Reports.** The Contractor certifies compliance with any certification, filing, reporting and service of process requirements of the Secretary of the Commonwealth, the Office of the Attorney General or other Departments as related to its conduct of business in the Commonwealth; and with its incorporating state (or foreign entity).

**Employer Requirements.** Contractors that are employers certify compliance with applicable state and federal employment laws or regulations, including but not limited to G.L. c. 5, s. 1 (Prevailing Wages for Printing and Distribution of Public Documents); G.L. c. 7, s. 22 (Prevailing Wages for Contracts for Meat Products and Clothing and Apparel); minimum wages and prevailing wage programs and payments; unemployment insurance and contributions; workers' compensation and insurance, child labor laws, AGO fair labor practices; G.L. c. 149 (Labor and Industries); G.L. c. 150A (Labor Relations); G.L. c. 151 and 455 CMR 2.00 (Minimum Fair Wages); G.L. c. 151A (Employment and Training); G. L. c. 151B (Unlawful Discrimination); G.L. c. 151E (Business Discrimination); G.L. c. 152 (Workers' Compensation); G.L. c.153 (Liability for Injuries); 29 USC c. 8 (Federal Fair Labor Standards); 29 USC c. 28 and the Federal Family and Medical Leave Act.

**Federal And State Laws And Regulations Prohibiting Discrimination** including but not limited to the Federal Equal Employment Oppurtunity (EEO) Laws the Americans with Disabilities Act,; 42 U.S.C Sec. 12,101, et seq., the Rehabilitation Act, 29 USC c. 16 s. 794; 29 USC c. 16. s. 701; 29 USC c. 14, 623; the 42 USC c. 45; (Federal Fair Housing Act); G. L. c. 151B (Unlawful Discrimination); G.L. c. 151E (Business Discrimination); the Public Accommodations Law G.L. c. 272, s. 92A; G.L. c. 272, s. 98 and 98A, Massachusetts Constitution Article CXIV and G.L. c. 93, s. 103; 47 USC c. 5, sc. II, Part II, s. 255 (Telecommunication Act; Chapter 149, Section 105D, G.L. c. 151C, G.L. c. 272, Section 92A, Section 98 and Section 98A, and G.L. c. 111, Section 199A, and Massachusetts Disability-Based Non-Discrimination Standards For Executive Branch Entities, and related Standards and Guidance, authorized under Massachusetts Executive Order or any disability-based protection arising from state or federal law or precedent. See also MCAD and MCAD links and Resources.

**Small Business Purchasing Program (SBPP).** A Contractor may be eligible to participate in the SBPP, created pursuant to Executive Order 523, if qualified through the SBPP SmartBid subscription process at: www.comm-pass.com and with acceptance of the terms of the SBPP participation agreement.

**Limitation of Liability for Information Technology Contracts (and other Contracts as Authorized).** The Information Technology Mandatory Specifications and the IT Acquisition Accessibility Contract Language are incorporated by reference into Information Technology Contracts. The following language will apply to Information Technology contracts in the U01, U02, U03, U04, U05, U06, U07, U08, U09, U10, U75, U98 object codes in the Expenditure Classification Handbook or other Contracts as approved by CTR or OSD. Pursuant to Section 11. Indemnification of the Commonwealth Terms and Conditions, the term "other damages" shall include, but shall not be limited to, the reasonable costs the Commonwealth incurs to repair, return, replace or seek cover (purchase of comparable substitute commodities and services) under a Contract. "Other damages" shall not include damages to the Commonwealth as a result of third party claims, provided, however, that the foregoing in no way limits the Commonwealth's right of recovery for personal injury or property damages or patent and copyright infringement under Section 11 nor the Commonwealth's ability to join the contractor as a third party defendant. Further, the term "other damages" shall not include, and in no event shall the contractor be liable for, damages for the Commonwealth's use of contractor provided products or services, loss of Commonwealth records, or data (or other intangible property), loss of use of equipment, lost

revenue, lost savings or lost profits of the Commonwealth. In no event shall "other damages" exceed the greater of $100,000, or two times the value of the product or service (as defined in the Contract scope of work) that is the subject of the claim. Section 11 sets forth the contractor's entire liability under a Contract. Nothing in this section shall limit the Commonwealth's ability to negotiate higher limitations of liability in a particular Contract, provided that any such limitation must specifically reference Section 11 of the Commonwealth Terms and Conditions. In the event the limitation of liability conflicts with accounting standards which mandate that there can be no cap of damages, the limitation shall be considered waived for that audit engagement. These terms may be applied to other Contracts only with prior written confirmation from the Operational Services Division or the Office of the Comptroller. The terms in this Clarification may not be modified.

**Northern Ireland Certification.** Pursuant to G.L. c. 7 s. 22C for state agencies, state authorities, the House of Representatives or the state Senate, by signing this Contract the Contractor certifies that it does not employ ten or more employees in an office or other facility in Northern Ireland and if the Contractor employs ten or more employees in an office or other facility located in Northern Ireland the Contractor certifies that it does not discriminate in employment, compensation, or the terms, conditions and privileges of employment on account of religious or political belief; and it promotes religious tolerance within the work place, and the eradication of any manifestations of religious and other illegal discrimination; and the Contractor is not engaged in the manufacture, distribution or sale of firearms, munitions, including rubber or plastic bullets, tear gas, armored vehicles or military aircraft for use or deployment in any activity in Northern Ireland.

**Pandemic, Disaster or Emergency Performance.** In the event of a serious emergency, pandemic or disaster outside the control of the Department, the Department may negotiate emergency performance from the Contractor to address the immediate needs of the Commonwealth even if not contemplated under the original Contract or procurement. Payments are subject to appropriation and other payment terms.

**Consultant Contractor Certifications** (For Consultant Contracts "HH" and "NN" and "U05" object codes subject to G.L. Chapter 29, s. 29A). Contractors must make required disclosures as part of the RFR Response or using the Consultant Contractor Mandatory Submission Form.

**Attorneys.** Attorneys or firms providing legal services or representing Commonwealth Departments may be subject to G.L. c. 30, s. 65, and if providing litigation services must be approved by the Office of the Attorney General to appear on behalf of a Department, and shall have a continuing obligation to notify the Commonwealth of any conflicts of interest arising under the Contract.

**Subcontractor Performance.** The Contractor certifies full responsibility for Contract performance, including subcontractors, and that comparable Contract terms will be included in subcontracts, and that the Department will not be required to directly or indirectly manage subcontractors or have any payment obligations to subcontractors. .

## EXECUTIVE ORDERS

For covered Executive state Departments, the Contractor certifies compliance with applicable Executive Orders (see also Massachusetts Executive Orders), including but not limited to the specific orders listed below. A breach during period of a Contract may be considered a material breach and subject Contractor to appropriate monetary or Contract sanctions.

**Executive Order 481.** Prohibiting the Use of Undocumented Workers on State Contracts. For all state agencies in the Executive Branch, including all executive offices, boards, commissions, agencies, Departments, divisions, councils, bureaus, and offices, now existing and hereafter established, by signing this Contract the Contractor certifies under the pains and penalties of perjury that they shall not knowingly use undocumented workers in connection with the performance of this Contract; that, pursuant to federal requirements, shall verify the immigration status of workers assigned to a Contract without engaging in unlawful discrimination; and shall not knowingly or recklessly alter, falsify, or accept altered or falsified documents from any such worker

**Executive Order 130.** Anti-Boycott. The Contractor warrants, represents and agrees that during the time this Contract is in effect, neither it nor any affiliated company, as hereafter defined, participates in or cooperates with an international boycott (See IRC § 999(b)(3)-(4), and IRS Audit Guidelines Boycotts) or engages in conduct declared to be unlawful by G.L. c. 151E, s. 2. A breach in the warranty, representation, and agreement contained in this paragraph, without limiting such other rights as it may have, the Commonwealth shall be entitled to rescind this Contract. As used herein, an affiliated company shall be any business entity of which at least 51% of the ownership interests are directly or indirectly owned by the Contractor or by a person or persons or business entity or entities directly or indirectly owning at least 51% of the ownership interests of the Contractor, or which directly or indirectly owns at least 51% of the ownership interests of the Contractor.

**Executive Order 346.** Hiring of State Employees By State Contractors Contractor certifies compliance with both the conflict of interest law G.L. c. 268A specifically s. 5 (f) and this order; and includes limitations regarding the hiring of state employees by private companies contracting with the Commonwealth. A privatization contract shall be deemed to include a specific prohibition against the hiring at any time during the term of Contract, and for any position in the Contractor's company, any state management employee who is, was, or will be involved in the preparation of the RFP, the negotiations leading to the awarding of the Contract, the decision to award the Contract, and/or the supervision or oversight of performance under the Contract.

**Executive Order 444.** Disclosure of Family Relationships With Other State Employees. Each person applying for employment (including Contract work) within the Executive Branch under the Governor must disclose in writing the names of all immediate family related to immediate family by marriage who serve as employees or elected officials of the Commonwealth. All disclosures made by applicants hired by the Executive Branch under the Governor shall be made available for public inspection to the extent permissible by law by the official with whom such disclosure has been filed.

**Executive Order 504.** Regarding the Security and Confidentiality of Personal Information. For all Contracts involving the Contractor's access to personal information, as defined in G.L. c. 93H, and personal data, as defined in G.L. c. 66A, owned or controlled by Executive Department agencies, or access to agency systems containing such information or data (herein collectively "personal information"), Contractor certifies under the pains and penalties of perjury that the Contractor (1) has read Commonwealth of Massachusetts Executive Order 504 and agrees to protect any and all personal information; and (2) has reviewed all of the Commonwealth Information Technology Division's Security Policies. Notwithstanding any contractual provision to the contrary, in connection with the Contractor's performance under this Contract, for all state agencies in the Executive Department, including all executive offices, boards, commissions, agencies, departments, divisions, councils, bureaus, and offices, now existing and hereafter established, the Contractor shall: (1) obtain a copy, review, and comply with the contracting agency's Information Security Program (ISP) and any pertinent security guidelines, standards, and policies; (2) comply with all of the Commonwealth of Massachusetts Information Technology Division's "Security Policies") (3) communicate and enforce the contracting agency's ISP and such Security Policies against all employees (whether such employees are direct or contracted) and subcontractors; (4) implement and maintain any other reasonable appropriate security procedures and practices necessary to protect personal information to which the Contractor is given access by the contracting agency from the unauthorized access, destruction, use, modification, disclosure or loss; (5) be responsible for the full or partial breach of any of these terms by its employees (whether such employees are direct or contracted) or subcontractors during or after the term of this Contract, and any breach of these terms may be regarded as a material breach of this Contract; (6) in the event of any unauthorized access, destruction, use, modification, disclosure or loss of the personal information (collectively referred to as the "unauthorized use"): (a) immediately notify the contracting agency if the Contractor becomes aware of the unauthorized use; (b) provide full cooperation and access to information necessary for the contracting agency to determine the scope of the unauthorized use; and (c) provide full cooperation and access to information necessary for the contracting agency and the Contractor to fulfill any notification requirements. Breach of these terms may be regarded as a material breach of this Contract, such that the Commonwealth may exercise any and all contractual rights and remedies, including without limitation indemnification under Section 11 of the Commonwealth's Terms and Conditions, withholding of payments, Contract suspension, or termination. In addition, the Contractor may be subject to applicable statutory or regulatory penalties, including and without limitation, those imposed pursuant to G.L. c. 93H and under G.L. c. 214, § 3B for violations under M.G.L c. 66A.

**Executive Orders 523, 524 and 526.** Executive Order 526 (Order Regarding Non-Discrimination, Diversity, Equal Opportunity and Affirmative Action which supersedes Executive Order 478). Executive Order 524 (Establishing the Massachusetts Supplier Diversity Program which supersedes Executive Order 390). Executive Order 523 (Establishing the Massachusetts Small Business Purchasing Program.) All programs, activities, and services provided, performed, licensed, chartered, funded, regulated, or contracted for by the state shall be conducted without unlawful discrimination based on race, color, age, gender, ethnicity, sexual orientation, gender identity or expression, religion, creed, ancestry, national origin, disability, veteran's status (including Vietnam-era veterans), or background. The Contractor and any subcontractors may not engage in discriminatory employment practices; and the Contractor certifies compliance with applicable federal and state laws, rules, and regulations governing fair labor and employment practices; and the Contractor commits to purchase supplies and services from certified minority or women-owned businesses, small businesses, or businesses owned by socially or economically disadvantaged persons or persons with disabilities. These provisions shall be enforced through the contracting agency, OSD, and/or the Massachusetts Commission Against Discrimination. Any breach shall be regarded as a material breach of the contract that may subject the contractor to appropriate sanctions.

**Amendment #9**
**Human Service Transportation Broker Services**
**HST Area 07**

This Contract Amendment #9 is by and between the Executive Office of Health and Human Services (EOHHS) with offices at One Ashburton Place, 11th Floor, Boston, MA 02108, and Greater Attleboro Regional Transit Authority (the Broker), Ten Oak Street, Suite 2, Taunton, MA 02708-3950.

**WHEREAS**, EOHHS and the Broker entered into a contract effective July 1, 2007, and as amended on January 31, 2008 (Amendment #1), July 1, 2008 (Amendment #2), July 1, 2009 (Amendment #3), July 1, 2010 (Amendment #4), January 1, 2011 (Amendment #5), July 1, 2011 (Amendment #6), July 1, 2012 (Amendment #7) and September 25, 2012 (Amendment #8), to provide an array of broker transportation services in the designated Service Area; and

**WHEREAS**, in accordance with **Section 9.1** of the Contract, EOHHS desires to renew the Contract for one additional year beginning on July 1, 2013 and ending on June 30, 2014; and

**WHEREAS**, in addition, in accordance with **Section 9.2** of the Contract, EOHHS and the Broker desire to amend the Contract to: (i) incorporate rates effective July 1, 2013; (ii) incorporate the Department of Mental Health (Clubhouse program) as an additional Agency, effective July 1, 2013; and (iii) update provisions to reflect requirements or changes in law or regulation and certain programmatic updates; and to make other clarifications to the Contract;

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Broker and EOHHS agree to amend the Contract as follows:

1. The Contract is hereby renewed one additional year, to and including June 30, 2014.

2. **SECTION 2. DEFINITIONS**, shall be amended as follows:

   a) Add the following new defined terms or abbreviations to Section 2 in alphabetical order:

   "**DMH** – Department of Mental Health"

   "**HST Advisory Board** – the oversight group of senior policy and management representatives from the participating human and elder service agencies and relevant state oversight agencies. The group determines policy and is the entity that guides the operation of the HST Office."

   "**MassDOT** – Massachusetts Department of Transportation."

   b) Delete the definition of "**Agency**" in Section 2, and insert in place thereof a new definition as follows:

"**Agency (also known as Funding or Referring Agency or Department)** – an eligible state entity purchasing Broker/mobility management and transportation services. Currently, the primary agencies are: the Office of Medicaid (also known as MassHealth), the Department of Developmental Services (DDS) (formerly the Department of Mental Retardation (DMR)), the Department of Mental Health (DMH), the Department of Public Health (DPH), the Massachusetts Commission for the Blind (MCB) and the Massachusetts Rehabilitation Commission (MRC)."

c) Delete the definition of "**HST Steering Board**" in Section 2 in its entirety.

d) Delete the definition of "**EOT**" in Section 2 in its entirety.

e) Delete the definition of "**Program-Based Transportation**" in Section 2, and insert in place thereof the following new definition:

"**Program-Based Transportation** – transportation that occurs on a regular schedule (e.g., daily) to a common program or Destination Facility, typically provided on a scheduled route, grouped trip basis. Program-Based Transportation includes, but is not limited to, transportation to the following programs: DPH's Early Intervention program, DDS's day/work programs, MassHealth-funded Day Habilitation, DMH's Clubhouse programs and certain programs or services through MCB and MRC."

3. **SECTION 3. GENERAL STANDARDS**, shall be amended as follows:

a) **Section 3.12.B.5** is hereby amended by deleting "Department of Social Services (DSS)" and inserting in place thereof "Department of Children and Families (DCF)".

b) **Section 3.12.C.** is hereby amended by deleting "DSS" and inserting in place thereof "DCF".

4. **SECTION 4. BROKERAGE OPERATIONS**, shall be amended as follows:

a) **Section 4.1 Transportation Models,** is hereby amended in **Section 4.1.B** by inserting "DMH" immediately after "Day Habilitation".

b) **Section 4.2. Transportation Requests,** is hereby amended by deleting **Section 4.2.A.1** in its entirety and inserting in place thereof a new **Section 4.2.A.1** as follows:

"1. PROGRAM BASED ONLY> Transportation Requests must be fulfilled in all cases no more than five (5) business days from receipt, unless a later date is specified on the request. In urgent situations requiring a change to an existing scheduled trip, the Broker shall be required to implement the request in a shorter time period as may be specified. These requirements apply even if a Consumer cannot be accommodated on a route initially; however, the Broker is responsible for converting any single trip to a shared ride as soon as possible."

c) **Section 4.3 Transportation Service Planning and Delivery Network** is hereby amended by deleting **Section 4.3.C.** in its entirety and inserting in place thereof a new **Section 4.3.C.** as follows:

"C. PROGRAM-BASED TRANSPORTATION> Competitively procure the Transportation Providers for each route at least every five years, with the next scheduled statewide procurement being conducted for July 1, 2008 (FY09); provided, however, that for the 1-year contract renewal commencing July 1, 2013, system-wide re-procurement of Transportation Providers will not be required. In the event of a transition from one Broker to another, The network of existing Transportation Providers may be maintained through an extension, assignment or transfer of existing Transportation Provider contracts and any procurement for new services or replacement services necessary to ensure a continuity of services during the transition period, as needed."

d) **Section 4.7 Human Service Transportation Area Advisory Council (HSTAAC)**, is hereby amended in **Section 4.7.B.4** by: (1) deleting "EOT" and inserting in place thereof "MassDOT"; (2) adding, immediately after "MassHealth (Agency staff);" the following: "DMH Programs (Clubhouse staff)"; and (3) deleting the period appearing immediately after "Adult Day Health (ADH) programs (program staff)" and insert in place thereof a semicolon.

5. **SECTION 5. SERVICE DELIVERY STANDARDS AND PERFORMANCE MONITORING**, shall be amended as follows:

a) **Sections 5.1. Broker Performance Standards**, is hereby amended in **Sections 5.1.E, H. and I** by adding, immediately after "DPH," in each instance it appears, the following: "DMH,".

b) **Section 5.2. Broker Oversight Requirements** is hereby amended in **Section 5.2.D.4.c.** by deleting "Department of Social Services (DSS)" and inserting in place thereof "Department of Children and Families (DCF)".

6. **SECTION 6. REPORTING AND RECORDKEEPING**, shall be amended as follows:

a) **Section 6.4 Annual Financial Reporting**, is hereby amended in **Section 6.4.D** by deleting "The Executive Office of Transportation" and inserting in place thereof "The Massachusetts Department of Transportation (MassDOT)".

7. **SECTION 7. BILLING AND PAYMENT**, shall be amended as follows:

a) **Section 7.2. Program-Based Trip Reimbursement**, is hereby amended in the first sentence of **Section 7.2.C** by (1) deleting "five (5)" and inserting in place thereof "six (6)"; and (2) adding, immediately after "DPH", the following: "DMH,".

b) **Section 7.3. Rate Reviews for Program-Based Reimbursement**, is hereby amended in **Section 7.3.A.** by adding "DMH," immediately after "DPH,".

c) **Section 7.6 Demand-Response (PT-1) Cost Savings Incentive Program,** is hereby amended in **Section 7.6.A.** by deleting the second sentence in its entirety and inserting in place thereof a new sentence as follows: "The Broker may accrue and retain savings up to the contracted PT-1 cost savings cap set forth on Appendix 3 for the Broker's applicable HST Service Area(s) for FY14, subject to the following requirements:".

d) **Section 7.6 Demand-Response (PT-1) Cost Savings Incentive Program,** is hereby amended in **Section 7.6.B.** by deleting "3%" in each place it occurs.

e) **Section 7.7 Reimbursement for PT-1 Second Attendant Costs**, is hereby amended by deleting **Section 7.7** in its entirety and inserting in place thereof the following:

**"7.7 Reimbursement for PT-1 Second Attendant Costs**

Costs for second attendants will be reimbursed at the rate promulgated by the Division of Health Care Finance and Policy or successor agency, in effect at the time of service."

f) **Section 7.8 Demand-Response and Program-Based Trip Rate for FY09-FY12** is hereby amended by deleting "**FY12**" in the section heading and inserting in place thereof "**FY14**".

g) **Section 7.10 Payment Schedule to Subcontractors**, is hereby amended by deleting the section in its entirety and inserting in place thereof the following:

**"7.10 Payment Schedule to Subcontractors**

Brokers shall make payment to its Subcontractors in a manner that is consistent with the Commonwealth's bill paying policy such that the Subcontractor is paid within 45 days of receipt of a completed and accurate invoice."

8. **SECTION 8. DATA PRIVACY AND SECURITY** shall be amended by deleting **Section 8** in its entirety and inserting in its place, the following:

**"SECTION 8. DATA PRIVACY AND SECURITY**

Although an independent contractor and not an agent of EOHHS or any Agency, the Broker shall comply with the provisions set forth in this **Section 8.**

**Section 8.1 Definitions**

All terms used but not otherwise defined in this section shall be construed in a manner consistent with the Privacy and Security Rules and all other applicable state or federal privacy or security laws.

A. Commonwealth Security Information. "Commonwealth Security Information" shall mean all data that pertains to the security of the

Commonwealth's information technology, specifically, information pertaining to the manner in which the Commonwealth protects its information technology systems against unauthorized access to or modification of information, whether in storage, processing or transit, and against the denial of service to authorized users, or the provision of service to authorized users, including those measures necessary to detect, document and counter such threats.

B. EOHHS-CE. "EOHHS-CE" shall mean any component of EOHHS and its constituent agencies that constitutes a Covered Entity under the Privacy and Security Rules, including: the Office of Medicaid; the Department of Developmental Services; the Department of Mental Health; the Soldiers' Home in Massachusetts; the Soldiers' Home in Holyoke; the covered components of the Department of Public Health, a hybrid agency, having designated its covered components as: the Childhood Lead Screening Laboratory and the MDPH Public Health Hospitals (Lemuel Shattuck Hospital; Massachusetts Hospital School; Tewksbury Hospital; Western Massachusetts Hospital; and State Office of Pharmacy Services).

C. Individual. "Individual" shall mean the person to whom the PI refers and shall include a person who qualifies as a personal representative in accord with 45 CFR § 164.502 (g).

D. Privacy Rule. "Privacy Rule" shall mean the Standards of Privacy of Individually Identifiable Health Information, at 45 CFR Parts 160 and 164.

E. Protected Information (PI). "Protected Information" shall mean any "Personal Data" as defined in Mass. Gen. Laws c. 66A; "Personal Information" as defined in Mass. Gen. Laws c. 93H; "Protected Health Information" as defined in the Privacy Rule; "Patient Identifying Information" as defined in 42 CFR Part 2; and any confidential personally identifiable information under any federal or state law (including for example any state and federal tax return information) that the Broker uses, maintains, discloses, receives, creates or otherwise obtains under this Contract. Information, including aggregate information, is considered PI if it is not fully de-identified in accord with 45 CFR 164.514 (a), (b), and (c).

F. Required By Law. "Required By Law" shall have the same meaning as used in the Privacy Rule.

G. Secretary. "Secretary" shall mean the Secretary of the US Department of Health and Human Services or the Secretary's designee.

H. Security Incident. "Security Incident" shall have the same meaning as used in the Security Rule.

I. Security Rule. "Security Rule" shall mean the Security Standards for the Protection of Electronic Protected Health Information, at 45 CFR Parts 160 and 164.

**Section 8.2 Broker's Obligations**

A. Mass. Gen. Laws c. 66A and other Privacy and Security Obligations

Broker acknowledges that in the performance of this Contract it will create, receive, use, disclose, maintain, or otherwise obtain "Personal Data," and that in so doing, it becomes a "Holder" of Personal Data, as such terms are used within Mass. Gen. Laws c. 66A. Broker agrees that it shall comply with Mass. Gen. Laws c. 66A, and any other applicable privacy or security law (state or federal) governing Broker's use, disclosure, and maintenance of any PI under this Contract, including for example, 42 CFR Subpart F, Mass. Gen. Laws c. 93H, and Executive Order 504.

Broker further agrees that it shall comply with any other privacy and security obligation that is applicable to any PI under this Contract as the result of EOHHS or an Agency having entered into an agreement with a third party (such as the Social Security Administration) to obtain the data, including by way of illustration and not limitation, signing any written compliance acknowledgment or confidentiality agreement or complying with any other privacy and security obligation required by the third party for access to data that EOHHS or an Agency receives from the third party.

B. EOHHS Data

Broker shall recognize at all times the respective rights of EOHHS and any Agency to control the access, use, disclosure, and disposition of all data created, obtained, received, used, maintained, or disclosed under this Contract, including all PI, and any data derived or extracted from such data.

C. Agents and Subcontractors

Broker shall ensure that any agent or subcontractor to whom it provides PI received from, or created or received by it on behalf of EOHHS or an Agency agrees in writing to the same restrictions and conditions that apply to Broker under this **Section 8** with respect to such information, including but not limited to, implementing reasonable safeguards to protect such information. With respect to agents and subcontractors used to perform Contract activities for entities defined as EOHHS-CEs, Broker shall also comply with requirements set forth at **Section 8.3.A.4**, below.

Broker is solely responsible for the compliance of any agent or subcontractor with this provision and all requirements in this **Section 8**, and shall not be relieved of any obligation under this **Section 8** because the data was in the hands of such entities or persons.

D. Data Security

1. Administrative, Physical, and Technical Safeguards

Broker shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of PI and that prevent use or disclosure of such data other than as provided for by this Contract. All such safeguards must comply with all Commonwealth security and information technology resource policies, processes, and mechanisms established for access to PI, including any applicable data security policies and procedures established by Executive Order 504, established by EOHHS and by the Information Technology Division. As one of its safeguards, Broker shall not transmit PI in non-secure transmissions over the Internet or any wireless communication device. Broker shall protect from inappropriate use or disclosure any password, user ID, or other mechanism or code permitting access to any database containing PI. If granted access to any EOHHS or Agency systems or databases (including the Health Insurance Exchange (HIX)), Broker must comply with all Commonwealth security and information technology resources policies, processes, procedures, and mechanisms established for access to such systems or databases by EOHHS, the Agency, or the Information Technology Division, and shall give EOHHS, or at EOHHS's direction, any Agency, prior notice of any change in personnel whenever the change requires a termination or modification of any EOHHS or Agency password, user ID, or other security mechanism or code, to maintain the integrity of the system or database.

Broker agrees to allow representatives of EOHHS, or at EOHHS's option, an Agency, access to its premises where PI is kept for the purpose of inspecting privacy and physical security arrangements implemented by Broker to protect such data.

Upon request, Broker shall provide EOHHS with copies of all written policies, procedure, standards and guidelines related to the protection, security, use and disclosure of PI, Commonwealth Security Information, or other confidential information and the security and integrity of its technology resources.

2. Commonwealth Security Information

If through this Contract, Broker obtains access to any Commonwealth Security Information, Broker is prohibited from making any disclosures of or about such information, unless in accord with EOHHS's express written instructions. If Broker is granted access to such information in order to perform its obligations under this Contract, Broker may only use such information for the purposes for which it obtained access. In using the information for such permitted purposes, Broker shall limit access to the

information only to staff or agents necessary to perform the permitted purposes. While in possession of such information, Broker shall apply all privacy and security requirements set forth in this **Section 8**, as applicable to maintain the confidentiality, security, integrity, and availability of such information. Notwithstanding any other provision in this **Section 8**, Broker shall report any non-permitted use or disclosure of such information to EOHHS immediately within twenty-four hours. Broker shall immediately take all reasonable and legal actions to retrieve such information if disclosed to any non-permitted individual or entity; shall include a summary of such retrieval actions in its required report of the non-permitted disclosure; and shall take such further retrieval action as EOHHS shall require. Notwithstanding any other provision in this Contract regarding termination Broker may not retain any Commonwealth Security Information upon termination of this Contract, unless such information is expressly identified in any retention permission granted in accord with **Section 8.6 (Effect of Termination)**. If retention is expressly permitted, all data protections stated herein survive termination of this Contract and shall apply for as long as Broker retains the information.

E. Non-Permitted Use or Disclosure Report and Mitigation Activities

Immediately upon becoming aware of any use or disclosure of PI by Broker, its subcontractors or agents, not permitted under this Contract, or of any Security Incident by the same, or of any event that would trigger notification obligations under any applicable law, Broker, shall take all appropriate action necessary to: (1) retrieve, to the extent practicable, any PI used or disclosed in a non-permitted manner or involved in a Security Incident, (2) mitigate, to the extent practicable, any harmful effect of the non-permitted use or disclosure of PI or of the Security Incident known to Broker, and (3) take such further action as may be required by any applicable state or federal law concerning the privacy and security of such PI. As soon as possible, but in any event, within two business days following the date upon which Broker becomes aware of the non-permitted use or disclosure of PI or of the Security Incident, or of the event that would trigger notification obligations under any applicable law, Broker shall report to EOHHS, both verbally and in writing: 1) the date of the non-permitted use or disclosure of PI or Security Incident, if known or if not known, the estimated date; 2) the date of the discovery of the non-permitted use or disclosure of PI or Security Incident; 3) the nature of the non-permitted use or disclosure of PI, or of the Security Incident, including as much specific detail as possible describing the event, as well as the nature of the PI involved (for example, types of identifiers involved such as name, address, age, social security numbers or account numbers; or medical or financial or other types of information); 4) the number of individuals whose PI was involved in the non-permitted use or disclosure of PI or Security Incident; 5) a summary of the nature and scope of Broker's investigation of the non-permitted use or disclosure of PI or Security Incident; 6) the harmful effects of the event known to Broker, all actions it has taken or plans to take to mitigate such effects, and the results of all mitigation actions already taken; and 7) a review of and any plans to implement

changes to Broker's policies and procedures, including staff training, to prevent such events in the future. Upon EOHHS's request, Broker shall take such further actions as requested by EOHHS or shall cooperate with EOHHS to further mitigate, to the extent practicable, any harmful effect of the non-permitted use or disclosure of PI, or of the Security Incident. Any actions to mitigate harmful effects of such privacy or security violations undertaken by Broker on its own initiative or pursuant to EOHHS's request under this paragraph shall not relieve Broker of its obligations to report such violations under this paragraph or any other provisions of this Contract.

F. Consumer Notification

In the event the consumer notification provisions of Mass. Gen. Laws c. 93H or similar notification requirements in other state or federal laws, are triggered by a data breach involving Broker, its employees, agents, or subcontractors, Broker shall promptly comply with its obligations under such laws. If EOHHS determines, in its sole discretion, that it or an Agency is required to give such notifications, Broker shall, at the request of EOHHS, assist EOHHS or the Agency in undertaking all actions necessary to meet consumer notification requirements and in drafting the consumer notices and any related required notices to state or federal agencies for EOHHS review and approval, but in no event shall Broker have the authority to give these notifications on behalf of EOHHS or an Agency. Broker shall reimburse EOHHS for reasonable costs incurred by EOHHS and the Agency associated with such notification, but only to the extent that such costs are due to: (i) Broker failure to meet its responsibilities under, or in violation of, any provision of this Contract, (ii) Broker violation of law, (iii) Broker negligence, (iv) Broker failure to protect data under its control with encryption or other security measures that constitute an explicit safe-harbor or exception to any requirement to give notice under such laws, or (v) any activity or omission of its employees, agents, or subcontractors resulting in or contributing to a breach triggering such laws.

G. Response to Legal Process/Data Requests

Broker shall immediately report to the EOHHS, both verbally and in writing, any instance where PI, Commonwealth Security Information, or any other data obtained under this Contract is requested, subpoenaed, or becomes the subject of a court or administrative order or other legal process. If EOHHS directs Broker to respond, Broker shall take all necessary legal steps, including objecting to the request when appropriate, to comply with Mass. Gen. Laws c. 66A, 42 CFR 431.306 (f), and any other applicable federal and state law. If EOHHS determines that it or the applicable Agency shall respond directly, Broker shall fully cooperate and assist EOHHS or the applicable Agency in its response. In no event shall Broker's reporting obligations under this paragraph be delayed beyond two business days preceding the return date in such request, subpoena or legal process, or two business days from obtaining such request for data, whichever is shorter.

H. Electronic and Paper Databases Updates

Within thirty days of execution of this Contract, Broker shall provide EOHHS an accurate list of electronic and paper databases containing PI, together with a description of the various uses of the databases. Broker shall update such lists as necessary in accord with the addition or termination of such databases.

I. Data Privacy and Security Custodian

Within five days of this Contract's effective date, Broker shall provide EOHHS in writing with the name of an individual(s), who shall act as Privacy and Security Officer(s) and be responsible for compliance with this **Section 8**. Broker shall also notify EOHHS in writing within five business days of any transfer of such duties to other persons within its organization.

**Section 8.3 EOHHS-CE Provisions**

With respect to those entities defined as EOHHS-CE, the following applies in addition to all other provisions set forth in this **Section 8**.

A. Broker Obligations

In addition to all other obligations set forth in **Section 8**, Broker has the following obligations with respect to EOHHS-CE PI:

1. Business Associate

Broker acknowledges that in the performance of this Contract it is the Business Associate, as defined in the Privacy and Security Rules, of the EOHHS-CEs. Broker further acknowledges that Title XIII (the HITECH Act) of the American Recovery and Reinvestment Act of 2009 and related modifications to the Privacy and Security Rules issued by the federal Department of Health and Human Services on January 25, 2013 at 78 FR 5566 through 5702, with an effective date of March 26, 2013, have increased the privacy and security obligations of, and imposes certain civil and criminal penalties upon, a Business Associate under the Health Insurance Portability and Accountability Act and the Privacy and Security Rules. Further, the HITECH Act and related modifications to the Privacy and Security Rules impose direct responsibility and liability upon the Business Associate as if the Business Associate were a Covered Entity, as that term is used in the Privacy and Security Rules, for certain obligations, including but not limited to:

i) the obligation to implement administrative, physical, and technical safeguards to protect PI and comply with other Security Rule requirements set forth in such provisions as 45 CFR §§ 164.306, 164.308, 164.310, 164.312, 164.314,and 164.316; and
ii) the obligation to comply with certain Privacy Rule requirements such as certain breach notification obligations set forth at 45 CFR 164.402,

164.406, 164.408. 164.410, as applicable to a Business Associate, and certain restrictions obligating a Business Associate to use and disclose Protected Health Information, as that term is used in the Privacy and Security Rules, only if such use or disclosure, respectively, is in compliance with each applicable requirement of 45 CFR 164.504(e), the Privacy Rule's minimum necessary rule, the limitations in this Contract, and as may be required by law, including disclosures to the Secretary.

Broker agrees to comply with all Business Associate requirements implemented by the HITECH Act and related modifications to the Privacy and Security Rules in accord with all effective dates set forth in the HITECH Act and related modifications to the Privacy and Security Rules. Broker further agrees to enter into any amendment to this Contract as may be required by EOHHS for compliance with the HITECH Act and related modifications to the Privacy and Security Rules.

2. Compliance with Access for Secretary

Broker shall make its internal practices, books, and records, including policies and procedures and PI, relating to the use and disclosure of PI received from, or created or received by it under the Contract, available to EOHHS or upon EOHHS's written request, to the Secretary, in a time and manner designated by either EOHHS or the Secretary for purposes of the Secretary determining any EOHHS-CEs' compliance with the Privacy and Security Rules. Under the new modifications to the Privacy and Security Rules noted above, Broker must comply with any direct obligation that it may have under such modifications to comply with any request from the Secretary with respect to Broker's direct obligations under and compliance with the Privacy and Security Rules.

3. Individual's Rights

Broker shall take such action as may be requested by EOHHS for any EOHHS-CE to meet obligations under 45 CFR §§ 164.524, 164.526, and 164.528 with respect to any such agency's PI in Broker's possession. If an Individual contacts Broker with respect to exercising any rights the Individual may have under 45 CFR §§ 164.524, 164.526, and 164.528 with respect to PI in Broker's possession, Broker shall notify EOHHS within two business days of the Individual's request and cooperate with EOHHS or the applicable EOHHS-CE to meet any EOHHS-CE's obligations with respect to such request.

4. Agents and Subcontractors

With respect to Agents and Subcontractors, Broker must comply with **Section 8.2.C**, above. In addition, with respect to agents and subcontractors used to perform Contract activities for entities defined as EOHHS-CEs, Broker must ensure that the written agreement referenced in **Section 8.2.C** meets all

requirements of a business associate agreement, as now required for subcontractors of a business associate, under the new modifications to the Privacy and Security Rules noted above, including but not limited to: 45 CFR 160.103; 45 CFR 164.502(e)(l)(ii) and (2); and 45 CFR 164.504(e).

B. EOHHS Obligations

EOHHS shall notify Broker of the following with respect to EOHHS-CE data:

1. Any limitation(s) in any EOHHS-CE's notice of privacy practices issued in accord with 45 CFR § 164.520, to the extent that such limitation may affect Broker's use or disclosure of PI.
2. Any changes in, or revocation of, permission by Individual to use or disclose PI, to the extent that such changes may affect Broker's use or disclosure of PI.
3. Any restriction to the use or disclosure of PI that a EOHHS-CE has agreed to in accord with 45 CFR § 164.522, to the extent that such restriction may affect Broker's use or disclosure of PI.

**Section 8.4 Permitted Uses and Disclosures by Broker**

Except as otherwise limited in this Contract, Broker may use or disclose PI only as follows:

A. Agreement Functions and Services

Except as otherwise limited in this Contract, Broker may only use or disclose PI to perform functions, activities, or services specified in this Contract, provided such use or disclosure would not: (1) violate any applicable law, including for example, the Privacy Rule, 42 CFR Subpart F, and Mass. Gen. Laws c. 66A if done by EOHHS or any Agency; or (2) violate the minimum necessary standards set forth in the Privacy Rule; or (3) conflict with any statements in EOHHS-CE's Notice of Privacy Practices. In performing functions, activities, or services under this Contract, Broker represents that it shall seek from EOHHS and any Agency only the amount of PI that is minimally necessary to perform the particular function, activity, or service. To the extent this Contract permits Broker to request PI from any other entity or individual, Broker shall only request an amount of PI that is reasonably limited to the minimal necessary to perform the intended function, activity, or service.

B. Required by Law

Broker may use or disclose PI as Required by Law, consistent with any restrictions in any applicable privacy or security law (state or federal) governing Broker's use, disclosure, and maintenance of any PI under this Contract.

C. Restriction on Contacting the Individual

Broker may not use PI to attempt to contact the Individual, unless such contact is otherwise necessary to perform functions, activities, or services under this Contract, or unless EOHHS otherwise instructs Broker to do so in writing.

D. Publication Restriction

Broker shall not use PI for any publication, statistical tabulation, research, or similar purpose, even if PI has been transformed into de-identified data in accord with the standards set forth in 45 CFR 164.514(a), (b), and (c).

**Section 8.5 Termination for Violation**

A. Termination for Violation

Notwithstanding any other provision in this Contract, EOHHS may terminate this Contract, immediately upon written notice, if EOHHS determines, in its sole discretion, that Broker has materially breached any of its obligations set forth in this **Section 8** or any other provision of this Contract pertaining to the security and privacy of any PI provided to Broker under this Contract.

B. Cure

Prior to terminating this Contract as permitted above, EOHHS, in its sole discretion, may provide an opportunity for Broker to cure the breach or end the violation. If such an opportunity is provided, but cure is not feasible, or Broker fails to cure the breach or end the violation within a time period set by EOHHS, EOHHS may terminate the Contract immediately upon written notice.

C. HHS Report

In the event that termination of this Contract for a material breach of any obligation regarding PI is not feasible, or if cure is not feasible, EOHHS shall report such breach or violation to the Secretary, if such material breach and termination pertains to work performed for an EOHHS-CE, under this Contract.

**Section 8.6 Effect Termination**

A. Return or Destroy Data

Except as provided immediately below, upon termination of this Contract for any reason whatsoever, Broker shall, at EOHHS's option, either return or destroy all PI obtained or created in any form under this Contract, and Broker shall not retain any copies of such data in any form. In no event shall Broker destroy any PI without first obtaining EOHHS's approval. In the event destruction is permitted, Broker shall destroy PI in accord with standards set forth in NIST Special Publication 800-88 Guidelines for Media Sanitization, all applicable state retention laws, all applicable state and federal security laws (including the HITECH Act and related modifications to the Privacy and Security Rules, noted above), and all state data security policies including policies issued by EOHHS and the Information Technology Division. Within five days of any permitted destruction, Broker shall provide EOHHS with a written certification that destruction has been completed in accord with the required standards and that Broker and its subcontractors and agents no longer retain such data or copies of such data. This provision shall apply to all PI in the possession of Broker's subcontractors or agents, and Broker shall ensure that all such data in the possession of its subcontractors or agents has been returned or destroyed and that no subcontractor or agent retains any copies of such data in any form, in accord with EOHHS's instructions.

B. Transfer Data

Notwithstanding **subsection A** immediately above, Broker shall, at EOHHS's option upon termination of this Contract for any reason whatsoever, transfer all PI obtained or created in any form under this Contract, or some portion thereof, to a third party identified by EOHHS. Such transfer shall proceed in accord with all applicable security standards for transfer of PI set forth in this **Section 8** and any other transfer directions provided by EOHHS at the time. Within five days of any requested transfer, Broker shall provide EOHHS with a written certification that the transfer was successfully completed. To the extent that the requested transfer involves only a portion of PI obtained or created under this Contract, Broker shall, at EOHHS's direction, follow **subsection A** immediately above or **subsection C** immediately below with respect to the remaining data. This provision shall apply to all PI in the possession of Broker's subcontractors or agents, and Broker shall ensure that all such data in the possession of its subcontractors or agents is transferred and that no subcontractor or agent retains any copies of such data in any form, in accord with EOHHS's instructions.

C. Retain Data

If Broker determines that returning or destroying PI when required under the Contract is not feasible, Broker shall provide EOHHS with written notification of the conditions that make return or destruction not feasible. If based on Broker's

representations, EOHHS concurs that return or destruction is not feasible, Broker shall extend all protections set forth in this section to all such PI and shall limit further uses and disclosures of such data to those purposes that make the return or destruction of such data not feasible, for as long as Broker maintains the data.

Notwithstanding **subsection A** and **B** above, Broker shall, at EOHHS's option upon termination of this Contract for any reason whatsoever, retain all PI obtained or created in any form under this Contract, or some portion thereof, upon termination, solely for storage purposes without any authority to use or disclose such PI. In such event, Broker shall extend all data protections in this **Section 8**, as applicable, and shall not use or disclose such PI for any purpose for as long as Broker stores such PI. Upon termination of such retention period, Broker shall, at EOHHS's direction, return or destroy such PI in accord with **subsection A** above, or transfer such data to a third party in accord with **subsection B** above. This provision shall apply to all PI in the possession of Broker's subcontractors or agents, and Broker shall ensure that all such data in the possession of its subcontractors or agents is retained, transferred, returned or destroyed in accord with EOHHS's direction and **subsections A, B,** and **C**, as applicable upon EOHHS's instructions, and that no subcontractor or agent retains any copies of such data in any form, in accord with EOHHS's instructions.

D. Survival

Notwithstanding any other provision concerning the term of this Contract, all protections pertaining to any PI covered by this Contract shall continue to apply until such time as all such data is returned to EOHHS, transferred, or destroyed, or until any period of storage following the termination of this Contract is ended, or if return or destruction is not feasible, protections are applied to such data in accord with **subsection 8.6.C**. immediately above.

**Section 8.7 Miscellaneous Provisions**

A. Regulatory References

Any reference in this Contract to a section in the Privacy or Security Rules or other regulation or law refers to that section as in effect or as amended.

B. Amendment

Broker agrees to take such action as is necessary to amend this Contract in order for EOHHS or any Agency to comply with any requirements of the Privacy and Security Rules, the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (HIPAA), and any other applicable state or federal law pertaining to the privacy, confidentiality, or security of PI. Upon EOHHS's written request, Broker agrees to enter promptly into negotiations for any amendment as EOHHS, in its sole discretion, deems necessary for EOHHS's or any Agency's compliance with any such laws. Broker agrees that, notwithstanding any other provision in this Contract, EOHHS may terminate this

Contract immediately upon written notice, in the event Broker fails to enter into negotiations for, and to execute, any such amendment.

C. Survival

The obligations of Broker under **Section 8.6** (**Effect of Termination**) of this **Section 8** or any provision allowing for continued possession of PI shall survive the termination of this Contract.

D. Waiver

EOHHS's exercise or non-exercise of any authority under this Contract, or the exercise or non-exercise of inspection or approval of privacy or security practices or approval of subcontractors, shall not relieve Broker of any obligations set forth herein, nor be construed as a waiver of any of Broker's obligations or as an acceptance of any unsatisfactory practices or privacy or security failures or breaches by Broker.

E. Interpretation

Any ambiguity in this Contract shall be resolved to permit EOHHS or any Agency to comply with the Privacy and Security Rules, HIPAA, Mass. Gen. Laws c. 66A, Mass. Gen. Laws c. 93H, and any other applicable law pertaining to the privacy, confidentiality, or security of PI."

9. **SECTION 9. ADDITIONAL TERMS AND CONDITIONS**, shall be amended as follows:

a) **Section 9.2 Amendments** is hereby amended by adding a new subsection D as follows:

"D. During FY14, it is anticipated that certain MassHealth members also eligible for Medicare who currently receive transportation services pursuant to this Contract will have their health care services, as well as transportation, managed instead by an integrated care organization which may contract separately with the Broker for services. The Broker acknowledges that the HST Office will require certain amendments to this Contract at that time pertaining to billing and reporting, among potentially other things. The Broker agrees to cooperate during that process and to enter into such amendments as may be required by the HST Office."

b) **Section 9.3 Termination** is hereby amended by deleting the section in its entirety and inserting in place thereof a new Section 9.3 as follows:

**"Section 9.3 Termination and Requirements for Transition upon Termination**

Subject to **Section 8.5 and 8.6**, The Broker or EOHHS, with input from the Agencies may terminate this Contract, without cause and without penalty by providing the other party prior written notice of termination at least 90 calendar days before the effective date.

At the expiration or other termination of this Contract, the Broker shall cooperate with EOHHS and its designees, including any subsequent contractor who might assume administration of all or part of the HST Brokerage System, and shall work with EOHHS and any new contractor to ensure a smooth and uninterrupted transition of services, processes, data, technology, telecommunications, and all other Broker activities.

The Broker's transition activities shall include but not be limited to directing any HST Consumer- or HST Brokerage System-related communications (including, without limitation and if applicable, web traffic and e-mails) to a new location designated by EOHHS for six months after termination of this Contract, and completion of all Transportation Provider inspections and reviews that were begun before the termination or transfer, in accordance with all requirements and timeframes specified in this Contract. The transition activities shall also include, without limitation, transferring or assigning, as applicable, Transportation Provider subcontracts, and other required subcontractor agreements, to the new contractor or as otherwise directed by EOHHS.

In addition, upon request at the expiration or other termination of this Contract, the Broker shall promptly supply all material necessary for continued operation of payment and related systems in a format and manner reasonably specified by and transferable to EOHHS, or its designee. Such material includes, but is not limited to, user and operation manuals and other documentation, system and program documentation. The Broker shall, at EOHHS's request, offer EOHHS the option to purchase or license any material to which the Broker has a proprietary right.

All finished or unfinished documents, data, and reports prepared by the Broker and/or its Transportation Providers pursuant to this Contract are the property of EOHHS. The Broker shall cooperate with EOHHS to ensure the orderly and efficient transfer of all documents, data, reports and other materials to EOHHS, its designee, or a third party identified by EOHHS, at the termination of the Contract should EOHHS, in its sole discretion, direct the Broker to transfer such documents, data, reports and other materials (or a portion thereof) at that time. If EOHHS does not direct the Broker to make such a transfer, the Broker shall retain and store the documents, data, reports and other materials in accordance with **Section 6.5**. This **Section 9.3** is subject in all respects to **Section 8** of this Contract, and shall survive the termination of this Contract. (See also section 7 of the Commonwealth Terms and Conditions and 130 CMR 450.205.)

EOHHS reserves the right to withhold final payment to the Broker until any such transition is complete. EOHHS will provide the Broker written notice that a transfer will occur. In the event that a subsequent contractor is unable to assume operations on the planned date for transfer, the Broker shall continue to perform those operations designated by EOHHS on a month-to-month basis beyond the planned transfer date, at a cost to be negotiated between the parties."

**10. The APPENDICES**, shall be amended as follows:

a) **APPENDIX 1: Transportation Provider Performance Standards, Section 1. General**, is hereby amended in **Section A. Definitions**, by deleting the definition of "Program-Based Transportation" and inserting in place thereof a new definition as follows:

"Program-Based Transportation: Transportation that occurs on a regular schedule (e.g. daily) to a common program or Destination Facility, typically provided on a scheduled route, grouped trip basis. Program-Based Transportation includes, but is not limited to, transportation to the following programs: Department of Public Health's (DPH) Early Intervention program, Department of Developmental Services (DDS) day/work programs, Department of Mental Health (DMH) Clubhouse programs, MassHealth funded Day Habilitation, and certain programs or services through Massachusetts Commission for the Blind (MCB) and Massachusetts Rehabilitation Commission (MRC)."

b) **APPENDIX 1: Transportation Provider Performance Standards, Section II. Transportation Operations** is hereby amended in **Section E.3.c.(3)** by deleting "Department of Social Services (DSS)" and inserting in place thereof "Department of Children and Families (DCF)".

c) **APPENDIX 1: Transportation Provider Performance Standards, Section II. Transportation Operations** is hereby amended in **Section E.3.d** by deleting "DSS" and inserting in place thereof "DCF".

d) **APPENDIX 1: Transportation Provider Performance Standards, Section II. Transportation Operations** is hereby amended in **Section E**, by adding a new **Section E.6** immediately after **Section E.5.** as follows:

"**6. DMH ONLY>**Ensure that Drivers and Monitors (where applicable) provide verbal reports of the following incidents to their dispatcher/supervisor, and to the Facility and/or residential staff: any injury that requires medical intervention or hospitalization; any event that results in serious disability; any sexual assault or alleged sexual assault; any physical assault which results in staff or client requiring medical intervention or hospitalization; any arrest; any incident that results in police or fire intervention during transit. Verbal reports must be filed on the day of the incident and written reports must be filed with the Broker and the Facility within twenty-four (24) hours."

e) **APPENDIX 1: Transportation Provider Performance Standards, Section IV. Personnel Requirements**, is hereby amended in **Section B. Monitor Qualifications**, by adding a new section 3a. as follows:

"**3a. DPH only** > The Provider must ensure that Monitors have a Mantoux TB test. The results of the TB test must be verified negative; however, if test results are positive the individual may still be eligible, upon approval of the Broker."

f) **APPENDIX 1: Transportation Provider Performance Standards, Section V, Driver and Monitor Performance Requirements** is hereby amended in Section 17 in the paragraph titled "**For children under 12 (DPH EI or unaccompanied MassHealth**

**children)**" by deleting (1) "Department of Social Services (DSS)" and inserting in place thereof "Department of Children and Families (DCF)" and (2) by deleting "DSS" and inserting "DCF" wherever it appears.

g) **APPENDIX 3, Broker Management Fee and Direct Transportation Rates**, is hereby amended by deleting the Appendix in its entirety and inserting in place thereof the new **Appendix 3** attached hereto, which is effective July 1, 2013.

APPENDIX 3
BROKER MANAGEMENT FEE AND
DIRECT TRANSPORTATION RATES

| | HST Area 07 (Southeast) | Projected FY14 one-way trips | FY14 One-way trip rate | Projected FY 2014 service cost | FY14 Broker PT-1 cost savings cap |
|---|---|---|---|---|---|
| Demand-Response | MassHealth (PT-1) | 624,866 | 23.41 | $14,628,113 | $535,840 |
| | MassHealth - 2nd Attendant | 50 | 8.00 | $400 | Attendant rate is subject to review and adjustment by EOHHS |
| Program-Based | MassHealth Day Habilitation | 470,183 | 24.52 | $11,530,189 | Program based model reimbursement is for actual cost of transportation - Average trip rates identified are estimates based on historical data and a projection of available funds and anticipated trip utilization and are subject to revision. |
| | Department of Developmental Services (DDS) | 102,613 | 15.94 | $1,636,121 | |
| | MassHealth Early Intervention | 13,249 | 25.77 | $341,427 | |
| | Department of Public Health (DPH) | 7,453 | 25.77 | $192,064 | |
| | Department of Mental Health (DMH) | 12,500 | 20.00 | $250,000 | |
| | Massachusetts Rehabilitation Commission (MRC) | 3,697 | 50.00 | $184,850 | |
| | Massachusetts Commission for the Blind (MCB) | 10 | 50.00 | $500 | |
| | MassHealth funded sub-total | 1,108,348 | | $26,500,129 | |
| | Direct service total | 1,234,621 | | $28,763,664 | |

| | Annual | Monthly |
|---|---|---|
| Broker capitated management cost for this area (FY 2008) | $1,184,631 | $98,719 |
| Broker capitated management cost for this area (FY 2009) | $1,243,863 | $103,655 |
| Broker capitated management cost for this area (FY 2010) | $1,243,863 | $103,655 |
| Broker capitated management cost for this area (FY 2011) | $1,243,863 | $103,655 |
| Broker capitated management cost for this area (FY 2012) | $1,243,863 | $103,655 |
| Broker capitated management cost for this area (FY 2013) | $1,243,863 | $103,655 |
| **Broker capitated management cost for this area (FY 2014)** | **$1,243,863** | **$103,655** |
| Total | $8,647,809 | |

RTA Broker management cost reflects all the costs associated with the provision of HST Brokerage services for this area and only those costs. HST Broker management funds are intended solely for the purpose of managing the HST Brokered system and are not to be used to subsidize other Transit Authority operations.

| | |
|---|---|
| Projected HST area total (direct service + Broker mgt) for FY 2014 | $30,007,527 |

O:\Transportation Contract\Transportation Contracts FY 2014 Amendments\Exec Signoff Documents\FY14 Appendix 3-RatesFINAL-exeesignoff.xls 5/1/2013

REQUEST FOR PROFESSIONAL VERIFICATION

DATE:

Dear

The attached authorization has been submitted by who has indicated that you can provide information regarding her disability and its impact on her needs to use our ADA paratransit service. The Americans with Disabilities Act of 1990 (ADA) requires that the Greater New Haven Transit District provide paratransit services to persons who cannot utilize the regular public bus system. The information you provide will allow us to evaluate the request and to provide service for specific trip requests. All information will be kept confidential.

PLEASE ANSWER THE FOLLOWING QUESTIONS

What is her physical or mental impairment that substantially limits one or more of her major life activities? _____

Under what conditions would she need to use the ADA service?

_____

Can the applicant walk a distance of two city blocks or up an incline?

_____

Can the applicant wait 10 minutes for a city bus?

_____

Can the applicant cross the street without assistance?

_____

Can the applicant see and negotiate curbs and steps?

_____

_____

Signature of Health Care Prof. Prof. Desig.(MD,RN. Etc.) Date Signed

The application will not be considered completed until your verification is returned. Please reply within 7 days. Do not fax this verification back to our office, due to the applicant's confidentiality. If your verification is not returned, the applicant may not receive the service he/she may need. Thank you in advance for you cooperation.
Send to:
GNHTD
840 Sherman Ave.
Hamden, Ct. 06514
Attn: Linda Kissel ADA Administrator

## PHYSICIAN OR OTHER PROFESSIONAL INFORMATION

Applicant's Name: _____ Date of Birth: ____/_____/__
**(please print)**

In order to allow the Greater New Haven Transit District (GNHTD) to evaluate your request for disability services please provide your physician's name and address and/or other medical professional to confirm the information you have provided. **Please complete the following information and authorization form, and return this page to GNHTD along with your application**.

**The following: (check appropriate professional)**

_____Physician _____Health Care Professional _____Rehabilitation Professional

is familiar with my disability and is authorized to provide information to the Greater New Haven Transit District for my ADA paratransit eligibility determination.

Professional's Name: _____

Office Address: _____

City: _____ State: _____ Zip:_____

Telephone #: _____ Office Fax #: _____

Signature of Applicant or Guardian: _____

### ADA DEFINITION OF DISABILITY

### (ELIGILIBITY FOR ADA PARATRANSIT SERVICE)

The following persons with disabilities are eligible for the Greater New Haven Transit District's ADA Paratransit Service.

1. Any person with a physical or mental disability who is unable to board, ride or disembark from any accessible fixed route bus, without the assistance of another individual (except the operator of a wheelchair lift).

2. Any person's inability to recognize their destination – or, inability to transfer to said destination.

3. Any person with a disability who has a specific impairment-related condition that prevents them from traveling to or from a bus stop on the public bus system. Architectural and environmental barriers such as distance, terrain or weather, do not, standing alone, form a basis for eligibility. However, a person may be eligible if the interaction of the disability and barriers prevent the person from traveling to or from the bus stop.

Client's must sign to transfer info to other Agency's requests.

AUTHORIZATION TO RELEASE CONFIDENTIAL INFORMATION

Name _____ Date of Birth

Current Address _____

City _____ State _____ Zip

Previous Address ( if the rider has moved from the service area) _____

City _____ State _____ Zip

I do authorize _____ to release information regarding the basis for my eligibility for ADA Paratransit to:

Name of Transit Agency _____

_____

Please include fax #: _____

Address _____ City _____ State _____ Zip

This released information will not be further transferred without additional authorization.

Signature of Consumer, if own guardian _____ Date

Signature of Guardian, If applicable _____ Date

List your current doctor or medical professional(s) below.

*ACCESS* will request medical verification on your behalf.

## Applicant Statement

**"I hereby authorize Kitsap Transit or its representatives to obtain, from the physician(s) listed below, medical information related to my health or treatment, for the purpose of evaluating my ADA eligibility for specialized transportation. I certify that the information provided on this application is true and correct. I understand that giving false information is against the law, and could result in losing Specialized Transportation services as well as a penalty under the law".** (RCW 9A.72.085 and RCW 40.16.030)

**Name:** _____ **Profession:** _____
(Doctor, Licensed Medical or Mental Health Professional)

_____
(Mailing Address) (City, State) (Zip Code)

**Phone:** _____ **Fax:** _____

**Name:** _____ **Profession:** _____
(Doctor, Licensed Medical or Mental Health Professional)

_____
(Mailing Address) (City, State) (Zip Code)

**Phone:** _____ **Fax:** _____

**Applicant Signature:** _____ **Date:** _____

**Printed name of applicant:** _____

(This authorization shall remain in effect for the entire period of service covered by this or any certification issued.)

**If you are not the applicant**, but have completed this form for someone applying for service, **complete the following information about yourself**.

Name: _____ Relation: _____

Signature: _____ Date: _____

Mailing Address: _____

Daytime Phone #: _____

# Notice of Privacy Practices

Kitsap Transit respects your privacy. We understand that your personal health and eligibility information is very sensitive. We will not disclose your information to anyone outside of the agency unless you tell us, in writing, to do so, or unless the law authorizes or requires us to do so. Nor will we process any eligibility application that does not have your signature or your legal guardian's signature on any page where a signature is required. Our privacy practices cover all authorized information contained in your ADA eligibility file.

## Use and Disclosure of ADA Eligibility Information

The information contained in your file includes all applications submitted and any health information received that aids in determining your eligibility. It may also include any letters received on your behalf, documented conversations, trip plans and other information pertinent to your ADA eligibility and service provision.

Kitsap Transit uses this information to determine eligibility and for assessing or providing transportation service needs. Staff access to this information is limited to those employees who must review it for the purposes stated above.

- You have the right to review your file. Your request must be made in writing or the review may occur in person with valid identification.
- You may request that a copy of your file be mailed to you. You may be required to pay a fee for this service.

It is the policy of Kitsap Transit to assure that no person shall, on the grounds of race, color or national origin, as provided by Title VI of the Civil Rights Act of 1964, be excluded from participation in, be denied the benefits of, or otherwise be discriminated against under any of its federally funded programs and activities.

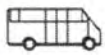
Any person, who believes his/her Title VI protection has been violated, may file a complaint with Kitsap Transit's Human Resources department. For Title VI complaints and additional information, please call (360) 478-6227.

If you are over 60 years of age and in need of transportation services prior to eligibility being established, please call Senior Information & Assistance at (360) 337-5700 for possible alternative options.

Please Note: Senior Information & Assistance does not provide direct transportation services.

# Application for ADA Paratransit Service Certification

The Americans with Disabilities Act of 1990 (ADA) is a civil rights bill which bans discrimination against people with disabilities. Under the ADA, transit agencies operating a fixed-route system must provide a comparable paratransit system for people with disabilities who cannot use the fixed-route system. Omnitrans' paratransit (Access) service is a pre-reservation, shared-ride, curb-to-curb service. Its service area is defined as up to ¾ mile on either side of an existing bus route. Service is available on the same days and times that routes in the area are operating.

If you have a disability which prevents you from using a lift-equipped Omnitrans regular bus  some or all of the time, you may be eligible for Omnitrans' paratransit  van (also known as Access) service some or all of the time.

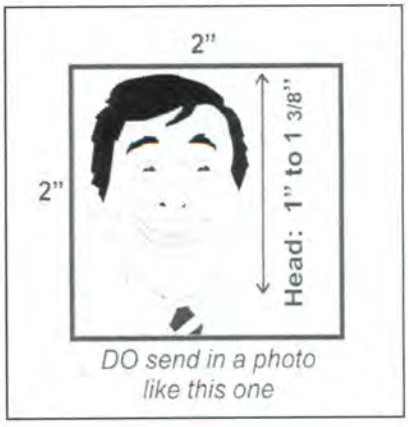
To be certified for the use of Omnitrans' ADA paratransit (Access) service, you need to submit a written application. A wallet-sized (2" x 2") photograph must be included with your application. This color photo must be a front facing view of head and shoulders only. ***No scarves, sunglasses, headbands or other feature-obscuring accessories will be allowed.*** (Exceptions: Prescription glasses and head coverings worn for religious reasons).

Eligibility is determined by three factors:

1. Individual's ability to get to/from the bus stop
2. Individual's ability to board/exit the bus
3. Individual's cognitive ability to navigate the regular bus system

Operational issues are not used to determine eligibility, including:

- Age
- Distance to bus stop
- Lack of bus service to an area
- Overcrowded buses
- Weather conditions
- Inability to speak English



*DO send in a photo like this one*

All information will be kept confidential. Only the information required to provide the requested service will be disclosed to those who perform those services. Your answers will not be shared with any other person or company. Once all the information needed to make an eligibility determination is collected, Omnitrans will respond to you by mail within 21 calendar days. If you are determined eligible to use the service, you Photo Identification card will be mailed to you within 10 business days of receiving your certification letter.

If you are determined to be Not Eligible for ADA paratransit service, or are dissatisfied with your eligibility type, you may appeal the decision by submitting a written request to Omnitrans within 60 days after the receipt of your denial/approval letter. Simply submit a letter stating that you wish to appeal the decision and why you feel you should be eligible for ADA paratransit service. Attach copies of any other pertinent information. Appeals received by Omnitrans, will be referred to an appeal specialist or review panel. You may be asked to come in for an appeal interview. The appeal recommendation is the final determination. The appeal process should take no longer than 30 days. You may only re-submit an application if your condition worsens.

It is important that all parts of the application are completed and a photo is attached to the application. If the application is not complete, or there is no photo attached, it will be returned to you for completion which will delay the application process.

Please return your completed application in person or mail it to:

**Omnitrans-ADA Certification**
1700 West 5th Street
San Bernardino, CA 92411
**Business Hours**
Monday through Friday-8 AM to 5 PM

If you have questions, please call (909) 379-7100. TDD*: (909) 384-9351

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* Telecommunications Device for the Deaf

## SECTION 1 – PERSONAL INFORMATION

**Last Name:** **First Name:** **MI:**

**Gender:** ❑ Male ❑ Female

**Language Ability (check all that apply):** ❑ English ❑ Other: *(specify)*

**Residential Address:**

**City:** **State:** **Zip:**

**Mailing Address:** *(if different)*

**City:** **State:** **Zip:**

**Home Phone: ( ) -** **Work Phone: ( ) -**

**TDD:** ❑ Yes ❑ No **TDD:** ❑ Yes ❑ No

***Last 4 digits of Social Security #:** ☒ ☒ ☒ - ☒ ☒ - ☐ ☐ ☐ ☐

**Date of Birth:** ☐☐ - ☐☐ - ☐☐☐☐ *(mm-dd-yyyy)*

*The Federal Privacy Act of 1974 requires that disclosure of your social security number is voluntary. For identification purposes, please provide the last 4 digits of your social security number.

**Prefer to receive information in:** ❑ Written format ❑ Audio Tape ❑ Braille

## SECTION 2 – EMERGENCY CONTACT INFORMATION

**Last Name:** **First Name:** **MI:**

**Relationship to applicant:**

**Day Phone: ( ) -** **Evening Phone: ( ) -**

**Language Ability (check all that apply):** ❑ English ❑ Other: *(specify)*

## FOR OFFICIAL USE ONLY – DO NOT WRITE IN THIS BOX

***Eligibility:*** ❑ Permanent ❑ Conditional ❑ Temporary: ***(until)*** ❑ Rejected

**PCA:** ❑ Yes ❑ No **SA:** ❑ Yes ❑ No **MA:** _____

**Condition(s) or Reason(s) for rejection:**

Reviewed by: on

For Omnitrans Use Only

Date Received:

Name:

## SECTION 3 – MOBILITY INFORMATION

1. **Which of these mobility/communication aids or equipment do you use to help you get where you need to go? (Please check all that apply to you.)**

❑ None

| | | |
|---|---|---|
| ❑ White Cane | ❑ Brace | ❑ Service animal |
| ❑ Cane | ❑ Manual wheelchair | ❑ Picture board |
| ❑ Walker | ❑ Powered wheelchair | ❑ Alphabet board |
| ❑ Crutches | ❑ Powered scooter/cart | ❑ Portable oxygen |

❑ Prosthesis: *(Specify)*_____

❑ Other: *(Specify)*_____

If you use a wheelchair/scooter/cart: *(if applicable)*

a) Is it WIDER than 30 inches: ❑ Yes ❑ No ❑ Do not know

b) Is it LONGER than 48 inches: ❑ Yes ❑ No ❑ Do not know

c) Is the total combined weight of you and your mobility device more than 600 pounds? ❑ Yes ❑ No ❑ Do not know

2. **With or without the use of a mobility aid, how many blocks can you go?**

❑ Less than 2 blocks ❑ 2 to 4 blocks ❑ More than 4 blocks

3. **If you were to ride the regular Omnitrans bus**  **would you need a Personal Care Attendant (PCA) with you?**

❑ Always → → → → →

❑ Sometimes → → →

❑ No

❑ To help me get to or from the bus stop

❑ To help me get on or off the bus

❑ To help me when I get where I'm going

4. **Have you ever had any training to learn how to use a regular bus?**

❑ Yes → → → →

❑ No

The training was at: _____

I learned: (Check all that apply to you)

❑ General bus travel

❑ How to ride one or two specific routes

❑ I finished the training

❑ I did not complete the training

## SECTION 4 – DISABILTIY OR HEALTH CONDITION INFORMATION

**1. What is the nature of your disability or condition that affects your ability to use the regular bus system? (Check all that apply)**

### A. General Medical Conditions

- ❑ None
- ❑ Cancer
- ❑ Kidney Failure
- ❑ Pneumonia
- ❑ Diabetes
- ❑ Organ Transplant
- ❑ AIDS
- ❑ Other: *(Specify)* _____

### B. Bone and Joint Conditions

- ❑ None
- ❑ Amputation of: *(Specify)* _____
- ❑ Broken Bone: *(Specify)* _____
- ❑ Arthritis
- ❑ Fusion
- ❑ Scleroderma
- ❑ Osteo-arthritis
- ❑ Ankylosing Spondylitis
- ❑ Osteoporosis
- ❑ Rheumatoid Arthritis
- ❑ Other: *(Specify)* _____

### C. Brain/Nerves/Muscle Conditions

- ❑ None
- ❑ Alzheimer's Disease
- ❑ Hemiplegia
- ❑ Post-polio
- ❑ Brain Injury
- ❑ Huntington's Chorea
- ❑ Quadriplegia
- ❑ Cerebral Palsy
- ❑ Multiple Sclerosis
- ❑ Spina Bifida
- ❑ Dementia
- ❑ Muscular Dystrophy
- ❑ Stroke
- ❑ Epilepsy
- ❑ Paraplegia
- ❑ Vertigo/Dizziness
- ❑ Guillian-Barre
- ❑ Parkinson's Disease
- ❑ Other: *(Specify)* _____

### D. Heart and Circulatory Conditions

- ❑ None
- ❑ Angina
- ❑ Edema
- ❑ High Blood Pressure
- ❑ Heart Attack
- ❑ Congestive Heart Failure
- ❑ Heart Surgery
- ❑ Peripheral Vascular Disease
- ❑ Other: *(Specify)* _____

**E. Lung and Breathing Conditions**

- ❑ None
- ❑ Allergies
- ❑ Cystic Fibrosis
- ❑ Lung Cancer
- ❑ Asthma
- ❑ Emphysema
- ❑ Chronic Obstructive Pulmonary Disease (COPD)
- ❑ Other: *(Specify)* _____

**F. Vision/Hearing/Speech Conditions**

- ❑ None
- ❑ Aphasia
- ❑ Diabetic Retinopathy
- ❑ Deaf-Blind
- ❑ Cataracts
- ❑ Partially Sighted
- ❑ Deaf
- ❑ Glaucoma
- ❑ Night Blindness
- ❑ Hard of Hearing
- ❑ Totally Blind
- ❑ Visual Field Deficit
- ❑ Other: *(Specify)* _____

**G. Developmental/Mental Conditions**

- ❑ None
- ❑ Autism
- ❑ Dwarfism
- ❑ Mood Disorder
- ❑ Psychosis
- ❑ Thought Disorder
- ❑ Developmental Disability:
  - ❑ Mild
  - ❑ Moderate
  - ❑ Severe
- ❑ Mental Retardation:
  - ❑ Mild
  - ❑ Moderate
  - ❑ Severe
- ❑ Other: *(Specify)* _____

**2. Has your health condition or disability been documented by a medical doctor?**

❑ Yes ❑ No

**3. Is your health condition or disability temporary?**

❑ Yes → → How long do you expect it to last? # of years _____

❑ No → → → → → →

❑ Do not know → →

How long have you had this condition or disability?

❑ Since birth # of years _____

4. Please indicate which of the following BEST describes the condition of your mobility: (Check ONE box only)

- ❑ Severely limited under all circumstances
- ❑ I have good days and bad days
- ❑ I can only go to specific locations
- ❑ I am currently receiving treatment and I hope to improve
- ❑ I am able to travel independently under all circumstances
- ❑ Other, please describe: _____

## SECTION 5 – FUNCTIONAL TRANSIT SKILLS

Check the box that most appropriately applies to your ability to *independently* perform the following skills.

| *I can:* | Always | Sometimes | Never |
|---|---|---|---|
| 1. Understand how to take a trip on a public bus | ❑ | ❑ | ❑ |
| 2. Read and understand a bus schedule | ❑ | ❑ | ❑ |
| 3. Tell time | ❑ | ❑ | ❑ |
| 4. Count bus fare or change | ❑ | ❑ | ❑ |
| 5. Recognize bus route numbers or train lines | ❑ | ❑ | ❑ |
| 6. Recognize landmarks e.g. church or street signs | ❑ | ❑ | ❑ |
| 7. Hold on to a handrail | ❑ | ❑ | ❑ |
| 8. Breathe without difficulty | ❑ | ❑ | ❑ |
| 9. Remember a transit agency's phone number | ❑ | ❑ | ❑ |
| 10. Use a telephone | ❑ | ❑ | ❑ |
| 11. Transfer from a sitting to a standing position | ❑ | ❑ | ❑ |
| 12. Maintain balance | ❑ | ❑ | ❑ |
| 13. Climb three 10" inch steps | ❑ | ❑ | ❑ |
| 14. Remember directions to a location | ❑ | ❑ | ❑ |
| 15. Walk or wheel independently | ❑ | ❑ | ❑ |
| 16. Wait at a bus stop for 20 minutes | ❑ | ❑ | ❑ |
| 17. Cross streets | ❑ | ❑ | ❑ |
| 18. Shop in a grocery store | ❑ | ❑ | ❑ |
| 19. Function without danger to myself and others | ❑ | ❑ | ❑ |

## SECTION 6 – TRAVEL INFORMATION

1. What form of transportation do you currently use?

| | Always | Sometimes | Never |
|---|---|---|---|
| A. Regular Fixed Route Bus | ❑ | ❑ | ❑ |
| B. Dial-A-Ride/OmniLink Van | ❑ | ❑ | ❑ |
| C. Drive Myself | ❑ | ❑ | ❑ |
| D. Someone Drives Me | ❑ | ❑ | ❑ |
| E. Use Access with Omnitrans Disability Card | ❑ | ❑ | ❑ |
| F. Other *(specify)* _____ | ❑ | ❑ | ❑ |

2. How many blocks are there from your residence to the nearest bus stop?

❑ Less than 2 blocks ❑ 2 to 4 blocks

❑ 5 to 7 blocks ❑ More than 7 blocks

❑ Do not know

3. Can you independently travel from your residence to your nearest bus stop?

❑ Yes ❑ Sometimes* ❑ No* ❑ Do not know/Have never tried

*If Sometimes or No, please indicate the barrier(s) that prevent you from accessing your nearest bus stop:

❑ The stop has no curb cut for my wheelchair/scooter/cart

❑ Uneven surface of the road

❑ The street is too steep

❑ Unable to cross street(s)

❑ Get confused and cannot find my way

❑ Cannot walk/wheel that far away

❑ When the weather is too hot

❑ When the weather is too cold

❑ When it is too dark outside (night blindness)

❑ When it is too bright outside (light sensitive)

4. Are there any other conditions which limit your ability to use the Regular Fixed Route Bus System?

❑ No ❑ Yes (Please describe): _____

_____

_____

## SECTION 7 – PROFESSIONAL VERIFICATION AUTHORIZATION

***In order to allow Omnitrans to evaluate your ADA Paratransit Service application, sometimes it is necessary to contact your health care or rehabilitation professional to confirm the information you have provided.***

***Please complete and sign the following authorization.***

**I authorize the following organization (physician's office, hospital, rehabilitation center, etc) to provide Omnitrans with information regarding my disability and its affect on my ability to get around on my own.**

**Name of Healthcare Professional or Agency:**

**Contact Person's Name:**

**Contact Person's Title:**

**Address:**

**City:** **State:** **Zip:**

**Telephone Number: ( ) -**

**Applicant's Signature/Mark:**

**Printed Name of Applicant:**

**Date:**

**Co-Signed by:**

***(Guardian or Person assisted with this application)***

**Printed Name of Co-Signed:**

**Relationship to Applicant:**

## SECTION 8 – UNDERSTANDING THIS APPLICATION FORM

I understand the purpose of this application form is to determine if I, the applicant am eligible to use Omnitrans' ADA paratransit (Access) service according to the guidelines of the American with Disability Act.

I understand that this application cannot be processed if it is not complete. I understand that Omnitrans may contact my healthcare professional/agency to verify my disability. I understand that a representative from Omnitrans may need to talk to me or see me at a later date to clarify or get further information.

I understand that all information will be kept confidential; only the information required will be disclosed to those who perform those services.

I understand the application process can take up to 21 days from the time Omnitrans receives a completed application. If my application is returned for clarification or additional information, this can delay the process. I will receive notification of the determination of this application. If I am eligible for this service on a permanent, temporary or conditional basis, I will be given instructions on how to obtain an ADA photo identification card.

I understand that I may appeal the determination within 60 days after receipt of written notification if I am determined not eligible for ADA paratransit service or if I am dissatisfied with my eligibility type.

I understand if Omnitrans receives new information regarding a change in my functional or cognitive ability, my eligibility status may be reviewed and changed.

I certify that the information provided on this application is true and correct to the best of my knowledge. I understand that falsification of information may result in denial of service as well as penalty under the law.

Signed:_____ Date:_____
(Applicant's Signature/Mark)

Co-signed:_____ Date:_____
(Guardian or Person assisted with this application)

Relationship to Applicant:

PIERCE TRANSIT the Way to go!

# NOTICE OF PRIVACY PRACTICES

This notice describes how medical and ADA eligibility information about you may be used and disclosed and how you can get access to this information.

Pierce Transit respects your privacy. We understand that your personal health and eligibility information is very sensitive. We will not disclose your information to others unless you tell us, in writing, to do so or unless the law authorizes or requires us to do so. We will not process any eligibility application that does not have your signature or your legal guardian's signature on all pages where a signature is required. For Pierce Transit's purposes, our privacy practices cover all information contained in your ADA eligibility file, including any research we've conducted regarding your case.

## Use and Disclosure of ADA Eligibility Information

The information contained in your file includes all applications received and any health information provided to determine your eligibility. It may include any letters received on your behalf, documented conversations, trip plans, and other information pertinent to your ADA eligibility and service provision.

Pierce Transit uses this individual information in the eligibility decision-making process, appeals, functional assessments, determination of service provision, and for travel training. We may also use the information to review the qualifications and performance of contractors, to train our staff, and to review and improve our services. We will also provide this information to anyone you ask us to, in writing, through a Release of Information request. Access to the information is limited to those individuals stated above.

You have the right to review your file. This review may occur in person, with advance notice. Valid identification will be required. You may request that a copy of your file be mailed to you. This request must be made in writing and we will charge you a reasonable cost-based fee for expenses such as copies, postage, and staff time. **We will not disclose specific information to you or anyone else over the phone.**

You may ask us to restrict certain uses and disclosure of this information. The request must be presented in writing and we are not required to grant the request. You may also revoke any previous consent to disclose information by submitting a written request. The revocation will apply only to future disclosure requests.

We may use and disclose your information without your authorization as follows:

- **Required by law.** Disclosure of information is permitted when required by law, whether federal, tribal, state, or local.
- **Public health and safety.** Information may be disclosed to public health authorities and their authorized agents for public health purposes including, but not limited to, public health surveillance, investigations, and interventions.
- **Health research.** Information can be disclosed for research without authorization if the research has been approved and has policies to protect the privacy of your individual information.
- **Abuse, neglect, or domestic violence.** Information may be disclosed to report abuse, neglect, or domestic violence under specific circumstances.
- **Law enforcement.** Information may be disclosed to law enforcement officials pursuant to a court order, subpoena, or other legal order, to help identify and locate a suspect, fugitive, or missing person; to provide information related to a victim of a crime or a death that may have resulted from a crime, or to report a crime.
- **Judicial and administrative proceedings.** Information may be disclosed in the course of judicial or administrative proceedings, including appeals and functional assessments.
- **Workers' compensation.** Disclosure of work-related health information as authorized by, and to the extent necessary to comply with, workers' compensation programs.
- **Payment and transportation coordination.** We may use and disclose your health information to obtain reimbursement for expenses or to coordinate transportation with other providers.

All requests to release information must be in writing, dated, and must:

- Include the SHUTTLE applicant/customer's name, current address, and phone number.
- Identify the nature of the information to be disclosed.
- Identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed (specifically, who the information may be released to, legal name, and relationship).
- Identify that Pierce Transit is to make the disclosure.
- Include an effective date and an expiration date or an expiration event that relates to the SHUTTLE applicant/customer or to the purpose of the use or disclosure.
- Include the manner of allowable release (verbal, viewing file, and/or copy of file). We will charge you a reasonable cost-based fee for expenses such as copies, postage, and staff time.

***You or your legal guardian must sign the request.***

*(If a legal guardian signs, he/she must attach proof of legal guardianship or power of attorney)*

Written requests must be submitted to:

Pierce Transit
ADA Eligibility
PO Box 99070
Lakewood WA 98496-0070

If you believe your privacy rights as described have been violated, you may discuss your concerns with the Pierce Transit ADA Certification and Travel Training Manager at 253.984.8164.

We reserve the right to change our privacy practices and the terms of this Notice at any time, provided such changes are permitted by applicable law.

CONTRACT NO. _____

BLANKET PURCHASE AGREEMENT

## PART I
## General Program Description

This Blanket Purchase Agreement (BPA) between Salem Area Mass Transit District ("BROKER") and the undersigned ("CONTRACTOR") has been established to provide non-emergency transportation for Medicaid and OHP PLUS recipients to and from Medicaid covered medical services in the Service Area as defined in Part I, Section 3.

1. Program Definition

Medicaid and Oregon Health Plan Plus (OHP PLUS) transportation services to be provided under this BPA are designed to transport Medicaid and OHP PLUS eligible persons of all ages (and their personal assistants, for those with limited physical mobility) to and from approved medical services (variously, a "Trip" or a "Transport") so such services will be accessible to eligible individuals who have no other means of transportation or are unable to use existing transportation. The program, and the provision of Transport services, is variously referred to herein as "TRIPLINK".

2. Target Population

The target population for transportation services to be provided under this BPA is Medicaid and OHP Plus eligible persons of all ages who need transportation to approved medical services who have no other transportation resources available to them or cannot access existing public transportation ("Clients").

3. Service Area

Clients residing in any part of Marion, Polk and Yamhill counties are eligible for Trips. At BROKER's direction, Services may also be assigned to be provided to Clients from outside the tri-county area who are receiving medical care in the tri-county area and Trips may be also authorized to and from medical care destinations outside the tri-county area.

4. Types of Transportation

This BPA covers five types of transportation:

a) Van transportation including wheelchair lift-equipped vans;
b) Sedan service;
c) Stretcher car service;
d) Secure transport;
e) DHS- Volunteer transportation

5. Brokerage Management

BROKER provides overall management of TRIPLINK for the tri-county area. BROKER screens telephone requests for transportation assistance to determine whether those individuals requesting services are eligible to receive medical and OHP Plus transportation services. If eligible, the BROKER may arrange for and assign Transport by Contractor pursuant to this BPA.

6. Hours of Operation

All TripLink trips assigned Monday through Friday from 6:00 AM to 6:00 PM shall be considered normal hours of operation. All TripLink trips assigned outside of these days and hours shall be considered after-hours trips. Contractors choosing to provide after-hours transportation services may charge an additional fee for this service if the Contractor's properly submitted rate sheet

provides for the amount of the additional fee. After-hours rates can only be paid for transportation occurring from 6:01 PM to 5:59 AM daily, all day Saturday and Sunday and on New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day.

7. Contractor Responsibilities

Contractor is responsible for meeting the provisions of this BPA. Contractor must provide BROKER with documentation of Contractor's minimum company service and safety standards prior to entering into this BPA, and such standards must have been approved by BROKER. Contractor must adopt, and at all times maintain in effect without modification, conform to and comply with, Contractor's policies and procedures for safety and service standards, which have been approved by BROKER ("Contractor's Transportation Standards"). An example of a policy and procedure for service and safety standards acceptable to BROKER is available upon request. In addition, Contractor must comply with the requirements set forth in Exhibit A, Part 4 of the Division of Medical Assistance Program agreement between the State of Oregon and BROKER, the terms of which are incorporated by reference herein. Without limiting the other terms and conditions of this BPA, Contractor agrees to the following:

**LEGAL COMPLIANCE**

7.1. Contractor will be in compliance with all local, state and federal drug and alcohol testing requirements as applicable.

7.2. Contractor must not be the subject of sanction, suspension, debarment or other administrative action by the Federal Government or the State of Oregon including the Division of Medical Assistance Programs (DMAP).

7.3. BROKER reserves the right to conduct a review or audit of Contractor's compliance with this BPA, including inspection of vehicles, at any time throughout the term of this BPA. Contractor also agrees that authorized representatives of the State of Oregon, including the Oregon Secretary of State, shall be permitted access to Contractor's books, records, vehicles and facilities to conduct audits and investigations. Such inspections may either be conducted at the Contractor's facility or other agreed upon location. Contractor shall make its books, records, vehicles, facilities and other property or information available for inspection at no cost to BROKER. Any review, audit or inspection is solely for BROKER's own purpose and shall in no way diminish the sole responsibility of the Contractor to comply with the terms and conditions of this BPA. Neither the performance of any such audit, review or inspection, nor the failure to perform any such audit, review or inspection, shall in any way impose any liability on BROKER or alter the liability of Contractor hereunder.

**VEHICLES AND EQUIPMENT**

7.4. All wheelchair securement systems shall accommodate forward facing wheelchairs. In addition, to the extent practical, all non wheelchairs seating (ambulatory seating) shall be forward facing. Ramp and lift platforms shall have a clear and usable platform surface with a minimum width of 32 inches measured from between 2 and 30 inches above the platform surface. All other ADA vehicle specifications shall apply. Wheelchair vehicles shall, at a minimum, fully comply with all ADA requirements. All wheelchair vehicles with hydraulic lifts must have the lift inspected and maintained every six months by a certified lift mechanic. Proof of inspection and maintenance must be supplied to the BROKER by July 1 and January 1 each year.

7.5. All Trip assignments and billing for brokerage transportation services are done via computer linkup with the program. Contractor must have computer equipment capable of receiving Trip assignments from BROKER.

7.6. All vehicles involved in an auto accident or theft must be reinspected and recertified to be eligible for TRIPLINK service.

7.7. Contractors must assure the comfort and safety of Clients by proper maintenance of their vehicles. Contractors must have all vehicles operating under contract inspected and certified safe by an ASE

certified mechanic annually. Inspection must include checking fluid levels, belts/hoses, cooling system, battery, emission, filters, air conditioning, steering, suspension, brakes, exhaust system, fluid leakage, and visual inspection of vehicle exterior. Proof of inspection must be supplied to the BROKER by July 1 of each contract year.

**RECORDS AND REPORTING**

7.8. Contractor and drivers shall collect all data required or reasonably requested by BROKER, in such form as BROKER may require from time to time.

7.9. Contractor shall provide to BROKER on a monthly basis, an accurate list of drivers eligible for BROKER Trip assignments.

7.10. BROKER shall be informed at the earliest possible time, and in no case later than the next working day, in the event that a 911 call is made to refer a Client for emergency transportation by calling 911.

7.11. Contractor shall report suspected fraudulent use of transportation services to BROKER.

7.12. Contractor shall promptly report any failure by Contractor or its employees or agents to comply with Contractor's Transportation Standards for covered services with an explanation of the causes of the failure and corrective actions taken.

7.13. Contractor shall notify BROKER at the earliest possible time and in no event later than the next working day, of any and all accidents, incidents or deviations from the reasonable direct route related to transporting a Client, including date, vehicle, driver, description of the incident, and names of all parties involved. BROKER should be notified immediately of any accident or incident that affects the Client's arrival time or the Client's destination or is related to the Client's health or well-being or relates in any way to a Client complaint. Copies of motor vehicle and law enforcement reports shall be provided to BROKER.

7.14. Contractor shall notify BROKER immediately by telephone or email upon any no show passengers at the scheduled pick-up time. Contractor is required to leave no show door hanger (provided by BROKER) at the Clients pick up location and attach a copy to the manifest for the day on which the no show occurred.

7.15. Contractor shall maintain all documentation as required in the Oregon Administrative Rules for Medical Transportation Services. Documentation shall include the following:

| | |
|---|---|
| Client Name | Date |
| Client ID Number | Time of Trip |
| Pick up Point | Trip Number |
| Destination | Ride Cost |
| Driver Identification | Pick up time |
| Passenger miles | Vehicle miles |

**QUALITY OF SERVICE**

7.16. Service will be provided in accordance with this BPA and Contractor's Transportation Standards. Billings will only be submitted for Trips specifically indicated on the manifest authorized by BROKER. Provider shall insure that no unauthorized passengers are transported while engaged in providing any Trip under this BPA without BROKER's express permission. Providers may allow employee ride along as a training exercise, but only when pre-approved by the BROKER. Employees in training may not be left alone with a Client. Providers shall not engage in transport of Clients with additional passengers on board that have not been previously authorized, such as relatives, friends or children while participating in the TRIPLINK program.

7.17. Contractor shall not make any changes to the Trips as authorized including, but not limited to, any changes resulting in (1) combined or shared Trips or (2) indirect routes of any kind. If a change is

needed the Contractor must receive prior approval for such change from the brokerage. Trips not provided as authorized will not be reimbursed. One or more incidents of the Contractor changing the authorized Trip may result in suspension or termination of this BPA in BROKER's sole discretion. Contractor shall not make any changes to Trips within the company manifest for convenience or scheduling conflicts. Changes may be made if BROKER is notified when the change occurs and approves the change.

7.18. Contractor shall cooperate with BROKER in every effort to minimize Client time on board the vehicle.

7.19. Average Client wait time for pick up or delivery for pre-scheduled transportation shall not exceed 30 minutes. A Contractor who is more than 30 minutes late for a pick up or who misses a pick up shall immediately report to BROKER with an explanation as to why the trip was missed or late.

7.20. Contractor shall not change the pick-up or drop-off times or negotiate pick-up and drop-off times with Medicaid and OHP Plus recipients. Clients shall be referred to BROKER if they require additional transportation or if a change in the authorized Trip is desired or needed. All requests for Medicaid eligible transportation received directly by the Contractor must be referred to BROKER.

7.21. One or more late or missed Trips as determined by BROKER are considered grounds for termination or suspension of this BPA under BROKERS sole discretion. Unusual weather or unusual traffic conditions affecting all vehicular traffic which prevent the Contractor from meeting the scheduled pick up time shall not constitute non-compliance.

7.22. Contractor must respond to all complaints and incidents within 5 days of receipt of notice of the same. Responses must be in written form and returned to BROKER. Contractors not responding within the 5 days may lose Trip assignments and may be suspended from TripLink service.

7.23 Contractor shall not agree to provide a Trip unless it is reasonably certain that the means to do so are available to the Contractor. If the Contractor is unable to provide a Trip assigned to it by BROKER, the Contractor shall notify BROKER immediately. BROKER staff will reassess the Trip and reassign it as appropriate. Contractor must notify BROKER in writing at least 2-business days in advance of any vehicles being pulled from service. Contractors must respond to an assignment of a next day Trip by 5:30 PM on the day prior to the date of the Trip. If Contractor does not call BROKER by the 5:30 PM deadline, Contractor shall be deemed to have accepted the assigned Trip. Contractors who "throw back" Trips may lose Trip assignments and may be suspended from TripLink service. A "throw back" is a Trip that has been deemed accepted by Contractor that is turned back to the BROKER for any reason not expressly permitted under this Agreement.

7.24. Contractors who have accepted Trips and then not provided the Trips for any reason, other than a reason expressly permitted under this Agreement, may be subject to suspension or termination of this BPA in the BROKER's sole discretion.

**DRIVERS**

7.25. Drivers must have been driving a minimum of five years to be eligible to drive for TripLink. As required by applicable State and Federal law, fingerprint background records check and DMV record check will be required for each driver available for or providing services under this BPA. Drivers shall be pre-qualified by Contractor prior to performing services under this BPA. Contractor will provide a prior certification form (attached) for submittal to BROKER verifying Contractor pre-qualification prior to BROKER processing driver personal history information, fingerprint criminal background checks and Department of Motor Vehicle checks. Fingerprint criminal background checks will be processed in accordance with the procedures outlined in Attachment A, which is incorporated herein by reference. Driver must have a good driving record as reported on a 10-year court certified driving record printout from the Dept. of Motor Vehicles (DMV). It will be the Contractor's responsibility to provide an original 10-year court certified, DMV 10-year driving record printout (original & no older than 30 days) to be submitted to BROKER at the time of fingerprinting. If the driver has resided in Oregon less than five (5) years, Contractor is responsible for providing BROKER with a court certified copy of the driver's driving record from every state of residence in the

past five (5) years. BROKER will notify the Contractor in writing of the driver's status. No driver will qualify to provide BROKER service without BROKER's written determination that the driver qualifies under the terms and conditions of this BPA. Drivers shall have no criminal convictions or matters disclosed by DMV, which may, in the sole judgment of BROKER, render the driver unsuitable or unfit for employment in a position that is responsible for providing transportation services to Clients. BROKER's review of the qualification of drivers shall in no way create liability in BROKER or relieve Contractor of its sole responsibility for proper selection, training and supervision of its drivers.

7.26. Any fines, penalties, violations, citations or other sanctions incurred in connection with Contractor's activities, including without limitation the operation of any vehicle, parking violations, or others shall be the sole responsibility of the Contractor. Contractor shall indemnify and hold BROKER harmless for, from and against any fines, penalties, violations, citations or other sanctions imposed on account of Contractor's activities or the operation of any vehicle, and any expense incurred as a consequence thereof.

7.27. No Driver shall solicit or accept gratuities or any other money or favors from Clients or from Trip passengers.

7.28. Drivers may not perform service while consuming or under the influence of alcohol or drugs. Contractor must immediately refer drivers suspected of being under the influence of alcohol or drugs for testing at the Contractor's expense. Refusal to test or positive test results will disqualify a driver for BROKER service.

8. Contractor Representations

Contractor represents and warrants as follows:

18.1. Organization and Authority. Contractor is duly organized and validly existing under the laws of the State of Oregon. Contractor has full power, authority and legal right to enter into this Agreement and to incur and perform its obligations hereunder;

18.2. Due Authorization. The making and performance by Contractor of this Agreement (1) have been duly authorized by all necessary action by Contractor and (2) do not and will not violate any provision of any applicable law, rule, regulation, or order of any court, regulatory commission, board, or other administrative agency or any provision of Contractor's charter or other organizational document and (3) do not and will not result in the breach of, or constitute a default or require any consent under any other agreement or instrument to which Contractor is a party or by which Contractor may be bound or affected. No authorization, consent, license, approval of, filing or registration with or notification to any other governmental body or regulatory or supervisory authority is required for the execution, delivery or performance by Contractor of this Agreement;

18.3. Binding Obligation. This Agreement has been duly executed and delivered by Contractor and constitutes a legal, valid and binding obligation of Contractor, enforceable in accordance with its terms subject to the laws of bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors' rights generally;

18.4. Contractor has the skill and knowledge possessed by well-informed members of its industry, trade or profession and Contractor will apply that skill and knowledge with care and diligence to perform the services in a professional manner and in accordance with standards prevalent in Contractor's industry, trade or profession;

18.5. Contractor shall, at all times during the term of this Agreement, be qualified, professionally competent, and duly licensed to perform the services under this BPA; and

18.6. Contractor prepared its proposal related to this Agreement, if any, independently from all other proposers, and without collusion, fraud, or other dishonesty.

9. BROKER Representations

BROKER represents and warrants as follows:

18.7. Organization and Authority. BROKER is a political subdivision of the State of Oregon duly organized and validly existing under the laws of the State of Oregon. BROKER has full power, authority and legal right to enter into this Agreement and to incur and perform its obligations hereunder;

18.8. Due Authorization. The making and performance by BROKER of this Agreement (1) have been duly authorized by all necessary action and (2) do not and will not violate any provision of any applicable law, rule, regulation, or order of any court, regulatory commission, board, or other administrative agency and (3) do not and will not result in the breach of, or constitute a default or require any consent under any other agreement or instrument to which BROKER is a party or by which BROKER may be bound or affected. No authorization, consent, license, approval of, filing or registration with or notification to any governmental body or regulatory or supervisory authority is required for the execution, delivery or performance by BROKER of this Agreement.

18.9. Binding Obligation. This Agreement has been duly executed and delivered by BROKER and constitutes a legal, valid and binding obligation of BROKER, enforceable in accordance with its terms subject to the laws of bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors' rights generally.

19. The warranties set forth in this BPA are in addition to, and not in lieu of, any other warranties.

**PART II**

**General Provisions**

1. Description of Agreement

This Blanket Purchase Agreement (BPA) is for the purchase of transportation for Medicaid and OHP PLUS recipients ("Clients") to and from covered medical services (a "Trip") in the Service Area as described in Part I, Section 3. Purchase of the services required by this BPA shall be made, if and when BROKER's Project Manager, or his/her designee, authorizes Contractor to provide a Trip under this BPA. The terms of this BPA are incorporated by reference into and shall govern each authorization made for Contractor to provide a Trip under the scope of this BPA. This BPA may not be modified or any provision waived unless in writing signed by the parties. This is not an exclusive agreement. BROKER does not warrant or guarantee a minimum or maximum amount of authorized Trips, or that any Contractor will receive any particular number of authorizations to provide Trips under this BPA.

2. Extent of Obligation

BROKER is obligated to pay only for Trips which are properly authorized under this BPA and which Contractor properly performs as required under this BPA.

3. Agreement Term

The term of this BPA shall be from April 1, 2012 through June 30, 2013, unless terminated earlier in accordance with this BPA.

4. Non Exclusive Agreement

This BPA is non-exclusive. BROKER may in its sole discretion select, contract with, and assign additional carrier(s) to perform any portion of the transportation of Clients. BROKER does not warrant or guarantee a minimum or maximum amount of service or that any Contractor will receive any amount of service.

5. Rate Sheets

The Contractor shall complete the rate sheet in the form set forth in Part III or such other form as may be provided, from time to time, by BROKER. These forms shall be completed to the satisfaction of BROKER. Any change in rates or hours of operation will become effective only beginning on the first day of each month and only if the new rates or hours of operation are submitted in writing and received by BROKER not later than 5:00 PM on the 15th day of the month prior to the first day of the next month. For example, for a rate change to be effective on January 1 the new rate must be received by December 15.

BROKER will solicit and accept a day or shuttle rate (herein referred to as shuttle rate) from Contractor. Submission of a shuttle rate is optional for Contractor but must be submitted in the Contractor's rate sheet to be effective. The shuttle rate allows BROKER to assign unlimited trips and mileage to a vehicle for one day, both inside and outside the three county service area. The shuttle rate is inclusive of all mileage, wait time and any other cost factors. Shuttles operate from 6AM to 6PM. Contractor is allowed to add its published after hours rates to Clients picked up before 6AM or dropped off after 6PM.

6. Pricing

Contractors can set their own prices subject to the limitations, terms and conditions of this BPA including, without limitation, the following limitations:

6.1. No payment will be made for duplicate mileage. When two Clients are transported at the same time (Shared Trip), only one mileage charge will be allowed. Shared Trip rates may not exceed the base pick-up rate set forth in the Contractor's rate sheet in effect at the time of the Trip.

6.2. Waiting time (any delay in transit after passenger pick up) may be paid only in the case of a medical interval in route (vomiting, nausea, or other medically necessary episode) or as authorized by BROKER.

6.3. No repair fee for vehicles damaged by Clients during transport is allowed.

6.4. No cleanup fee for vehicles is allowed.

6.5. Charges for assistance, wait time (including time before or after passenger pick up or delivery, time before hire, and time after hire but before arrival at pick up point or after arrival at delivery point) or assistance after the Client exits the vehicle are not allowed.

6.6. No additional charge may be made for one escort or attendant accompanying the Client.

6.7. The prices offered to BROKER shall be no higher than those charged to the general public for the same service.

6.8. No payment will be made for no-show or late cancel trips.

6.9. Trips to and from outside the tri-county area may be offered to Contractor on a case by case "bid" basis. Bid trips will be paid only in the amount of a bid offered by Contractor and accepted by BROKER. Payment in excess of bid amount will not be allowed except as preauthorized by BROKER.

7. Purchase Limitations

7.1 No individual Trip under this BPA shall exceed a charge of $1500.

7.2 All Trips must receive prior authorization by BROKER.

7.3 After-hours Trips must be authorized in advance by BROKER. Authorization for after-hours Trips will be determined by BROKER. No authorization or payment will be made for after-hours claims submitted more than 72 hours after the service was provided.

8. Reimbursement

8.1. BROKER will only pay for the most cost-effective and reasonably direct route from point of origin to the destination.

8.2. Payment will be made only when transport of a Client with medical encounter data has occurred.

8.3. Payment will not be made when Contractor fails to get Client to the scheduled appointment on-time resulting in a failure to be seen by the medical provider.

8.4. Payment is based on the condition that the service provided is reimbursable under Medical Assistance Program between the State of Oregon and BROKER and the Medicaid and Oregon Health Plan (Title XIX) program.

8.5. Payment will be at the lesser of the amount charged the general public or the contracted rate pursuant to Contractor's rate sheet in effect at the time the service is provided.

8.6. Payment by SAMTD is considered to be payment in full of all services provided by Contractor under this BPA through the date of Contractor's invoice. Contractor shall not bill Clients for any service provided under this BPA.

9. Billing

9.1. Contractor will submit weekly invoices to BROKER for Contractor's charges for services performed during the preceding week under this BPA. Invoicing shall be performed using BROKER's billing system. Required information includes:

(1) Trip authorization number;
(2) Client name;
(3) Mode of transportation;
(4) Date and time of transport;
(5) Pick-up and drop off locations;
(6) Trip charge;
(7) Driver name;
(8) Vehicle identification;
(9) Other data as may be required by the billing software system.

9.2 Any inappropriate billing for services provided under this BPA shall be deemed a material breach and Contractor will be subject to immediate suspension or termination for cause in BROKER's sole discretion. Inappropriate billing practices include, but are not limited to, the following:

(1) Over billing for transportation services.
(2) Billing for individual Trips where group or Shared Trips were provided.
(3) Billing for services not provided.
(4) Billing Medicare for services provided under this BPA.
(5) Billing a Client for services provided under this BPA

9.3 Payment for services under this BPA shall be made only for Trips authorized by BROKER. BROKER shall pay Contractor within thirty (30) days after SAMTD's Business Services Division receives approval to pay the invoice from the Project Manager for Trips authorized as provided in this BPA. All billings for services under this BPA shall be forwarded to BROKER no later than 10 days following provision of service. BROKER will not pay for services billed more than 10 days after provision of service.

9.4 If audit or billing review by BROKER identifies over billing or other excessive charges, Contractor shall immediately reimburse the amount of the overpayment (without limitation of BROKER's other rights and remedies, including, but not limited to, BROKER's right to terminate or suspend Contractor). Audit and review may take place anytime after payment for services has been made.

10. Insurance

10.1 During the term of this BPA, Contractor shall purchase and maintain all insurance required by this BPA. Policies shall be purchased only from companies that are authorized to do business in Oregon. Contractor shall furnish acceptable certificates of insurance to BROKER prior to commencement of any contract work. Contractor shall indemnify BROKER for, from and against any loss, liability or damages that BROKER may incur due to Contractor 's failure to purchase or maintain any required insurance.

10.2 Contractor shall pay all premiums and deductibles to provide the following:

(1) Assurance that any and all subject workers of Contractor will receive compensation for compensable injuries by providing evidence of either: (a) workers' compensation insurance coverage; (b) self- insurance in compliance with law; or (c) a policy

providing coverage in the event a worker is determined to be a subject worker of Contractor ("if any" coverage).

(2) Broad form comprehensive general liability coverage, $1,000,000.00 combined single limit bodily injury, property damage and employer's liability.

(3) Automobile bodily injury and property damage liability insurance covering all motor vehicles, whether owned, non-owned, leased, or hired, with not less than the following limits:

a) Bodily injury: $1,000,000.00 per person; $1,000,000.00 per occurrence.

b) Property damage: $1,000,000.00 per occurrence.

c) Uninsured motorist: $1,000,000.00 per occurrence.

10.3 The insurance required under this Section shall:

(1) Include the State of Oregon, Oregon Department of Human Services, Division of Medical Assistance, Oregon Health Authority, BROKER and their directors, officers, representatives, agents, and employees as additional insured's with respect to work or operations connected with this BPA.

(2) Require the insurer to give BROKER not less than thirty (30) days notice prior to termination or cancellation of coverage or any change or modification of coverage; and

(3) Include an endorsement providing that the insurance is primary insurance and that no insurance that may be provided by BROKER may be required to contribute to payment for a loss.

10.4. In the event of any limitation, cancellation or restriction of Contractor's insurance coverage required herein, Contractor shall notify BROKER orally and in writing within 3 days of notification by the insurance company to the Contractor.

10.5. Contractor and its subcontractors shall be solely responsible for damage to their own equipment.

11. Contractor's Status and General Responsibilities

11.1. The parties agree and acknowledge that their relationship is that of independent contracting parties and that Contractor is not an officer, employee, or agent, as those terms are used in ORS 30.265 or otherwise, of BROKER or of the State of Oregon. Contractor shall inform BROKER of Contractor's Federal Internal Revenue Service Employer Identification Number, or, if Contractor is an individual with no employer identification number, Contractor's Social Security Number.

11.2. Contractor is responsible for all benefit program contributions for its employees and subcontractors, agents and officers that arise out of or under this BPA. These programs may include, but are not limited to: Federal Social Security, Unemployment Insurance, Workers Compensation, and Public Employees' Retirement System.

11.3. Contractor shall provide and pay for all labor, materials, equipment, utilities, and other goods or services necessary for full contract performance unless this BPA specifically provides otherwise. Contractor shall supervise and direct performance of its activities using its best skill, and shall be responsible for selecting the means of performance. If, during or after the term of this BPA, Contractor learns of any actual or potential defect in the services provided under this BPA, or any problem associated with the results of performance, or of any nonconformance with a provision of this BPA or of federal, state, or local law, Contractor shall inform BROKER at

the earliest possible time (and in no event later than the next day) in writing with a full description of the defect, problems, or nonconformance. Failure to so notify BROKER will be deemed a material breach of this BPA and will subject Contractor to immediate suspension or termination for default in BROKER's sole discretion.

12. Notices and Communications

All notices and other communications concerning this BPA shall be written in English and shall bear the number assigned to this BPA by BROKER. Notices and other communications may be delivered personally, by telegram, or by regular, certified, or registered mail

13. Assignment and Delegation

Contractor shall not assign or transfer its interest in this Agreement without prior written approval of BROKER. Any such assignment or transfer, if approved, is subject to such conditions and provisions as BROKER may deem necessary. No approval by BROKER of any assignment or transfer of interest shall be deemed to create any obligation of BROKER in addition to those set forth in the Agreement. Subject to the foregoing limitation, the provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors and permitted assigns.

14. Indemnification

Contractor shall indemnify, hold harmless, reimburse and defend BROKER and its representatives, officers, directors, and employees for, from and against any loss or claim made by third parties including but not limited to legal fees and costs of defending actions or suits, resulting directly or indirectly from Contractor 's performance or nonperformance of this BPA, or where the loss or claim is attributable to the negligence or other fault of Contractor, its employees, representatives, or subcontractors. Contractor 's obligation under this Section shall survive the termination of this BPA. Approval by BROKER of insurance contracts required under this BPA shall not reduce or relieve Contractor or its subcontractors, if any, of liability under this BPA.

15. Safety

Contractor shall implement and enforce the Contractor's Transportation Standards.

16. Subcontract Provisions

Contractors shall not subcontract, by lease agreement or otherwise, or assign this BPA or any of Contractor's obligations under this BPA without the prior written consent of BROKER, which may be withheld in BROKER's sole discretion. BROKER may condition its consent on terms and conditions, including without limitation the condition that Contractor shall include acceptable provisions in any subcontract to make all of the provisions of this BPA fully effective and directly enforceable against the subcontractor, without releasing Contractor from any obligation. Contractor shall provide all necessary plans, specifications, and instructions to any suppliers and subcontractors to enable them to properly perform their work.

17. Convict Labor

Contractor shall not employ any individual in performance of this BPA who is an inmate of a penal or correctional institution.

18. Termination

18.1 For Convenience. This BPA may be terminated for BROKER's convenience upon 30 days notice in writing, and delivered by certified mail or in person. Contractor shall be compensated for all services performed under this BPA up to the effective termination date, minus any offsets by BROKER for overpayments or any other costs or damages suffered by

BROKER. Any such termination of this BPA shall be without prejudice to any obligations or liabilities of either party already accrued prior to such termination.

18.2 For Cause. BROKER may immediately terminate this BPA as to any Contractor(s) for cause upon written notice to Contractor(s). A termination for cause may occur for any reason deemed sufficient by BROKER in its discretion, including, but not limited to, the following: (1) one or more breaches of this BPA deemed material by BROKER in its sole discretion; (2) MULTIPLE late or missed trips as determined by BROKER; or (3) any single or multiple failure by Contractor to comply with any of the Contractor's Transportation Standards in BROKER's sole discretion. Unless otherwise stated by BROKER at the time of termination or thereafter, termination shall mean that Contractor and its principals shall not reapply for services under this BPA.

18.3 Upon termination of this BPA for convenience or default, Contractor shall bill all outstanding Trip charges not later than fourteen (14) days following notice of termination.

19. Non-Waiver of Suspension/Termination Rights. BROKER's failure to suspend or terminate Contractor for past violations of this BPA, including without limitations any of the Contractor's Transportation Standards, shall in no way waive, limit or abrogate BROKER's right in its sole discretion to suspend or terminate Contractor for such a past or subsequent violation or violations. Similarly, BROKER's limited degree or duration of a suspension or termination of Contractor for past violations of this BPA, including any of the Contractor's Transportation Standards, shall in no way waive, limit or abrogate the degree or duration of suspension or termination that BROKER in its sole discretion may issue for any future violation or violations.

20. In addition to and without limitation of BROKER's remedies available under applicable law (including damages or injunctive relief, of both) or available under this BPA, any one or more violations of any of the requirements in this BPA as determined by BROKER may be grounds for termination or suspension of Contractor in BROKER's sole discretion.

21. Suspension

BROKER, at its sole discretion, may discontinue Trip assignment or suspend the BPA at any time and for any length of time pending investigation of any concerns about service provision or contract compliance under this BPA. Service may be reinstated upon BROKER's sole discretion once the terms and conditions of the BPA are being followed or service delivery concerns are resolved to BROKER's satisfaction.

22. Effective Date and Duration

The termination of this BPA or the expiration of the term of this BPA shall not extinguish either party's right to enforce this BPA with respect to any default or defect in performance that has not been cured.

23. Government Employment Status

The funds to pay the Contractor will be charged against federal funds. Contractor certifies that it is not currently employed by the Federal Government for the work being performed under this BPA.

24. Dual Payment

Contractor shall not be compensated for work performed under this BPA by any other Department or Agency of the State of Oregon or the Federal Government.

25. Access to Records

25.1 Contractor shall maintain all financial records relating to this Agreement in accordance with generally accepted accounting principles. In addition, Contractor shall maintain any other records, books, documents, papers, plans, records of shipments and payments and writings of

Contractor, whether in paper, electronic or other form, that are pertinent to this Agreement in such a manner as to clearly document Contractor's performance. All financial records, other records, books, documents, papers, plans, records of shipments and payments and writings of Contractor whether in paper, electronic or other form, that are pertinent to this Agreement, are collectively referred to as "Records." Contractor acknowledges and agrees that BROKER, OHA and the Oregon Secretary of State's Office and the federal government and their duly authorized representatives shall have access to all Records to perform examinations and audits and make excerpts and transcripts. Contractor shall retain and keep accessible all Records for a minimum of six (6) years, or such longer period as may be required by applicable law, following final payment and termination of this Agreement, or until the conclusion of any audit, controversy or litigation arising out of or related to this Agreement, whichever date is later. Contractor shall maintain Records in accordance with the records retention schedules set forth in OAR Chapter 166.

25.2 All records, reports, data documents, systems and concepts, whether in the form of writings, figures, graphs, or models which are prepared or developed in connection with this BPA shall become public property.

26. Compliance with Applicable Law

Contractor will secure and at all times maintain in good standing all licenses, permits and certificates required by each applicable governmental authority having jurisdiction over Contractor's activities. Contractor will at all times comply with all applicable laws, regulations and ordinances of each governmental authority having jurisdiction., Without limiting the generality of the foregoing, Contractor will comply with all applicable local, state, and federal transportation safety standards regarding passenger safety and comfort; proper equipment; accessibility; maintenance; seat belts and all equipment necessary to transport Clients using wheelchairs or stretchers. In addition, any lift-equipped vehicle supplied shall meet all the requirements of the Americans with Disabilities Act of 1990 (ADA) and the regulations thereto. Without limiting the obligation of Contractor to comply with any other applicable laws, Contractor specifically agrees to comply with the provisions of ORS 279B.220, 279B.225, 279B.230, 279B.235, and 279B.270 to the extent applicable to the services performed by Contractor under this BPA; and the Pro- Children Act of 1994 (codified at 20 USC section 6081 et. seq.).

Both parties shall comply with all state and local laws, regulations, executive orders and ordinances applicable to the Agreement or to the services under this BPA. Without limiting the generality of the foregoing, both parties expressly agree to comply with the following laws, regulations and executive orders to the extent they are applicable to the Agreement: (a) all applicable requirements of state civil rights and rehabilitation statutes, rules and regulations; (b) all state laws requiring reporting of Client abuse; (c) ORS 659A.400 to 659A.409, ORS 659A.145 and all regulations and administrative rules established pursuant to those laws in the construction, remodeling, maintenance and operation of any structures and facilities, and in the conduct of all programs, services and training associated with the work under this BPA. These laws, regulations and executive orders are incorporated by reference herein to the extent that they are applicable to the Agreement and required by law to be so incorporated. All employers, including Contractor, that employ subject workers who provide services in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126.

27. Nondiscrimination

The Contractor agree to comply with Title VI of the Civil Rights Act of 1964, with Section V of the Rehabilitation Act of 1973, and with all applicable regulations of federal and state civil rights and rehabilitation statutes, rules and regulations. The Contractor shall also comply with the Americans with Disabilities Act of 1990, ORS 659.425, and all regulations and administrative rules established pursuant to those laws. Contractor shall provide transportation services to Medicaid and OHP PLUS recipients without regard to race, creed, ethnicity, national origin, sexual orientation, marital status, gender, age, or the presence of any sensory, mental, or physical disability.

28. Confidentiality

Contractor shall treat all information and, in particular, information relating to recipients (Clients) which is obtained by or through its performance under this BPA, as confidential information to the extent that confidential treatment is provided for under State and Federal law, including 42 CFR 431.300 to 431.307 and ORS 411.320 and OAR 943-014-0000 et seq. Confidentiality regarding Medicaid recipients, their respective medical condition or diagnosis, and transportation services provided shall be maintained at all times. Contractor shall safeguard such information and shall not use any information so obtained in any manner except as necessary to the proper discharge of its obligations hereunder. Contractor shall comply with the restrictions and conditions on disclosure of medical information imposed by the Health Insurance Portability and Accountability Act of 1996 (Pub. Law 104-191) and implementing regulations (45 CFR pts. 160 and 164). Contractor shall enter into and comply with any agreements relating to protection of individually identifiable health information as may be reasonably required by BROKER. Contractor agrees to comply with OAR 125-055-0100 through OAR 125-055-0130 and the following:

(1) Privacy and Security of Individually Identifiable Health Information. Individually Identifiable Health Information about specific individuals is confidential. Individually Identifiable Health Information relating to specific individuals may be exchanged between Contractor and BROKER for purposes directly related to the provision of services to Clients which are funded in whole or in part under this Agreement. Contractor shall not use or disclose any Individually Identifiable Health Information about specific individuals in a manner that would violate OHA Privacy Rules, OAR 943-014-0000 et. seq., or OHA Notice of Privacy Practices, if done by OHA. A copy of the most recent OHA Notice of Privacy Practices is posted on the OHA web site at https://apps.state.or.us/Forms/Served/DE2090.pdf or may be obtained from OHA.

(2) Data Transactions Systems. If Contractor intends to exchange electronic data transactions with BROKER in connection with claims or encounter data, eligibility or enrollment information, authorizations or other electronic transaction, Contractor shall execute an EDI Trading Partner Agreement with OHA and shall comply with OHA EDI Rules.

(3) Consultation and Testing. If Contractor reasonably believes that the Contractor's or BROKER's data transactions system or other application of HIPAA privacy or security compliance policy may result in a violation of HIPAA requirements, Contractor shall promptly consult the OHA Information Security Office. Contractor or BROKER may initiate a request for testing of HIPAA transaction requirements, subject to available resources and the BROKER testing schedule.

29. Intellectual Property

27.1 Except as otherwise expressly provided herein, or as otherwise required by state or federal law, OHA will not own the right, title and interest in any intellectual property created or delivered by BROKER or Contractor in connection with the provision of Services.

27.2 If state or federal law requires that Contractor grant to the United States a license to any intellectual property, or if state or federal law requires that the OHA or the United States own the intellectual property, then Contractor shall execute such further documents and instruments as OHA may reasonably request in order to make any such grant or to assign ownership in the intellectual property to the United States or OHA. To the extent that OHA becomes the owner of any intellectual property created or delivered by Contractor in connection with the Services, OHA will grant a perpetual, worldwide, non-exclusive, royalty-free and irrevocable license, subject to any provisions in the Agreement that restrict or prohibit dissemination or disclosure of information, to Contractor to use, copy, distribute, display, build upon and improve the intellectual property.

30. Severability

The parties agree that if any term or provision of this BPA is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the BPA did not contain the particular term or provision held to be invalid.

31. Special Federal Requirements

31.1 Contractor agrees to comply with the relevant parts of 45 CFR Part 74, Part 80, Part 84, Part 86, Part 90, Part 91, Part 92 and Office of Management and Budget (OMB) Circulars A-128 or A-133 as appropriate.

31.2 Contractor agrees to comply with Executive Order 11246 entitled Equal Employment Opportunity as amended by Executive Order 11375 and as supplemented in Department of Labor Regulation 1 CFR Part 60. All subcontractors shall also comply with these provisions.

31.3 Contractor shall maintain fiscal records and other records pertinent to this BPA. All fiscal records shall be maintained pursuant to accepted accounting standards and other records shall be maintained to the extent necessary to clearly reflect actions taken. Contractor further agrees to provide access to any books, documents, papers and records which are pertinent to this BPA and, further, to allow the making of excerpts, transcripts, or performing audits or examinations thereof. Such access shall be freely allowed to state and federal personnel and their duly authorized agents. All records shall be retained and kept accessible for five years following final payment and conclusion of all pending matters. All subcontracts shall also comply with these provisions. In addition, Contractor, its agents, employees and subcontractors shall maintain all such records as fully confidential. Such confidential status shall be in compliance with the requirements stated in 45 CFR 205.50, 42 CFR 431 subpart F, ORS 411.320, and ORS 418.130.

31.4 To the extent it is required to do so by law, Contractor shall abide by all mandatory standards and policies which related to energy efficiency and which are contained in the State of Oregon Energy Conservation Plan, which was issued in compliance with the Energy Policy and Conservation Act (PL94-385). All subcontracts shall also be in compliance with the foregoing.

31.5 If the sum payable under this contract exceeds or may exceed $100,000, Contractor shall provide the State of Oregon with written assurance that Contractor will comply with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 USC 1857 H), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738 and Environmental Protection Agency regulations (40 CFR Part 15). Contractor agrees to promptly report all infractions to the State of Oregon, the Department of Health and Human Services, and the U.S. Environmental Protection Agency. All subcontracts shall also comply with these provisions.

31.6 Contractor shall comply, at its expense, with all requirements under OMB Circular A-128, A-133, or other applicable OMB circulars, in its operations.

31.7 To the extent it is required to do so by federal law, Contractor certifies that it will provide a drug-free workplace by:

(1) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in Contractor's workplace and specifying the actions that will be taken against employees for violation of such prohibition.

(2) Establishing a drug-free awareness program to inform employees about:

(a) The dangers of drug abuse in the workplace; and

(b) Contractor 's policy of maintaining a drug-free workplace; and

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that may be imposed upon employees for drug abuse violations.

(3) Making it a requirement that each employee to be engaged in the performance of this BPA be given a copy of the statement required by Section 31.7 (1).

(4) Notifying the employee in the statement required by Section 31.7 (1) that as a condition of employment, the employee will:

(a) Abide by the terms of the statement; and

(b) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction.

(5) Notifying DMAP within 10 days after receiving notice under Section 31.7 (4)(b), from an employee or otherwise receiving actual notice of such conviction.

(6) Imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 5154 of the Drug-Free Workplace Act of 1988.

(7) Making a good faith effort to continue to maintain a drug-free workplace through implementation of Section 31.7 (1) through (6).

31.8 Contractor certifies, to the best of its knowledge and belief, that:

(1) No federal appropriated funds have been paid or will be paid, by or on behalf of Contractor, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this federal contract, grant, loan, or cooperative agreement, the Contractor agrees to complete and submit Standard Form-LLL "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, sub grants, and contracts under grants, loans, and cooperative agreements) and that all sub recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

32. Recycling

As required by Oregon Statute, in the performance of this BPA, Contractor shall use, to the maximum extent economically feasible, recycled paper.

33. Mediation

Should any dispute arise between the State of Oregon and BROKER which relates to this BPA and is the subject of non-binding mediation process, the Contractor agrees to participate in good faith in the non-binding mediation process. All cost of mediation shall be borne equally by the parties.

34. Applicable Law and Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, “Claim”) between the parties that arise from or relate to this Agreement shall be brought and conducted solely and exclusively within a circuit court in the State of Oregon of proper jurisdiction. THE PARTIES, BY EXECUTION OF THIS AGREEMENT, HEREBY CONSENT TO THE IN PERSONAM JURISDICTION OF SAID COURTS. Except as provided in this section, neither party waives any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the eleventh amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court.

35. Waiver

A waiver by BROKER of its right to a remedy for breach of this BPA shall not be deemed to waive its right to a remedy for a subsequent breach. BROKER's acceptance of services, or payment under this BPA shall not preclude BROKER from recovering against Contractor or Contractor 's surety for damages due to Contractor 's failure to comply with this BPA.

36. Remedies Cumulative

The remedies exercisable by BROKER under this BPA shall be cumulative and in no way affect any other remedy available under the law to BROKER.

37. Compliance With Tax Laws

ORS 305.385(6) states:

> "No contract or other agreement for the purpose of providing goods, services or real estate space to any agency shall be entered into, renewed or extended with any person, unless the person certifies in writing, under penalty of perjury, that the person is, to the best of the person's knowledge, not in violation of any tax laws described in ORS 305.380(4)."

By signature on this BPA, Contractor hereby swears/affirms, under penalty of perjury as provided in ORS 305.385(6), that to the best of their knowledge they are not in violation of any of the tax laws described in ORS 305.380(4).

38. Amendment

The terms of this BPA may not be waived, altered, modified, supplemented or amended, except by written agreement signed by both parties.

39. Headings

The headings used in this Agreement are solely for convenient reference, are not part of this Agreement, and are not to be considered in construing or interpreting this Agreement. In this Agreement, the singular shall include the plural and the plural shall include the singular. Any indication of gender in this Agreement shall be modified, as required, to fit the gender of the party in question.

38. Third Party Beneficiaries

BROKER and Contractor are the only parties to this BPA and are the only parties entitled to enforce its terms. Nothing in this BPA gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this BPA.

40. Merger Clause

THIS AGREEMENT (INCLUDING ATTACHMENT A) CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. NO WAIVER, CONSENT, MODIFICATION OR CHANGE OF TERMS OF THIS AGREEMENT SHALL BIND EITHER PARTY UNLESS IN WRITING AND SIGNED BY BOTH PARTIES. SUCH WAIVER, CONSENT, MODIFICATION OR CHANGE, IF MADE, SHALL BE EFFECTIVE ONLY IN THE SPECIFIC INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, NOT SPECIFIED HEREIN REGARDING THIS AGREEMENT. CONTRACTOR, BY THE SIGNATURE BELOW OR ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

Signed this _____ day of _____ , 2013 by:

_____
**Allan Pollock, General Manager**
**Salem Area Mass Transit District**

_____
**Contractor signature and date**

_____
**(**Print name and title of authorized signatory)

_____
**(**Print legal name of Contractor)

# Attachment A

## CRIMINAL RECORDS AND BACKGROUND CHECK DISCLOSURE AND AUTHORIZATION PACKET

All persons who apply for positions that involve transporting customers of Salem Area Mass Transit District (SAMTD) and TripLink must undergo a criminal records and background check.

Please read the attached documents and then sign the Criminal History Records Check and Fair Credit Reporting Act Disclosure and Authorization forms. **Failure to authorize a criminal background check will disqualify you from transporting SAMTD customers.**

Attached are the following documents and forms:
(1) Instructions for completing the forms in this packet.
(2) The Criminal History Records Check and Fair Credit Reporting Act Disclosure and Authorization forms (Form A) that:
► explain the intent of and your rights under Oregon Revised Statutes (ORS) 181.537 and 267.237;
► notify you that you are authorizing release of information pursuant to the Fair Credit Reporting Act;
► explain the procedure for determining qualification to provide transportation services for SAMTD; and
► authorize Salem Area Mass Transit to obtain a background and criminal history records check.

**NOTE:**

- Read this packet **carefully**.
- **Ask questions** of your employer or of SAMTD staff before you turn in these forms. To contact SAMTD staff, please dial 503-588-2424.
- **Sign Form A.**

## Instructions for Completing Form

**Disclose All History.** You must disclose your complete criminal history. This includes convictions of or guilty and no-contest pleas to felonies and misdemeanors, probation violations, and failures to appear. Be certain to list date(s) (approximate if necessary) and locations for each conviction. **If you fail to disclose any portion of your criminal records history, you will be disqualified from transporting SAMTD customers.**

**Traffic-Related Offenses**. Certain traffic offenses can result in a felony or misdemeanor conviction. If you have been convicted of, or plead guilty or no contest to such a traffic-related offense, you must disclose it.

**Old Offenses.** If you have history that you believe should have been "expunged" or removed from your record, but you do not **know** that it was expunged or removed, you should disclose it.

**Current Charges/Awaiting Prosecution**. If you are currently awaiting prosecution (waiting for trial) for a crime, which, if convicted, would disqualify you, you must disclose the nature of the charges. SAMTD will not allow such persons to provide services without supervision until the charges are resolved. You must provide SAMTD with information about the outcome of the charges or the trial as soon as that information is available.

**Additional Information.** If you wish to give more information about your conviction, you may use the space on Form B or attach additional pages with that information. If you wish to provide additional information, you should include at least the following:

- Describe the circumstances that gave rise to your arrest or conviction.

- Describe what actions you were required to take or that were taken against you because of the conviction (for example, did you serve probation, did you pay restitution, did you make an agreement that reduced the charge or resulted in the charges being dismissed, etc.?)

- Describe any treatment, counseling, rehabilitation (drug or alcohol), training, education or other program(s) that were required because of your arrest or conviction.

**Appeals.** If SAMTD disqualifies you from transporting SAMTD customers, you may have the right to appeal that determination. If you are disqualified you will receive an Appeals Procedure packet that includes an explanation of your appeal rights.

## Criminal History Records Check and Fair Credit Reporting Act Disclosure and Authorization Form

Form A

Oregon Revised Statutes (ORS) 181.537 and 267.237 provide SAMTD access to Oregon State Police and Federal Bureau of Investigation (FBI) criminal records if the information is required to protect vulnerable Oregonians. ORS 181.537 and 267.237 authorize SAMTD to require criminal history records checks and fingerprinting of individuals who operate motor vehicles for the public and who are employed by mass transit districts or transportation districts who provide transit service under a contract with the Office of Medical Assistance Programs. Screening applies to current employees, prospective employees (job applicants), and individuals under contract who transport the general public, including children, the elderly, individuals with disabilities, and clients eligible for the Office of Medical Assistance Program.
The Fair Credit Reporting Act (FCRA), as amended by the Fair and Accurate Credit Transactions Act of 2003 (FACTA), authorizes credit reporting agencies (CRAs) to provide information to a person or entity who intends to use the information for employment purposes. SAMTD might request and obtain a report from a CRA during the course of conducting a background check in connection with your application to provide transportation services to SAMTD. A summary of rights under FCRA is enclosed as part of the Criminal Records and Background Check Disclosure and Authorization Packet.

By signing this form, you acknowledge and agree to the following:

• My ability to provide transportation for SAMTD is conditional upon the completion of a criminal history records check. I will not be qualified to provide transportation for SAMTD if I:

- refuse to complete an Oregon or federal criminal history records check, or provide my fingerprints.
- have a record of convictions or indictments of certain disqualifying criminal offenses.
- fail to disclose information or submit false information on the disclosure form.

• SAMTD uses all means legally available to conduct a background and criminal history records check. A complete inquiry into my background and criminal history record may include:

- a criminal history records check through the Oregon State Police (OSP) and the Federal Bureau of Investigation (FBI), including fingerprint-based record checks.
- requesting and obtaining a consumer report under the terms and conditions of FCRA.
- using the information I disclose on the Criminal History Records Check and Fair Credit Reporting Act Disclosure and Authorization forms.
- obtaining my driving record from any state's Department of Motor Vehicles or equivalent agency.

• I am entitled to review a copy of my personal Oregon criminal offender information as maintained and reported by the Oregon State Police. If I believe that any information contained in this report is inaccurate or incomplete, or has been kept in violation of any state or federal statute or act, I may challenge the content of the report through the Oregon State Police. Under federal law I am not entitled to review or obtain a copy of my FBI record. If I wish to challenge any FBI record information, including fingerprint-based records, I may do so through the Federal Bureau of Investigation.

• My completed criminal history records check and determination will be entered into a database maintained by SAMTD. The database information is confidential. Oregon State Police will return fingerprint cards to SAMTD. SAMTD will destroy the fingerprint portion of the cards upon receipt. I am entitled to review my Oregon criminal offender record maintained by SAMTD, after positive identification has been made.

• I have received a copy of the document entitled "Summary of Your Rights under the Fair Credit Reporting Act." By signing this authorization form, I am consenting to SAMTD obtaining information from CRAs in accordance with the FCRA.

• If SAMTD determines that I am disqualified from providing transportation for SAMTD customers, the disqualification notice and Appeals Procedure will be sent to me.

**By my signature below, I acknowledge that I have read and understand the above, and that I authorize SAMTD to obtain all information necessary to conduct a criminal records check and a background check, as described and explained above. I hereby authorize and instruct SAMTD to obtain and review my credit report. My credit report will be obtained from a credit reporting agency chosen by SAMTD. I understand and agree that SAMTD intends to use the credit report for the purpose of evaluating my financial ability to provide services to SAMTD.**

**My signature below also authorizes the release to credit reporting agencies of financial or other information that I have supplied to SAMTD in connection with such evaluation. Authorization is further granted to the credit reporting agency to use a copy of this form to obtain any information the credit reporting agency deems necessary to complete my credit report.**

**I understand that this form is effective when signed below, and photocopy, facsimile or electronic copies shall have the same effect for all purposes as an ink-signed original.**

Signature:_____

Printed Name: _____

Date: _____

Telephone Number: _____

Transportation Provider/Employer Name:_____

Transportation provider verifies they have pre-qualified this individual to be processed for fingerprinting.

Transportaion Provider signature: _____

Date of Hire: _____

Note: Eligibility to provide transportation for SAMTD is subject to the completion of a criminal history records check as defined in ORS 181.537 and 267.237.

**BLANKET PURCHASE AGREEEMENT**
**PART III**
**CONTRACTOR INFORMATION AND PRICING**

**BUSINESS PROFILE**

1.

MAIN OFFICE:

LEGAL NAME:

STREET ADDRESS:

MAILING ADDRESS:

CITY/STATE/ZIP:

PHONE NUMBER:

FAX NUMBER _____

EMAIL ADDRESS _____

2. **TYPE OF BUSINESS**

PUBLIC AGENCY: _____

PRIVATE NON-PROFIT:OTHER:

PRIVATE FOR-PROFIT:

SOLE PROPRIETORSHIP:

PARTNERSHIP:

CORPORATION

LIMITED LIABILITY COMPANY:

3. **IDENTIFICATION NUMBERS**

OREGON SECRETARY OF STATE REGISTRY ID NUMBER:

FEDERAL TAX NUMBER:

OTHER: (Specify):

4. **KEY PERSONNEL**

| CHIEF ADMINISTRATIVE OFFICIAL | KEY CONTACT PERSON FOR CONTRACT PERFORMANCE |
|---|---|
| **NAME**: _____ | **NAME**: _____ |
| **TITLE:** _____ | **TITLE:** _____ |
| **ADDRESS:** _____ | **ADDRESS:** _____ |
| **PHONE:** _____ | **PHONE:** _____ |

**RATE SHEET (See new rate sheet next page)**

Date: _____

Provider Code:_____ Contract #: _____ # of Vehicles:_____

Business Name:_____

Mailing Address:_____
NUMBER & STREET

_____
CITY STATE ZIP

Phone Number: (____) _____ - _____Fax Number: (____) _____ - _____

Hours of Operation: Days of Week_____ Time: _____

**EFFECTIVE DATE:** _____

| TYPE OF SERVICE (Sedan, Wheelchair Van, Stretcher, etc) | PICK-UP RATE OR CHARGE (Rate amount, e.g. $1.00) | ADDITIONAL CHARGES (Per Mile Rate, etc) | AFTER HOURS RATE (optional) 6:01pm – 5:59am daily & Saturday & Sunday | RATE OR CHARGE TO GENERAL PUBLIC FOR SAME UNIT OF SERVICE |
|---|---|---|---|---|
| *FOR EXAMPLE: Sedan* | *$10.00* | *$1.25 Per Mile* | ***Only one After-Hour rate for all counties is acceptable*** | *$2.00* |
| **MARION COUNTY** | | | | |
| | | | | |
| | | | | |
| **POLK COUNTY** | | | | |
| | | | | |
| | | | | |
| **YAMHILL COUNTY** | | | | |
| | | | | |
| | | | | |

**SHUTTLE RATE (Optional) $ _____ per day**

Contractor's Signature:_____Date: _____

**RATE SHEET**

Date: _____

Mailing Address:_____
NUMBER & STREET

_____
CITY STATE ZIP

Phone Number: (____) _____ - _____ Fax Number: (____) _____ - _____

Hours of Operation: Days of Week_____ Time: _____

**EFFECTIVE DATE:** _____

| TYPE OF SERVICE | PICK-UP RATE OR CHARGE (Rate amount, e.g. $1.00) | ADDITIONAL CHARGES (Per Mile Rate, etc) | RATE OR CHARGE TO GENERAL PUBLIC FOR SAME UNIT OF SERVICE |
|---|---|---|---|
| *FOR EXAMPLE:* *Sedan* | *$10.00* | *$1.25 Per Mile* | *$2.00* |
| **MARION COUNTY** Ambulatory | | | |
| Wheelchair | | | |
| Stretcher | | | |
| Secured | | | |
| **POLK COUNTY** Ambulatory | | | |
| Wheelchair | | | |
| Stretcher | | | |
| Secured | | | |
| **YAMHILL COUNTY** Ambulatory | | | |
| Wheelchair | | | |
| Stretcher | | | |
| Secured | | | |

**AFTER HOURS RATE** **$**_____

**SHUTTLE RATE (Optional)** **$** _____ **per day**

**Use of provider wheelchair** **$** _____

Contractor's Signature:_____Date: _____

**WORK SITE SCHEDULE**

1. List business hours and days during which you are available to operate TRIPLINK Services. Changes are only accepted with monthly rate sheets:

   a. Contractors must operate 24/7 to be listed on the hospital discharge list which is sent to hospitals monthly.

2. Service Area

   b. Is your business available for out of area service trips (bid trips)? Indicate which counties you will service.

3. Indicate Services Provided

   Ambulatory

   Wheelchair

   Regular Size Large Reclining Supplied by Provider

   Stretcher

   Bariatric pt/specify weight _____

   Certified Secured Transport

   Other: _____

4. Project Management and Supervision

   a. Identify the contract manager (BROKER contact):

Name:

Telephone:

Title:

Location:

5. What is the date you will begin BROKER Service under this BPA. State whether you can assure that qualified and trained drivers will be available for services throughout the proposed Service Area(s) on that date.

6. COMPUTER INFORMATION

**Computer Hardware and Software Requirements**

**Scheduled Carriers**

A Scheduled Carrier is defined as any provider who pre-schedules trips or will have trips pre-scheduled for them to specific vehicles or runs. Providers qualified as a Scheduled Carrier will be required to use the broker-provided software to:

1. Retrieve Trip Sheet Info/Schedules/Manifests
2. Data-enter trip check-in info related to actual cost, actual pickup/drop off times, actual pick up/drop off odometers, cancels, and no-shows.

Hardware Requirements

**Computer**

Memory: 128 Megabytes of RAM minimum
256 Megabytes of RAM ***strongly*** recommended

Hard Drive:1 Gigabyte or more of free space available

CD ROM:4X or higher. Needed to install software.

Processor:Pentium III 500 Megahertz or higher

**Internet Access**

Type:High-speed or Broadband connections like DSL, Cable, or ISDN. Cannot be dial up modem.

Software Requirements

Operating System: Windows XP Pro Running most current Service Packs and Critical Updates
Norton Anti Virus running most current virus definition files
512 MB RAM
Pentium 2.8 Ghz (or higher) CPU
533 Mhz (or higher) Front side bus
100 Mbps NIC

Paratransit software: Use of this software is explicitly restricted to business matters exclusively related to this contract.

Other: Adobe Acrobat Reader available free by download.

As it relates to installed software:

(a) PROVIDER shall not sell, assign, let for hire, distribute, give away or otherwise supply to a third party all or any portion of the software, its supporting documentation, any copy thereof, or any modification thereto without prior written authorization from the broker. PROVIDER shall be entitled to make one copy solely for its internal archival purposes. The original and all copies of the software are and shall remain the property of ATC.

(b) PROVIDER agrees to observe complete confidentiality with regard to all aspects of the software and agrees:

(1) To take all reasonable precautions not to disclose or otherwise permit any other person or entity access, in any manner, to the software, except that such disclosure or access shall be permitted to any employee or consultant of PROVIDER requiring access to the software in the course of their employment or engagement, at the licensed site only;

(2) To ensure that all employees or consultants to whom disclosure is made under (b) (1) above are advised as to the confidential nature of the software and to take all reasonable steps to ensure that all such employees and consultants are prohibited from disclosing or copying any of the software except for the purposes of their employment and in accordance with this license;

(3) Not to alter, cancel, remove or deface any copyright or proprietary rights notice or identification that indicates ownership of the software or of any interest therein.

(c) PROVIDER shall not reverse engineer, reverse assemble or reverse compile the software Products in whole or in part.

(d) The supply of all modifications and enhancements shall be subject to the same conditions and restrictions contained in this BPA.

(e) Workstations requirements for running the software:

Windows XP Pro Running most current Service Packs and Critical Updates
Norton Anti Virus running most current virus definition files
512 MB RAM
Pentium 2.8 Ghz (or higher) CPU
533 Mhz (or higher) Front side bus
100 Mbps NIC

7. Driver and Vehicle Information

Yes No

___ ___ Drivers for my organization are skilled in passenger assistive techniques and are trained to use any specialized equipment such as wheelchair lifts to assist in loading and unloading riders.

___ ___ Drivers for my organization have completed an approved course in first aid training including the use of cardio-pulmonary resuscitation techniques (CPR) and complete a yearly review of Blood Borne Pathogens..

___ ___ My organization maintains records and evidence, which verifies that training has been received.

___ ___ Vehicles used by my organization are adequate for passenger safety and comfort. They are properly equipped, accessible, and comply with the federal motor vehicle safety standard having when applicable: seat belts as required by state, county, and/or city laws and regulations; wheelchair loading and securing devices as required, and; restraining devices, padding and blankets as needed.

**Vehicle Information**

List each vehicle to be used in the performance of service under this contract. Use additional or attach your company list if needed.

| Model | Make | VIN | License # | Year | Lift Equipped |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Print Clear Form



Oregon Health Authority

Division of Medical Assistance Programs

# PROVIDER ENROLLMENT AGREEMENT

This Enrollment Agreement sets forth the conditions for being enrolled as a Provider with the Oregon Health Authority ("Authority") and to receive a Provider Number in order to submit claims, and receive payment, for medical care, services, equipment and/or supplies furnished by Provider to persons eligible for medical assistance in Oregon ("Recipients"). Payments for medical assistance are made using Medicaid, State Children's Health Insurance Program, or funds from other federally funded programs.

_____ _____

*Provider name and location for this enrollment* *Date*

_____ _____

*Social Security Number* *Date of birth*

As a condition for participation as a provider with the authority for medical assistance, Provider agrees as follows:

**1. Eligibility and continued participation**

That the information submitted in the Enrollment Request form, Enrollment Attachment (if applicable), Disclosure Statement and supporting documentation is true and accurate. Provider further understands and agrees that:

a. Information disclosed by Provider may be subject to verification. This information will be used for purposes related to the administration of the Medical Assistance Program;

b. Provider will notify OHA of any changes to the information contained in the Enrollment Request form, Enrollment Attachment (if applicable), and Disclosure Statement, within 30 days of the date of the change; and

c. Any deliberate omission, misrepresentation or falsification of any information contained in the Enrollment Request form, Enrollment attachment (if applicable) and Disclosure Statement or contained in any communication supplying information to OHA may be punished by law, including but not limited to revocation of the OHA provider number and recovery of payments made.

**2. Services**

To provide covered medical care, services, equipment or supplies to recipients in accordance with all applicable provisions of statutes, rules and federal regulations governing the reimbursement of services or items under medical assistance programs in Oregon, including OHA Rules, as those laws, rules and instructions may be adopted or amended from time to time. "OHA Rules" means the General Rules (OAR 410 Division

120) and OHA provider rules(s) applicable to the Provider's service category and OHA program that are in effect on the date of service.

To perform all services which are paid for by OHA under this Enrollment Agreement as an independent contractor. Provider is not an "officer," "employee" or "agent" of OHA, as those terms are used in ORS 30.265.

**3. Accurate billing**

To certify by signature of the Provider or designee, including electronic signatures on a claim form or transmittal document, that the care, service, equipment or supplies claimed were actually provided and medically appropriate, were documented at the time they were provided, and were provided in accordance with professionally recognized standards of health care, applicable OHA Rules and this Agreement. The Provider is solely responsible for the accuracy of claims submitted, and the use of a billing entity does not change the Provider's responsibility for the claims submitted on Provider's behalf. Any overpayment made to Provider by OHA may be recouped by OHA including withholding of future payments or other process as authorized by law.

**4. Payment**

To accept the Authority's payment for any care, service, equipment or supplies as payment in full, and agrees not to make any additional charge to a Recipient except that specifically allowed by OHA Rules. Payment amount and methodology for making a payment is determined using the procedures described in applicable OHA Rules. By accepting payment, Provider certifies compliance with all applicable OHA Rules.

Provider understands that OHA has sufficient funds currently available and authorized to make payments under this Enrollment Agreement within OHA's biennial budget. Provider further understands that payment for services performed after this biennium is contingent on OHA receiving from the Oregon Legislative Assembly appropriations or other expenditure authority sufficient to allow OHA, in its reasonable administrative discretion, to continue to make payments.

**5. Compliance with applicable laws**

To comply with federal, state and local laws and regulations applicable to the care, services, equipment or supplies and this Agreement, including but not limited to OAR 410-120-1380. Failure to comply with the terms of this Enrollment Agreement or the OHA Rules may result in termination, sanctions, or payment recovery, subject to Provider appeal rights, pursuant to OHA Rules.

**6. Recordkeeping and access to records**

To keep such records as are necessary to fully disclose the specific care, services, equipment or supplies provided to Recipients for which reimbursement is claimed, at the time it is provided, in compliance with the applicable OHA Rules in effect on the date of service. Provider is responsible for the completion and accuracy of financial and clinical records and all other documentation regarding the specific care, services, equipment or supplies for which payment has been requested.

To provide upon reasonable request by the Authority, the Oregon Medicaid Fraud Unit, Office of Payment Accuracy and Recovery, the Oregon Secretary of State's Office and the federal government, or their duly authorized representatives, immediate access to review

and copy any and all records relied on by Provider in support of care, services, equipment or supplies billed to the Oregon medical assistance program. The term "immediate access" means access to records at the time the written request is presented to the Provider.

(a) ***Provider agreements.*** OHA must enter into an agreement with each provider under which the provider agrees to furnish to OHA or to the Health and Human Services (HHS) secretary on request, information related to business transactions in accordance with paragraph (b) of this section.

(b) ***Information that must be submitted.*** A provider must submit, within 35 days of the date on a request by the HHS Secretary or OHA, full and complete information about—

(1) The ownership of any subcontractor with whom the provider has had business transactions totaling more than $25,000 during the 12-month period ending on the date of the request; and

(2) Any significant business transactions between the provider and any wholly owned supplier, or between the provider and any subcontractor, during the 5-year period ending on the date of the request.

(c) *Denial of Federal financial participation (FFP).*

(1) FFP is not available in expenditures for services furnished by providers who fail to comply with a request made by the HHS Secretary or OHA under paragraph (b) of this section or under 42 CFR §420.205 (Medicare requirements for disclosure).

(2) FFP will be denied in expenditures for services furnished during the period beginning on the day following the date the information was due to the HHS Secretary or OHA and ending on the day before the date on which the information was supplied.

**7. Confidentiality**

To protect the confidentiality of identifying information that is collected, used or maintained about a recipient. Confidential information shall only be released with appropriate written authorization of the recipient or their authorized representative, or for purposes directly connected with the administration of the OHA program in accordance with applicable federal and state law. To the extent provider is a covered entity, provider specifically agrees that it is required to comply with the Health Insurance Portability and

Accountability Act (HIPAA), sections 262 and 264 of Public Law 104-191, 42 USC 1320d and federal regulations at 45 CFR Parts 160, 162 and 164, all as amended from time to time, in effect on the date of service.

**8. Security**

To take reasonable precautions to ensure the security of confidential information, provider numbers, all passwords, Personal Identification Numbers (PIN) or other security access codes and the use of all transmission processes such as the web portal or other access portal solely for purposes of the OHA Provider Enrollment Agreement, consistent with OHA Rules and applicable law.

**Duration and termination of agreement**

This agreement shall remain in effect for no more than five years. Provider or OHA may terminate this Enrollment Agreement by written notice to the other by certified mail, return receipt requested, subject to any specific provider termination requirements in OHA Rules.

**PROVIDER:** I have read the foregoing agreement, understand it and agree to abide by its terms and conditions. I further understand and agree that violation of any of the terms and conditions of this Agreement constitute sufficient grounds for termination of this agreement and may be grounds for other action as provided by rule, regulation or statute.

_____

*Print name of provider or authorized business representative*

_____ _____

*Signature of provider or authorized business representative* *Date*

_____

*Social Security Number* *Date of birth*

_____

*Title of business representative*

## SUBCONTRACTOR AGREEMENT

This Agreement ("Agreement") is made and entered into as of July 1, 2013 by and between XXX Health Plans, Inc. ("Contractor"), an Oregon nonprofit corporation whose address is XXX, and YYY Council of Governments ("Subcontractor"), an Oregon intergovernmental entity created under the authority of ORS 190.010 whose address is YYYY.

## RECITALS

A. Contractor received certification from the Oregon Health Authority as a Coordinated Care Organization ("CCO") for the service area of Benton, Lincoln and Linn Counties ("Service Area");

B. As a CCO, Contractor will coordinate and manage health care for Oregon Health Plan members ("Members") in its Service Area, including mental and physical health care services and Non-Emergent Transportation services (NEMT).

C. Contractor has determined that there is a need for assistance as pertains to provision, coordination and management of NEMT services for its Members.

D. Subcontractor specializes in the provision, coordination and management of NEMT services and is designated and subcontracted currently as a transportation brokerage in the State of Oregon.

E. Contractor desires to contract with Subcontractor to have Subcontractor coordinate and manage NEMT services for Members residing in the Linn, Benton and Lincoln Counties, and Subcontractor desires to coordinate and manage such services.



The parties agree as follows:

1. ***WORK*** – Contractor retains Subcontractor, as its subcontractor to coordinate NEMT services for Members in a capitated risk arrangement, including, but not limited to: i) performing the obligations described in Exhibit A; ii) performing the obligations under Contract ####### between Oregon Health Authority on behalf of Oregon Health Plan and XXX Health Plan, Inc. ("Contract #######"), including tasks and duties as reasonably requested by Contractor to ensure Contractor's compliance with Contract #######; iii) contracting with individual providers and drivers ("Provider" or "Providers"); iv) ensuring the accessibility of NEMT services for Members; and v) providing related services which are authorized by Contractor, all of which are collectively identified and defined as "Subcontracted Work". Subcontractor agrees to render all Subcontracted Work pursuant to the terms of this Agreement and in accordance with accepted standards of care and all applicable laws, government regulations, and other instructions or documentation submitted to Subcontractor by Contractor in relation to this Agreement.

2. ***PROVIDERS*** - Subcontractor represents and warrants that all Providers who perform any Subcontracted Work hereunder are duly licensed, certified and/or accredited and qualified, as concerns education, experience and competence and have met all guidelines and standards

applicable to Providers' ability to perform Subcontracted Work at a minimum. Subcontractor shall be responsible for immediately notifying Contractor of any Provider whose license, certification, or insurance is no longer valid, suspended, revoked, or not renewed. Failure of Subcontractor to so notify Contractor of Provider's change in credential or employment status shall be deemed a breach of this Agreement by Subcontractor.

3. ***COMPENSATION*** - For Subcontracted Work hereunder, Subcontractor will be paid on a per Member per month basis for all NEMT eligible Members, which is attached to this Agreement as Exhibit B. Compensation process may change based on accuracy of data and ability to reconcile enrollment. Subcontractor will be compensated for demonstrated actual costs exceeding the Per Member Per Month.

Compensation will be paid to Subcontractor monthly based on the weekly 834 eligibility files from Oregon Health Authority in accordance with enrollment to the CCO for Contract #######.

Contractor and Subcontractor will meet at least quarterly for the purpose of evaluating the compensation with a focus on service delivery model.

4. ***HIPAA COMPLIANCE*** - Subcontractor will comply with Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and Contract ####### as relates to HIPAA, including but not limited to: i) Privacy and Security of Individually Identifiable Health Information; ii) Individually Identifiable Health Information about specific individuals is protected from unauthorized use or disclosure consistent with the requirements of HIPAA; and iii) Individually Identifiable Health Information relating to specific individuals may be exchanged between Contractor and the Oregon Health Authority for purposes directly related to the provision of services to Members. Since Subcontractor will have access to personally identifiable patient health information, Subcontractor agrees to enter into and abide by Contractor's Business Associate Agreement under HIPAA as attached to this Agreement as Exhibit C "Business Associate Agreement".

5. ***DOCUMENTATION*** - Unless otherwise authorized by Contractor, Subcontractor must submit necessary documentation to Contractor in order to perform and to continue to perform Subcontracted Work under this Agreement, including but not limited to: (i) this executed Agreement; (ii) upon request of Contractor, copies of the licensure and/or certification and a completed credentialing packet of each transportation Provider to perform services under this Agreement, (iii) upon request of Contractor, certificates of insurance (auto, general and professional liability); and (iv) other documentation that Contractor may deem reasonably necessary.

6. ***RECORDS -*** Subcontractor shall complete all records and reports in a timely manner, including such records and reports reasonably requested by Contractor to ensure Contractor's and/or Subcontractor's compliance with all applicable federal and state laws and regulations and/or Contract #######. All such records and reports shall be prepared in accordance with the requirements of Contract ####### and all applicable federal and state laws and regulations.

7. ***RECORDS RETENTION*** - Subcontractor shall keep a copy of all documentation relating to Subcontracted Work rendered under this Agreement as required under Exhibit A, including Contract #######. Subcontractor shall submit a copy of such documentation to Contractor upon reasonable request.

8. ***TERM AND TERMINATION*** - This Agreement shall be effective on July 1, 2013. The term of this Agreement shall be continuous and, except as otherwise provided herein, can be terminated with ninety (90) days written notice by either party; provided however, Contractor reserves the right to terminate this Agreement immediately in the event that its prime contract, under which Subcontracted Work is contracted, is terminated or expires. Either party may immediately terminate this Agreement or specify a timeframe for termination of this Agreement in the written notice: (1) upon the material breach by the other party of any of such other party's obligations hereunder, which breach has not been cured within fourteen (14) days or within the timeframe for cure otherwise specified in the written notice after the breaching party has received written notice thereof; or (2) upon providing written notice to the other party if the other party has committed a material breach of Section 9 “Confidential Information” herein, which breach has not been cured within fourteen (14) days or within the timeframe for cure otherwise specified in the written notice. If this contract crosses fiscal years, funding for future years is contingent upon the Subcontractor adopting appropriations.

9. ***CONFIDENTIAL INFORMATION*** - For purposes of this Agreement, “Confidential Information” shall include all information or material that has or could have commercial value or other utility in the business or prospective business of Contractor or its affiliates, including any information collected or acquired by Subcontractor in the process of fulfilling its obligations under this Agreement. Confidential information also includes all information of which unauthorized disclosure could be detrimental to the interests of Contractor, or its affiliates, whether or not such information is identified as Confidential Information by Contractor. By example and without limitation, Confidential information includes, but is not limited to, any and all information of the following or similar nature, whether or not reduced to writing: business concepts, customer lists, customer and supplier identities and characteristics, agreements, marketing knowledge and information, sales figures, pricing information, marketing plans and business plans, strategies, forecasts, financial information, budgets, software, research papers, projections, procedures, routines, quality control procedures, processes, formulas, trade secrets, innovations, inventions, discoveries, improvements, research or development and test results, specifications, data, software applications, data structures, software tools, know-how, formats, plans, sketches, specifications, drawings, models, and any other information or procedures that are treated as or designated secret or confidential by Contractor or its customers or potential customers. Subcontractor may acquire or be given access to information which Contractor considers confidential and Subcontractor hereby agrees that it will not, without Contractor’s prior written consent, disclose (except as necessary in the performance of this Agreement) any Confidential Information. Subcontractor will protect the confidentiality of such information and will restrict access to Contractor’s Confidential Information to as few of its respective employees as necessary. All Confidential Information shall belong solely and exclusively to Contractor. Subcontractor agrees to immediately return or destroy Contractor’s Confidential Information, including copies thereof, upon request. It is understood and agreed that nothing in this Agreement shall prohibit or limit Subcontractor’s use or disclosure of any Confidential

Information which: (i) was known to Subcontractor prior to the date of this Agreement; (ii) was independently developed by Subcontractor; (iii) was lawfully acquired from third parties (which had no obligations of confidentiality with respect to such information); (iv) is or becomes publicly available through no breach of this Agreement; or (v) is required to be disclosed by the written order of a court or other governmental body; provided, however, that if Subcontractor becomes subject to such an order Subcontractor will promptly deliver notice of such to Contractor so that Contractor may have time to take action to oppose or limit such order. The parties acknowledge that Subcontractor is subject to Oregon Public Records Law and that Subcontractor will comply with this Section 9 to the extent permitted by Oregon Public Records Law.

10. ***INDEMNIFICATION*** - Each party agrees to indemnify, defend and hold the other party, its officers, directors, employees and representatives, harmless from and against any and all loss or liability for any third party claims, causes of actions, suits, proceedings, losses, damages, demands, settlement amounts, fees, expenses, fines, penalties and costs (including reasonable attorneys' fees) for personal injury or other damage to the extent arising from, based on, or caused by fault or negligence in the performance of the party's obligations under this Agreement. The parties agree that Subcontractor's indemnification of Contractor shall be in accordance with the Oregon Tort Claims Act and the Oregon Constitution.

11. ***INSURANCE*** - Subcontractor represents and warrants that it shall provide, entirely at its own expense, continuously during the term of this Agreement, all necessary insurance, including the insurance requirement under Contract #######, to protect against risks associated with performing Subcontracted Work and against liability arising from its own negligence or that of Providers, auxiliary staff, other employees or agents, or by operation of law. The Subcontractor shall cause the Provider's general liability insurance and auto liability insurance required under this contract to include Contractor as Additional Insureds with respect to Subcontractors activities under this Contract. Subcontractor shall also maintain appropriate professional liability insurance in the amounts required by Contractor. The parties agree that Subcontractor's insurance shall be in accordance with the Oregon Tort Claims Act and the Oregon Constitution.

12. ***REMEDIES*** - Subcontractor agrees that in addition to any other remedy available to Contractor pursuant to statute or common law, this Agreement or otherwise, Contractor may seek injunctive relief from a court of competent jurisdiction to enforce any obligations set forth in this Agreement. The parties also acknowledge that mediation usually helps parties to resolve disputes that have arisen regarding contract interpretation and administration. Therefore before proceeding to arbitration, the parties agree to mediate their differences. In the event mediation is unsuccessful, the parties agree to submit the dispute to a mutually agreed upon arbiter for final and binding arbitration pursuant to its then existing rules. All costs of arbitration shall be shared equally between the parties hereto, and such costs may be awarded to either party by the arbitrator as a part of the award. The arbitrator shall also require the party not prevailing to pay the prevailing party's attorney fees, costs and disbursements. Any award entered pursuant to this Section shall be reduced to the form of a judgment and may be entered in the judgment docket or registry of Benton County Circuit Court.

13. ***INDEPENDENT CONTRACTOR*** - By this Agreement the parties intend to create the relationship of independent contractor between them. Subcontractor is not the employee, agent, partner, or joint venture of Contractor. Contractor will not provide any benefits to Subcontractor or Providers or employees other than that described in this Agreement. Subcontractor shall comply with all laws, rules, ordinances, and regulations of all federal, state, or local political bodies having jurisdiction over Subcontracted Work. Subcontractor shall obtain, and cause all of its Providers and employees to obtain, all permits, licenses, certifications and insurance necessary to render Subcontracted Work hereunder. Subcontractor shall pay all taxes, including payroll taxes, insurance and contributions for social security and unemployment, which are measured by wages, salaries, or other remunerations, paid to its Providers and employees, levied under existing laws, rules, or regulations. It is expressly agreed and understood that this is a nonpersonal services contract, under which the professional services rendered by the Subcontractor are rendered in its capacity as an independent contractor. Contractor may evaluate the quality of professional and administrative services provided, but retains no control over professional aspects of the services rendered.

14. ***CONFORMITY WITH STATUTE, PROSPECTIVE AMENDMENT*** - Any provisions of law which invalidate or otherwise are inconsistent with the terms of this Agreement or which would cause one or both of the parties to be in violation of law shall supersede those terms of this Agreement. Both parties shall exercise their best efforts to comply with all applicable provisions of law and other rules and regulations of relevant governmental authorities. In the event of a change in statute or regulation, which in the good faith belief of counsel for either party, renders any portion or aspect of this Agreement unlawful, the parties shall negotiate in good faith to amend this Agreement to comply with applicable law. If the parties cannot agree to such amendments within 30 days of the initiation of negotiations, either party may terminate this Agreement upon 30 days' notice to the other. In addition, the parties shall negotiate in good faith to amend this Agreement to account for shifts in responsibilities between the parties as the parties create efficiencies over time. Subcontractor agrees to execute or abide by any amendments to Contract ####### as required by the Oregon Health Authority.

15. ***ADMINISTRATIVE DUTIES*** - Subcontractor will rely on Contractor to assume the primary role as concerns the following administrative duties under Contract #######: i) complaints and grievances; ii) customer services; iii) enrollment/disenrollment; and iv) member materials. Contractor may delegate aspects of the above mentioned as is necessary to fulfill its contractual requirements and Subcontractor shall provide best efforts in assisting Contractor. As concerns the above mentioned administrative duties as well as the other administrative responsibilities under Contract #######, Contractor and Subcontractor will meet on a quarterly basis to review and assign the coordination of administrative duties and responsibilities and may adjust administrative contractual requirements and compensation accordingly.

16. ***MISCELLANEOUS PROVISIONS***

a. **ENTIRE AGREEMENT** - This Agreement sets forth the entire understanding of the parties, and, unless otherwise provided for herein, may not be modified except in writing signed by the parties. This Agreement may be executed in one or more counterparts, each of

which shall be deemed an original but all of which together will constitute one and the same instrument. This Agreement may be executed by facsimile signature.

b. **SURVIVAL** - The terms of paragraphs 4, 5, 6, 9, 10, 11, 12, 13, and 14 and any others which by their terms or nature are intended to survive the termination or expiration of this Agreement, shall survive such termination or expiration.

c. **ASSIGNMENT** - Except for the provision of Non-Emergent Medical Transportation services to providers, which shall be delegated by Subcontractor in compliance with Contract #######, Subcontractor may not assign, delegate or otherwise transfer this Agreement or any of its rights or obligations hereunder without the prior written consent of Contractor. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

d. **SEVERABILITY** - Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. The headings in this Agreement are for convenience of reference only and shall not be deemed to alter or affect any provisions thereof.

e. **FORCE MAJEURE** - Neither party shall be liable for any failure or inability to perform their respective obligations hereunder due to any cause beyond the reasonable control of the non-performing party, including without limitation, acts of God, regulations of laws of any government, acts of war or terrorism, acts of civil or military authority, fires, floods, accidents, epidemics, quarantine restrictions, unusually severe weather, explosions, earthquakes, strikes, labor disputes, loss or interruption of electrical power or other public utility, freight embargoes or delays in transportation, or any similar or dissimilar cause beyond its reasonable control.

f. **GOVERNING LAW** - This Agreement shall be governed by and construed in accordance with the internal laws of the State of Oregon without regard to its conflict of laws principles.

IN WITNESS WHEREOF, the parties have signed this Agreement on the date written above.

CONTRACTOR:

By:_____

Name:_____

Title:_____
Date:_____

SUBCONTRACTOR

By:_____

Name:_____

Title:
Date:_____

Approved As To Form:

By:_____

Name:_____

Title:__

Date:_____

 Sample contract between XXX Health Plans and YYY Council of Governments.

**EXHIBIT A**
**SCOPE OF WORK**

Contractor and Subcontractor understand and agree as follows:

1. Subcontracted Work, including the performance and provision of Non-Emergent Medical Transportation, will be provided according to Oregon Administrative Rules as amended and attached.

**410-136-3020 New Rule**
**General Requirements for NEMT**

(1) The brokerage shall:
(a) Prior authorize and pay subcontractors for the least costly but most appropriate mode of transportation for the client's medical needs to and from an CCO covered medical service. The most appropriate and least costly ride may include requiring the client to share the ride with other clients;
(b) Ensure the client is obtaining OHP covered medical services in the client's local area. "Local area" means an area within the accepted community standard and includes the client's metropolitan area, city or town of residence;
(c) Verify the client's CCO eligibility and that the client's benefit package includes NEMT services. The brokerage shall verify this through electronic eligibility information;
(d) Assess the client's access to other means of transportation, such as driving their own car or getting a ride from a family member or neighbor;
(e) Verify the client's attendance for continuing requests for rides if the medical provider could not affirm an appointment for a previous ride;
(f) Schedule a ride with an alternate subcontractor if the subcontractor originally assigned is unable to provide the ride; and
(g) Assign rides based on an evaluation of several factors, including but not limited to:
(A) Cost;
(B) The client's need for appropriate equipment and transportation;
(C) Any factors related to a subcontractor's capabilities, availability and past performance; and
(D) Any factors related to the brokerage's need to maintain sufficient service capacity to meet client needs.



(4) Pursuant to OAR 410-120-1210, Medical Assistance Benefit Packages and Delivery System, clients receiving the following benefit packages are not eligible for NEMT:
(a) OHP Standard;
(b) Citizen Alien Waived Emergency Medical; and
(c) Qualified Medicare Beneficiary (QMB) only.

(5) The brokerage shall maintain records of the reasons for authorizing a ride:
(a) That is not cost effective or not based on the factors specified in section (3);
(b) With more than two attendants for an ambulance or stretcher car; or
(c) With more than one attendant for a wheelchair van.

(6) The brokerage shall provide a ride to a client to fill prescription medication only in the following situation:
(a) The client needs to stop on the way home to fill or pick up prescribed medication related to the medical service for which the brokerage provided the ride;
(b) It is medically necessary to fill or pick up the medication immediately; and
(c) The pharmacy is located on the return route or is the closest pharmacy to the return route.

(7) The brokerage may provide a ride to a client to fill prescribed medication under the following situations:
(a) The brokerage asks the client if the prescription service is available through the CCO's contracted mail-order prescription service, and the client responds that it is not available through that source. (b) The client has an urgent need to fill or pick up prescribed medication because the postal prescription service mailed the wrong medication, or the client has an unexpected problem caused by the medication; or
(c) The client is transient or without regular access to a mailbox. In this situation, the brokerage may evaluate the need on a case-by-case basis.

(8) The brokerage shall provide out-of-area rides under the following circumstances:
(a) The client is receiving an OHP covered medical service that is not available in the service or local area but is available in another area of the state; or
(b) The client is receiving a covered service in California, Idaho or Washington where the service location is no more than 75 miles from the Oregon border.

(9) Brokerages may coordinate to provide a return ride to a client who receives medical services outside the client's local area.



(10) Within 30 calendar days, brokerages shall retroactively authorize and pay for NEMT services that have already occurred only when the brokerage could not prior authorize the service because the brokerage was closed, the brokerage confirms the circumstances of the ride and:
(a) The eligible client needed urgent medical care;
(b) The eligible client required secured transport pursuant to OAR 410-136-3140, Secure Transports; or
(c) The client was in a hospital, and the hospital discharged or transferred the client.

(11) Brokerages shall not authorize or pay for out-of-area rides based only on client preference or convenience.

(12) Brokerages shall provide toll-free call centers for clients to request rides. The following pertain to the brokerage's call center and scheduling of rides:
(a) The call center shall operate at a minimum Monday through Friday from 9:00 am to 5:00 pm, but the brokerage may close the call center on New Year's Day, Martin Luther King Day, Memorial Day, July 4, Labor Day, Thanksgiving and Christmas. The CCO may approve, in writing, additional days of closure if the brokerage requests the closure at least thirty days in advance.
(b) Brokerages shall make all reasonable efforts for clients to have access to available NEMT services 24 hours a day. When the call center is closed, the brokerages shall provide a recording or answering service to refer the client directly to a subcontractor. If no subcontractor is available, the brokerage must provide clients with recorded information about service hours and how to reach emergency services by calling 911;
(c) The brokerage shall allow a client to schedule rides at least 30 days in advance of the medical service; and
(d) The brokerage shall allow a client to request multiple ride requests at one time.

(e) The brokerage shall develop procedures and make reasonable efforts to arrange a ride requested on the day of the medical service when the medical service is:
(A) For an urgent medical condition; and
(B) Due to the urgency of the medical condition, the client scheduled an immediate medical appointment.

(13) The brokerage is not responsible for providing emergency medical transportation services. However, brokerages shall have procedures for referring clients requesting emergency medical transportation services to the appropriate emergency transportation resources and procedures for subcontractors per OAR 410-136-3040, Vehicle Equipment and Subcontractor Standards.

(14) Brokerages shall establish regional advisory groups consisting of representatives from the CCO, Authority, DHS, Area Agencies on Aging, consumers and representatives of client advocacy groups from within the service or local area. The role of the group includes, but is not limited to:
(a) Assisting in monitoring and evaluating the NEMT program; and
(b) Recommending potential policy or procedure changes and program improvements to brokerages and the CCO and assisting in prioritizing those changes and improvements.

(15) Brokerages shall have the discretion to use or not use DHS-approved volunteers. DHS shall provide brokerages with a list of approved and trained volunteers. DHS shall supervise the volunteers and assumes all liability for each volunteer as provided by law.

(16) Brokerages or their subcontractors shall not bill eligible clients for any transports to and from CCO covered medical services or any transports where the CCO denied reimbursement.

(17) On a minimum of five percent of the ride requests, brokerages shall contact medical providers to verify appointments and that the appointments are for OHP covered medical services.

(18) Brokerages may purchase tickets for common carrier transportation, such as inter- or intra-city bus, train or commercial airline when deemed cost effective and safe for the client.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3040 New Rule**
**Vehicle Equipment and Subcontractor Standards**

(1) Brokerages shall require subcontractors to maintain their vehicles for the comfort and safety of the clients. The vehicles shall meet the following requirements:
(a) The interior of the vehicle shall be clean;
(b) The subcontractor shall not smoke or permit smoking in the vehicle at any time; and
(c) The subcontractor shall comply with appropriate local, state, and federal transportation safety standards regarding passenger safety and comfort. The vehicle shall include, but is not limited to, the following safety equipment:
(A) Safety belts for all passengers if the vehicle is legally required to provide safety belts;
(B) A first aid kit;
(C) A fire extinguisher;
(D) Roadside reflective or warning devices;
(E) A flashlight;
(F) Tire traction devices when appropriate;
(G) Disposable gloves; and
(H) All equipment necessary to transport clients using wheelchairs or stretchers if the subcontractor uses the vehicle for these modes of transportation.

(2) The subcontractor shall follow a preventative maintenance schedule that incorporates at least all of the maintenance recommended by the vehicle manufacturer. The vehicle must be in good operating condition and shall include, but is not limited to:
(a) Side and rear view mirrors;
(b) A horn; and
(c) Working turn signals, headlights, taillights and windshield wipers.
(3) Brokerages shall ensure subcontractors' drivers receive training on their job duties and responsibilities, including:
(a) Understanding NEMT services in general, reporting forms, vehicle operation, requirements for fraud and abuse reporting and the geographic area in which subcontractors will provide service;
(b) Requiring the subcontractors' drivers to complete the National Safety Council Defensive Driving course or an equivalent course within six months of the date of hire and at least every three years thereafter;
(c) Requiring the subcontractors' drivers to complete Red Cross-approved First Aid, Cardiopulmonary Resuscitation and blood spill procedures courses or equivalent courses within six months of the date of hire and to maintain the certification as a condition of employment;
(d) Requiring the subcontractors' drivers to complete the Passenger Service and Safety course or an equivalent course within six months of the date of hire and at least every three years thereafter;
(e) Understanding established procedures for subcontractors and the subcontractor' drivers in the event that the client needs emergency care during the ride; and

(4) Brokerages shall ensure the following when hiring a subcontractor:

(a) The subcontractor must have a valid driver license. The license must be the class of license, with any required endorsements, that permits the subcontractor to legally operate the vehicle for which they are hired to drive per ORS chapter 807 and OAR chapter 735, division 062, or the applicable statutes of other states; and
(b) The subcontractor must pass a criminal background check in accordance with OAR chapter 407, division 7, and meet the brokerage's requirements and any applicable state statutes for a positive criminal background check.

(5) For authorized out-of-state NEMT services in which the subcontractor solely performs work in the other state and for which the brokerage has no oversight authority, the brokerage is not responsible for ensuring the subcontractor's vehicle and the subcontractor standards meet the requirements set forth in this rule.

(6) Brokerages must require any subcontractor to obtain and maintain the following insurance policies:
(a) General liability insurance with a combined single limit, or the equivalent, of not less than $1,000,000 for each occurrence for bodily injury and property damage. The policy must include an indemnity clause for liability coverage. The policy must provide that the State of Oregon, Oregon Health Authority and its divisions, officers and employees are additional insureds but only related to the brokerages services.
(b) Automobile liability insurance with a combined single limit, or the equivalent, of not less than $1,000,000 for each accident for bodily injury and property damage, including coverage for owned, hired or non-owned vehicles, as applicable.

(7) Brokerages and their subcontractors that employ workers as defined in ORS 656.027 shall comply with ORS 656.017 and shall provide workers' compensation insurance coverage for those workers, unless they meet the requirement for an exemption under ORS 656.126 (2). Brokerages shall require each of their subcontractors to comply with this requirement.

(8) Brokerages and their subcontractors shall furnish proof of insurance to the CCO and/or Authority upon request.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3060 New Rule**
**Ownership of Equipment and Property**

(1) Brokerages shall provide all equipment necessary for the operation of NEMT services. “Equipment” includes, but is not limited to, workstations, computers, computer peripherals and software used exclusively for NEMT services. “Equipment” does not include vehicles.

(2) The brokerage shall execute any documents or instruments that the CCO reasonably requests to grant or assign ownership in intellectual property to the United States or the Authority, or CCO when:
(a) State or federal law requires the Authority or brokerage to grant to the United States a license to any intellectual property; or
(b) State or federal law requires that the CCO, Authority, or the United States owns the intellectual property.

(3) Notwithstanding section (2) of this rule, the CCO shall not own the right, title and interest in any intellectual property the brokerage created or delivered to provide NEMT services.

(4) If the CCO becomes the owner of any intellectual property that the brokerage created, the CCO shall grant a perpetual, worldwide, non-exclusive, royalty-free and irrevocable license, subject to any restrictions or prohibitions on the dissemination or disclosure of information, to the brokerage to use, copy, distribute, display, build upon and improve the intellectual property for its business purposes.

(5) The brokerage in its subcontracts with subcontractors shall include any terms and conditions necessary to execute section (2) of this rule.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3080 New Rule**
**Out-of-State Transportation**

(1) “Out-of-state transportation” means transportation to or from any location outside Oregon, with the exception of contiguous areas up to 75 miles outside the Oregon border.

(2) The brokerage shall arrange rides and pay for out-of-state transportation, as defined in section (1) of this rule, to and from an out-of-state OHP covered medical service when:
(a) The brokerage confirms that the Authority, the Prepaid Health Plan (PHP) or CCO authorized the out-of-state OHP covered medical service per OAR 410-120-1180, Medical Assistance Benefits: Out-of-State Services; and
(b) The client is eligible for transportation services per OAR 410-136-3020, General Requirements for NEMT.

(3) Brokerages shall not arrange or pay for:
(a) A client’s return from any foreign country to any location within the United States for the client to obtain medical care because the care is not available in the foreign country;
(b) A client’s return to Oregon from another state when the client was not in the other state to obtain authorized medical services or treatments.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3120 New Rule**
**Attendants for Child Transports**

(1) This rule applies to NEMT for children under 12 years of age who are eligible for NEMT services to and from OHP covered medical services. The rule also applies to children and young adults with special physical or developmental needs, regardless of age, hereafter referred to as “child” or “children.”

(2) Parents or legal guardians must provide an attendant to accompany the children while traveling to and from medical appointments except when:
(a) The driver is a DHS volunteer, DHS employee or an CCO employee;
(b) The child requires secured transport per OAR 410-136-3140, Secure Transports; or
(c) An ambulance subcontractor transports the child for NEMT services, and the brokerage reimburses the ambulance subcontractor at the ambulance transport rate.

(3) Attendants are required for NEMT ambulance transports when the brokerage uses an ambulance to provide wheelchair or stretcher car or van rides.

(4) DHS shall establish and administer guidelines for children in the department’s custody, including guidelines for volunteer drivers. If DHS’s requirements differ from this rule, DHS’s requirements take precedence.

(5) An attendant may be the mother, father, stepmother, stepfather, grandparent or legal guardian of the child. The attendant also may be any adult the parent or legal guardian authorizes to be an attendant. An attendant also may be a brother, sister, stepbrother or stepsister of the child, as long as the attendant is at least 18 years of age, and the parent or legal guardian authorizes it.

(6) Brokerages or their subcontractors may require the child’s parent or legal guardian to provide written authorization for an attendant other than themselves to accompany the child.

(7) Brokerages or their subcontractors shall not bill additional charges for a child’s attendant.

(8) The attendant must accompany the child from the pick-up location to the destination and on the return trip. The attendant must also remain with the child during their appointment. Another person shall not accompany the attendant unless the parent or legal guardian authorizes it or unless the other person is an eligible child traveling to the same location for a medical appointment.

(9) The parent, guardian or adult caregiver for the child shall provide and install child safety seats as required by state law. The subcontractor shall not transport a child if a parent or legal guardian fails to provide a child safety seat that complies with state law.

Stat. Auth.: ORS 413.042

190 Sample contract between XXX Health Plans and YYY Council of Governments.

Stats. Implemented: ORS 414.065

**410-136-3140 New Rule**
**Secured Transports**

(1) “Secured transport” means NEMT services for the involuntary transport of clients who are in danger of harming themselves or others. Secured transports are allowable when:
(a) The brokerage has ensured the subcontractor has met the requirements of the secure transport protocol pursuant to OAR 309-033-0200 through OAR 309-033-0970, and, therefore, the subcontractor is able to transport the client who is in crisis or at immediate risk of harming themselves or others due to mental or emotional problems or substance abuse; and
(b) The transport is to a Medicaid enrolled facility that the CCO recognizes as being able to treat the immediate medical or behavioral health care needs of the client in crisis.

(2) One additional attendant may accompany the client at no additional charge when medically appropriate, such as to administer medications, etc. in-route, or to satisfy legal requirements, including, but not limited to when a parent, legal guardian or escort is required during transport.

(3) The brokerage shall authorize NEMT services for an eligible client when the court orders an OHP covered medical service.

(4) The brokerage shall assume that a client returning to their place of residence is no longer in crisis or at immediate risk of harming themselves or others, and is, therefore, able to use non-secured transportation. In the event that a secured transport is medically appropriate to return a client to their place of residence, the brokerage shall obtain written documentation, signed by the treating medical professional, stating the circumstances that required secure transport. The brokerage shall retain the documentation and a copy of the order in their record for the CCO to review.

(5) The brokerage shall not approve or pay for secure medical transport provided to a person:
(a) In the custody of or under the legal jurisdiction of any law enforcement agency;
(b) Going to or from a court hearing, or to or from a commitment hearing;
(c) Whom the CCO has determined is an inmate of a public institution as defined in OAR 461-135-0950, Eligibility for Inmates; or
(d) Whose OHP eligibility has been suspended pursuant to ORS 414.420 or ORS 414.424.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3180 New Rule**
**Transportation of Clients Changing Hospitals or Other Facilities**

(1) Brokerages shall arrange and pay for transporting an eligible client who has had a change in condition, noted in the client's DHS care plan, resulting in a need for a new service setting with a lower or higher level of care. This includes clients who are changing levels of care between their community-based care settings or between institutional and community-based settings. The client's DHS worker, CCO, or Care Facilty must request the ride.

(2) Brokerages shall not arrange or pay for:
(a) The transport or return of an inpatient client from an admitting hospital to another hospital (or facility) for diagnostic or other short-term services when the patient will return to the admitting hospital within the first 24-hours of admission. The subcontractor shall bill the admitting hospital directly for these transports;
(b)The transport of a client receiving long-term care service in their home or residing in a long-term care facility for the sole purpose of shopping for another long-term care facility, even if the client is looking for a new facility to receive a lower or higher level of care;
(c) The transport of a client moving from one type of facility to a facility of the same type, such as from an adult foster home to another adult foster home; and
(d)The transport of a client who is relocating to another state, unless the transport is to receive an OHP covered medical service pursuant to ORS 410-136-3080, Out-of-State Transportation.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3260 New Rule**
**Brokerage Reimbursements to Subcontractors**

(1) Brokerages shall reimburse their NEMT subcontractors for the most cost-effective route from point of origin to point of destination.

(2) Brokerages shall reimburse for NEMT ground and air ambulance transports pursuant to OAR 410-136-3220, Reimbursements for Ground and Air Ambulance Transports.

(3) With the exception of section (2), brokerages shall establish a base rate with its subcontractors. “Base rate” for all modes of transportation except ground and air ambulance means the rate the brokerage and its subcontractors agree on for each mode of transportation.

(4) If a subcontractor uses an ambulance as a stretcher car or van, the brokerage shall reimburse the subcontractor using the base rate for stretcher cars or vans.

(5) Notwithstanding section (4), brokerages shall pay ambulance subcontractors at the ambulance rate instead of the stretcher car or van rate when the transport exceeds two hours, necessitating a medical technician to care for the client during the ride.

(6) Brokerages shall not reimburse their subcontractors for waiting for clients to get to the vehicle or for assisting clients to get in or out of a vehicle.

(7) Brokerages may reimburse their subcontractors for waiting time:
(a) In special situations, such as when the subcontractor has to wait for a client who is using the subcontractor’s gurney and cannot transfer to a gurney at a medical facility; or
(b) Because of a medical issue during the ride, such as:
(A) The client is nauseous or is vomiting after dialysis or chemotherapy; or
(B) The client needs to stop to get prescription medication or medical supplies related to the medical service.

(8) Brokerages shall reimburse their subcontractors at the base rate for ambulatory vehicles if the subcontractor provides a ride to an ambulatory client in a non-ambulatory vehicle.

(9) Brokerages may authorize a subcontractor to transport a non-ambulatory client in an ambulatory vehicle if the vehicle can accommodate and transport the client and if allowed by local ordinance. The brokerage shall reimburse its subcontractor at the non-ambulatory vehicle rate.

(10) The wheelchair base rate applies to the transport of a client with a reclining wheelchair; wheelchairs do not qualify as stretchers or gurneys.

(11) The following applies to reimbursement for deceased clients:

(a) If a client dies before the subcontractor arrives at the scene, the brokerage shall not reimburse its subcontractors; or
(b) If a client dies after the transport begins but before reaching the destination, the brokerage's payment is limited to the base rate for the mode of transportation and mileage. For ambulance transports, the payment also would include costs for an extra attendant, if applicable.

(12) A brokerage shall not reimburse a subcontractor if:
(a) A county or city ordinance prohibits any charging for services identified in the medical transportation services administrative rules; or
(b) The subcontractor does not charge the public for such services.
Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3280 New Rule**
**Client Reimbursed Mileage, Meals and Lodging**

(1) The brokerage must prior authorize a client's mileage, meals and lodging to an OHP covered medical service in order for the client to qualify for reimbursement. If the brokerage prior authorized the travel costs, a client may request reimbursement up to 30 days after the travel.

(2) The client must return any documentation the brokerage requires before receiving reimbursement. Documentation required shall include a receipt for lodging.

(3) The brokerage may hold reimbursements under the amount of $10 until the client's reimbursement reaches $10.

(4) Brokerages shall reimburse clients for meals when a client, with or without an attendant, travels a minimum of four hours round-trip out of their local area. The travel, however, must span the following meal times:
(a) For a breakfast allowance, the travel must begin before 6 am;
(b) For a lunch allowance, the travel must span the entire period from 11:30 am through 1:30 pm; and
(c) For a dinner allowance, the travel must end after 6:30 pm.

(5) Brokerages shall reimburse for meals at the CCO allowable rate.

(6) Brokerages shall not reimburse clients for meals that a hospital or other medical facility provides.

(7) Brokerages shall reimburse clients for lodging when:
(a) A client would otherwise be required to begin travel before 5 am in order to reach a scheduled appointment;
(b) Travel from a scheduled appointment would end after 9 pm; or
(c) The client's health care provider documents a medical need.

(8) Brokerages shall reimburse for lodging at the CCO's allowable rate or the actual cost of the lodging, whichever is less.

(9) Brokerages shall reimburse for meals or lodging for only one attendant, which may be a parent, to accompany the client if medically necessary, but only if:
(a) The client is a minor child and unable to travel without an attendant;
(b) The client's attending physician provides a signed statement indicating the reason an attendant must travel with the client;
(c) The client is mentally or physically unable to reach his or her medical appointment without assistance; or
(d) The client is or would be unable to return home without assistance after the treatment or service.

(10) The brokerage shall not reimburse for the attendant's time or services.

(11) If a client's health care provider admits the client for inpatient care, an attendant is no longer medically necessary because the facility provides all necessary services for the client. Therefore, the attendant is no longer eligible for lodging and travel expenses. The brokerage shall reimburse for meals and lodging for the attendant's transportation home. However, the brokerage may pay for the attendant's meals and lodging if it is more cost effective for the attendant to remain near the client to accompany the client on the return trip as allowed by section (11).

(12) Upon the client's release from inpatient care, if the attendant is medically necessary based on one of the conditions or circumstances listed in section (8), the brokerage shall reimburse for the attendant to return to the inpatient facility to accompany the client on the return trip. This only applies if the brokerage prior authorizes the attendant's travel.

(13) Brokerages shall not reimburse for mileage, meals and lodging for an attendant visiting an inpatient client, unless the physician provides a signed statement of the medical need. This includes, but is not limited to, parents of minors, breastfeeding mothers and spouses.

(14) Incidences of Fraud, Waste, and Abuse will be reported to the Medicaid Fraud Unit as necessary following the State and Federal guidelines.

(15) If a person or entity other than the client or the minor client's parent or legal guardian provides the ride, the brokerage may reimburse the person or entity that provided the ride. However, the client or the minor client's parent or legal guardian must approve in writing of the reimbursement.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3300 New Rule**
**Modifications Based on Client Circumstances**

(1) Brokerages may impose reasonable modifications on NEMT services when the client:
(a) Is threatening harm to the driver or others in the vehicle;
(b) Has a health condition that creates health or safety concerns to the driver or others in the vehicle;
(c) Has other behaviors or circumstances that place the driver or others in the vehicle at risk of harm;
(d) Frequently does not show up for scheduled rides;
(e) Frequently cancels the ride on the day of the scheduled ride time;
(f) Has behaviors that cause a local medical provider or facility to refuse to provide further services without imposing modifications; or
(g) Has special needs that require special accommodations.

(2) Reasonable modifications include, but are not limited to, requiring the client to:
(a) Use a specific transportation subcontractor;
(b) Travel with an attendant;
(c) Use public transportation where available;
(d) Drive themselves or locate someone to drive them and receive mileage reimbursement; or
(e) Confirm the ride with the brokerage on the day of or the day before the scheduled ride.

(3) Before requiring any modifications, the brokerage shall talk with the client about the reason for imposing a modification, explore modifications that are appropriate to the needs of the client and that address the health and safety concerns of the brokerages. The brokerage or client may include the client's worker, PHP or CCO in the discussion. The client may include other individuals in the discussion.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3320 New Rule**
**Member Rights and Confidentiality**

(1) Brokerages shall treat all information gathered on the client as privileged and confidential communications. The brokerage shall apply confidentiality policies to all requests for information from outside sources. Nothing prohibits the disclosure of information in summaries, statistical reports or other forms as long as the document does not identify particular individuals and cannot lead to the identification of individuals. Brokerages and any subcontractors may share information as necessary to serve the client effectively. The brokerage shall not divulge the information without the written consent of the client, the responsible parent of a minor child or the client's legal guardian. The use or disclosure of information is limited to persons directly connected to the administration of NEMT services.

(2) The brokerage shall not deny or allow subcontractors to deny any client NEMT services based on race, color, sex, sexual orientation, religion, national origin, creed, marital status, age, health status or the presence of any sensory, mental or physical disability.



(3) Brokerages must treat clients and ensure subcontractors treat clients in accordance with OAR 410-120-1855, Client Rights and Responsibilities.

(4) The CCO and Brokerage shall have educational materials available for clients on its NEMT services. The CCO must first approve the materials and document the approval in writing. The CCO will coordinate with the Authority for necessary approval of materials.

(5) As required by 42 CFR 431, a brokerage shall follow OAR 410-120-1860 and OAR 410-120-1865 pertaining to contested case hearings when it denies a ride, with the following exceptions:
(a) The brokerage must immediately provide a secondary review by another employee when the initial screener denies a ride; and
(b) The brokerage must mail a notice of action to a client denied a ride within 72 hours of denying a ride.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3340 New Rule**
**Reports and Documentation**

(1) Brokerages shall maintain documentation of rides denied and rides provided to clients. This documentation shall include, but is not limited, to:
(a) The name of the client and the person requesting the ride on behalf of the client, if applicable;
(b) The client's OHP medical care identification number;
(c) The date and time of the request for transportation;
(d) The mode of transportation authorized for the client and a justification for authorizing a mode of transportation that is not reasonably understandable;
(e) The location for picking-up the client and the destination;
(f) The medical reason for the appointment;
(g) The availability of other transportation resources and the justification for authorizing a ride when the client has other resources;
(h) The subcontractor assigned to give the ride and the date and time the brokerage notified the subcontractor of the assignment;
(i) The name of the employee who approved a ride; and
(j) In the case of a denial of a ride:
(A) The name of the employee who denied a ride;
(B) The name of the employee who performed the secondary review before denying the ride;
(C) The reason for the denial and the applicable Oregon administrative rule that supports the denial;
(D) The date on the notice of action the brokerage mailed to the client; notice shall include hearing rights.
(E) Documentation on the brokerage's review, resolution, or disposition of the matter, if applicable, including the reason for the decision and the date of the resolution or disposition; and
(F) Notations of oral and written communications with the client.

(2) The brokerage shall retain the documentation on denials of rides for three calendar years, even if the brokerage is no longer a Medicaid enrolled provider before the end of the three years. The CCO may request this information at any time.

(3) The brokerage shall maintain billing files organized by subcontractor that justify the number of transports and with cross references to actual rides and specific clients.

(4) The brokerages shall report monthly on estimated revenue and expenses. The report must contain the following costs as they pertain to providing NEMT services:
(a) Sub-totals of administrative expenses, including:
(A) Salaries and wages of the brokerage's employees;
(B) Payroll related expenses for the brokerage's employees;
(C) Other employee related expenses, such as recruitment and advertising;
(D) Computer hardware and software purchased, leased or licensed;
(E) Office supplies such as stamps, paper or printing;

(F) Non-computer related equipment purchased, leased or licensed;
(G) Telephone;
(H) Administrative support and other indirect charges;
(I) Education and training;
(J) Building expenses such as leases, rents, security, janitorial services and repairs that retain the property's operating condition but do not add to the permanent value of the property;
(K) Subcontractor identification and drug testing, such as fingerprinting and drug analysis;
(L) Legal expense not related to the CCO, such as attorney fees; fines or penalties;
(M) Indirect expenses, such as accounting, human resources, risk management or insurance;
(N) Sub-contracts for operations or temporary employees;
(O) Required driver training, if applicable;
(P) Software maintenance, if applicable; and
(Q) Details of other administrative expenses not specified above.
(b) The number and costs of the following:
(A) Stretcher car rides;
(B) Wheelchair rides;
(C) Ambulatory rides;
(D) Secured transports;
(E) Bus tickets;
(F) Bus passes;
(G) Reimbursements to clients; and
(H) Commercial transports.
(c) The amount of credits to subcontractors.



(5) The financial reports must show the number of rides that volunteer drivers provide.

(6) Brokerages must submit the financial report required in Section (4) of this rule within 45 days of the end of the reporting month.

(7) Brokerages shall collaborate with the CCO to prepare the NEMT portion of the annual CCO Budget.

(8) The CCO may request, and the brokerage shall provide, other reports or information not specified in Sections (1), (3), (4) and (6) of this rule.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

**410-136-3360 New Rule**
**Audits**

(1) The CCO, Authority, the Oregon Secretary of State Audits Division, the Oregon Department of Justice and the federal government may audit the brokerage's or its subcontractor's records at least annually. The audit shall include, but is not limited to, the following areas:
(a) Financial status;
(b) Performance and quality of the service;
(c) Efficiency and effectiveness of the program's operation; and
(d) The relationship between the funds provided by the CCO and the amounts expended by brokerages or billed by subcontractors and that the use of funds is reasonable and necessary to ensure quality service.

(2) The CCO, Authority, the Oregon Secretary of State Audits Division, the Oregon Department of Justice, and the federal government may review the brokerage's or subcontractor's records whenever necessary to verify delivery of service, financial and operational status, and compliance with Oregon administrative rules or to investigate unresolved questions of fact.

(3) As specified by 42 CFR 455.17, brokerages and subcontractors shall report to the CCO any suspected fraud or abuse of NEMT services. If the suspected fraud or abuse is subcontractor-related, and the brokerage or the CCO determines the subcontractor has committed fraud, the brokerage shall immediately terminate its subcontract.

Stat. Auth.: ORS 413.042 Stats. Implemented: ORS 414.065

202 Sample contract between XXX Health Plans and YYY Council of Governments.

**EXHIBIT B**
**COMPENSATION**

Compensation will be paid as capitation rates on a per Member per month basis to cover all Non-Emergent Medical Transportation as outlined using the following schedule:

| | Counties | Total |
|---|---|---|
| **NEMT CCO Plus** | | |

(1) Contractor and Subcontractor shall assess any needed modifications to the capitation rates:
(A) Quarterly;
(B) When Contractor changes any program affecting eligibility or scope; or
(C) If other factors impact the cost of delivering service.

(2) Subcontractor shall account for NEMT services separate from any other services the brokerage provides.

(3) Contractor shall pay Subcontractor monthly with the Contractor's first check run, no later than the 8th of each month based on the weekly 834 eligibility files. Each monthly payment will include any adjustments based on the prior month eligibility communicated on the 834 eligibility files.

(4) Contractor shall provide eligibility in a transportation flat file to the subcontractor daily and Subcontractor shall authorize and provide services using daily eligibility files in good faith, including mailing transit passes to clients. Contractor shall honor eligibility files sent to Subcontractor as proof of eligibility. "Good faith" means:
(a) The Subcontractor verified client eligibility on the date of service or the date of mailing the transit passes, using the Contractors eligibility information; or
(b)The client eligibility information was inconsistent or not available, and the brokerage used the most recent client information available immediately before the time of service or mailing of transit passes.

(5) Actual costs for NEMT services shall include Subcontractor's administrative and indirect expenses based on the subcontractors Indirect Cost Plan and other indirect expenses as approved by contractor from time to time, and payments to providers for transportation services.

(6) Subcontractor will be compensated for demonstrated actual costs exceeding the Per Member Per Month.

**EXHIBIT C**
**BUSINESS ASSOCIATE AGREEMENT**

THIS BUSINESS ASSOCIATE AGREEMENT ("Agreement"), effective July 1st, 2013, ("Effective Date"), is entered into by and between ZZZ, an Oregon nonprofit corporation, on behalf of one of the Covered Entities identified at the link below and YYY Council of Governments, an Oregon Revised Statutes, (ORS) Chapter 190 intergovernmental organization ("Business Associate").

**RECITALS**

A. ZZZ is the parent organization of the Covered Entities identified at AAAA, who are designated as a single Affiliated Covered Entity in accordance with the administrative simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA") and regulations promulgated thereunder at 45 CFR Parts 160, 162 and 164, including the Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule"), Breach Notification of Unsecured Protected Health Information Rule ("Breach Notification Rule") and Security Standards for the Protection of Electronic Protected Health Information ("Security Rule") (collectively "Standards"), as well as other applicable law, including the American Recovery and Reinvestment Act of 2009, Public Law 111-5 and all implementing regulations adopted pursuant thereto ("HITECH").

B. Business Associate will be providing services (the "Services") for one or more members of Affiliated Covered Entity involving creating, receiving, maintaining, or transmitting Protected Health Information ("PHI") on behalf of Affiliated Covered Entity.

C. In compliance with HIPAA and HITECH Privacy and Security Rule Standards, Business Associate is required to safeguard PHI.

D. Each member of the Affiliated Covered Entity has authorized ZZZ to enter into contracts, including Business Associate contracts, on member's behalf. Accordingly, ZZZ is authorized to enter into this Agreement on behalf of all members of the Affiliated Covered Entity.

E. The parties desire to enter into this Agreement to protect PHI, and to amend any agreements between them, whether oral or written, with the execution of this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and agreements below and in order to comply with all legal requirements for the protection of this information, the parties agree as follows:

**General Provisions.**

**Effect.** This Agreement supplements, modifies and amends any and all agreements (the "Other Agreement(s)"), whether oral or written, between the parties

involving the disclosure of PHI by the Affiliated Covered Entity to Business Associate, or the creation, receipt, maintenance, or transmission of PHI by Business Associate on behalf of the Affiliated Covered Entity. The terms and provisions of this Agreement shall supersede any other conflicting or inconsistent terms and provisions in any Other Agreement(s) between the parties, including all exhibits or other attachments thereto and all documents incorporated therein by reference. Without limitation of the foregoing, any limitation or exclusion of damages provisions shall not be applicable to this Agreement.

**Amendment.** Business Associate and the Affiliated Covered Entity agree to amend this Agreement to the extent necessary for the Affiliated Covered Entity to comply with the Standards and other applicable laws and regulations, including HITECH, promulgated or to be promulgated by the Secretary or other regulations or statutes. Business Associate agrees that it will fully comply with all applicable laws and regulations, and that it will agree to amend this Agreement to incorporate any material change required to assure compliance with such laws and regulations.

**Definitions.** Capitalized terms used herein without definition shall have the respective meanings assigned to such terms in Section 0 of this Agreement or as otherwise defined in the Standards or in HITECH.

**Obligations of Business Associate.**

**Use and Disclosure of Protected Health Information.** Business Associate may use and disclose PHI only as required to satisfy its obligations under the Other Agreement(s), as permitted herein, or required by law, but shall not otherwise use or disclose any PHI. Business Associate shall not, and shall ensure that its directors, officers, employees, contractors and agents do not, use or disclose PHI received from the Affiliated Covered Entity in any manner that would constitute a violation of the Standards or other applicable law or regulation if so used or disclosed by the Affiliated Covered Entity, except that Business Associate may use or disclose PHI (i) for Business Associate's proper management and administrative services or to carry out its legal responsibilities, as long as any such disclosure is required by law or Business Associate obtains in writing reasonable assurances from the recipient that the PHI will be held confidentially, that the PHI will be used or further disclosed only as required by law or for the purpose for which Business Associate made the disclosure to the recipient, and that recipient will notify Business Associate of any instances in which the recipient is aware that the confidentiality of the information has been breached, or (ii) to provide data aggregation services relating to the health care operations of the Affiliated Covered Entity if required under the Other Agreement(s). Business Associate hereby acknowledges that, as between Business Associate and the Affiliated Covered Entity, all PHI shall be and remain the sole property of the Affiliated Covered Entity, including any and all forms thereof developed by Business Associate in

the course of its fulfillment of its obligations pursuant to this Agreement and the activities set forth in the Other Agreement(s). Business Associate further represents that, to the extent Business Associate requests that the Affiliated Covered Entity disclose PHI to Business Associate, such a request is only for the minimum necessary PHI for the accomplishment of Business Associate's purpose. Business Associate expressly agrees that any and all uses or disclosures of PHI, relating to either this Agreement or the Other Agreement(s), including future Other Agreement(s) that the Affiliated Covered Entity and Business Associate may enter into, by Business Associate will be done in accordance with the terms of this Agreement and the provisions of all applicable federal and state laws and regulations, including without limitation, the Privacy and Security Standards or HITECH.

**Safeguards against Misuse of Information.** Business Associate agrees that it will use all appropriate safeguards, including administrative, physical and technical safeguards for Electronic Media and PHI, to prevent the use or disclosure of PHI other than pursuant to the terms and conditions of this Agreement and in accordance with the Security Rule. Business Associate further warrants that it shall implement as of the Effective Date, administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of any Electronic PHI that it creates, receives, maintains or transmits on behalf of Affiliated Covered Entity. Business Associate agrees that it will otherwise comply, where applicable, with the Security Rule.

**Reporting of Disclosures of Protected Health Information.** Business Associate shall, upon becoming aware of any use or disclosure of PHI in violation of this Agreement by Business Associate, its officers, directors, employees, contractors or agents or by a third party to which Business Associate disclosed PHI pursuant to Section 2.4 of this Agreement, immediately report any such disclosure to the Affiliated Covered Entity but in no case later than five (5) business days. Business Associate shall also immediately report to the Affiliated Covered Entity any Privacy or Security Incident involving or impacting PHI in any format subject to the terms of this Agreement of which Business Associate becomes aware, but in no case later than five (5) business days, except that this Agreement hereby serves as notice, and no further reporting shall be required, of unsuccessful attempts at unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an Information System, such as "pings" on a firewall. The reporting obligations of this Section include notification of Breaches of Unsecured PHI in accordance with the Breach Notification Rule at 45 CFR 164.410 and other applicable laws. Such notice shall be made to the following:

To: Attention: ZZZ Privacy Officer
Samaritan Health Services, Inc.
3600 NW Samaritan Drive
Corvallis, Oregon 97330

**Agreements by Third Parties.** Business Associate agrees to limit the use of subcontractors regarding the provision of services under any and all Agreements with Affiliated Covered Entity to business entities within the United States. Business Associate shall, in accordance with 45 C.F.R. §§164.502(e)(1)(ii) and 164.308(b)(2), as applicable, obtain and maintain an agreement with each subcontractor that creates, receives, maintains, or transmits PHI on behalf of Business Associate, pursuant to which agreement such subcontractor agrees to be bound by the same or more stringent restrictions, terms and conditions that apply to Business Associate pursuant to this Agreement with respect to such PHI. Business Associate shall require that any agent or subcontractor notify Business Associate of any instances in which PHI is used or disclosed in an unauthorized manner. Business Associate agrees to notify Affiliated Covered Entity in no case later than five (5) business days of the Business Associates' knowledge of any such unauthorized use or disclosure. Business Associate shall take steps to cure the breach of confidentiality and end the violation, or shall terminate the subcontract. Notwithstanding the foregoing, Business Associate shall only disclose that PHI to such subcontractor as is reasonably necessary to perform the Services or to fulfill a specific function required or permitted under this Agreement. Business Associate shall obtain Affiliated Covered Entity's written consent prior to disclosing PHI to such subcontractors when 500 or more individual's PHI would be disclosed.

**Access to Information.** If Business Associate maintains a Designated Record Set on behalf of the Affiliated Covered Entity, within five (5) days of a request by the Affiliated Covered Entity for access to PHI about an Individual contained in a Designated Record Set, Business Associate shall make available to the Affiliated Covered Entity such PHI for so long as such information is maintained in the Designated Record Set. In the event any Individual requests access to PHI directly from Business Associate, Business Associate shall within two (2) days forward such request to the Affiliated Covered Entity or as directed by the Affiliated Covered Entity provide the Individual access to the PHI. Any denials of access to the PHI requested shall be the responsibility of the Affiliated Covered Entity.

**Availability of Protected Health Information for Amendment.** Within ten (10) days of receipt of a request from the Affiliated Covered Entity for the amendment of an Individual's PHI or a record regarding an Individual contained in a Designated Record Set (for so long as the PHI is maintained in the Designated Record Set), Business Associate shall provide such information to the Affiliated Covered Entity for amendment and incorporate any such amendments in the PHI as required by 45 C.F.R. §164.526.

**Accounting of Disclosures.** Business Associate hereby agrees to document all access to and disclosures of PHI and such other information related to access to and the disclosure of PHI as may reasonably be necessary for the Affiliated Covered Entity to respond to any request by an Individual for an accounting of

disclosures of PHI and/or access report in accordance with 45 C.F.R. §164.528. Within ten (10) days of notice by the Affiliated Covered Entity to Business Associate that it has received a request for an accounting of disclosures of PHI and/or access report, Business Associate shall make available to the Affiliated Covered Entity such information as is in Business Associate's possession and is required for the Affiliated Covered Entity to make the accounting and/or access report required by 45 C.F.R. §164.528. At a minimum, Business Associate shall provide the Affiliated Covered Entity with the following information: (i) the date of the disclosure, (ii) the name of the entity or person who received the PHI, and if known, the address of such entity or person, (iii) a brief description of the PHI disclosed, (iv) a brief statement of the purpose of such disclosure which includes an explanation of the basis for such disclosure, and (v) any other information required to respond to a request for accounting of PHI in accordance with the Privacy Standards or HITECH. In the event the request for an accounting is delivered directly to Business Associate, Business Associate shall within two (2) days forward such request to the Affiliated Covered Entity. Affiliated Covered Entity is responsible for preparing and delivering the requested accounting. Business Associate hereby agrees to implement an appropriate recordkeeping process to enable it to comply with the requirements of this Section. Nothing in this section shall require the provision of an access report unless 45 C.F.R. §164.528 is amended to require such a report.

**Availability of Books and Records.** Business Associate hereby agrees to make its internal practices, books and records, including but not limited to policies and procedures, relating to the use and disclosure of PHI available to the Secretary for purposes of determining the Affiliated Covered Entity's and Business Associate's compliance with the Standards and HITECH.

**Compliance with Electronic Transactions and Code Set Standards.** If Business Associate conducts any Standard Transactions for, or on behalf of, Affiliated Covered Entity, Business Associate agrees to comply, and will require any subcontractor or agent conducting such Standard Transaction to comply, with each applicable requirement of 45 CFR Parts 160 and 162, as modified or amended. Business Associate agrees not to enter into any agreement with subcontractors or agents in connection with the conduct of Standard Transactions that: (i) changes the definition, data condition or use of a data element or segment in a Standard; (ii) adds any data element or segments to the maximum defined data set; (iii) uses any code or data elements that are either marked "not used" in the Standard's Implementation Specification(s) or are not in the Standard's Implementation Specification(s); or (iv) changes the meaning or intent of the Standard's Implementation Specification(s).

**Delegation of Compliance Obligations Under the Privacy Rule.** To the extent Business Associate is to carry out Affiliated Covered Entity's obligation under the Privacy Rule, Business Associate shall comply with the requirements of the Privacy Rule that apply to the Affiliated Covered Entity in the performance of such obligation.

**Mitigation.** Business Associate hereby agrees to mitigate, to the extent practicable, any harmful effects of which Business Associate becomes aware that arise out of the use or disclosure of PHI by Business Associate that is in violation of this Agreement.

**Minimum Necessary; Access through Connectivity to Electronic Medical Record Databases.** Business Associate agrees to disclose to its subcontractors, agents or other third parties, and to request from Affiliated Covered Entity, only the minimum amount of PHI necessary to accomplish the intended purpose of the Services to be provided under this Agreement or any Other Agreement(s). If Business Associate is provided access to any PHI through connectivity to the Affiliated Covered Entity's electronic medical record databases, Business Associate shall limit such access to the minimum necessary to accomplish the intended purpose of the Services to be provided under this Agreement or any Other Agreement(s).

**Indemnification.** Business Associate hereby agrees to indemnify and hold the Affiliated Covered Entity harmless from and against any and all liability and costs, including attorneys' fees, breach notification costs, and mitigation costs such as reasonable identity theft monitoring, created by a breach of this Agreement by Business Associate, its agents or subcontractors, without regard to any limitation or exclusion of damages provision otherwise set forth in the Other Agreement(s).

**Insurance**. Business Associate shall maintain appropriate and adequate insurance coverage for Business Associate's obligations pursuant to this Agreement. Business Associate shall ensure in writing that any subcontractor that creates, receives, maintains, or transmits Protected Health Information on Business Associate's behalf shall maintain appropriate and adequate insurance coverage for subcontractor's obligations pursuant to subcontractor's agreement with Business Associate under Section 2.4.

**Notice of Request for Data.** Business Associate agrees to notify the Affiliated Covered Entity within five (5) business days of Business Associate's receipt of any request or subpoena or court order for PHI from a government agency or relating to litigation, other than requests that are governed by Section 2.5 of this Agreement. To the extent that the Affiliated Covered Entity decides to assume responsibility for challenging the validity of such request, Business Associate agrees to cooperate fully with the Affiliated Covered Entity in such challenge.

**Injunction.** Business Associate hereby agrees that the Affiliated Covered Entity will suffer irreparable damage upon Business Associate's breach of this Agreement and that such damages shall be difficult to quantify. Business Associate hereby agrees that the Affiliated Covered Entity may file an action for an injunction to enforce the terms of this Agreement against Business Associate, in addition to any other remedy the Affiliated Covered Entity may have.

**Term and Termination.**

**Term.** This Agreement shall become effective on the Effective Date and, unless otherwise terminated as provided herein, shall continue in effect so long as Business Associate uses, discloses, creates or otherwise possesses any PHI created, received, maintained, or transmitted on behalf of the Affiliated Covered Entity and until all PHI created or received by Business Associate on behalf of the Affiliated Covered Entity is returned to the Affiliated Covered Entity pursuant to Section 3.3.

**Termination upon Breach of Provisions Applicable to Protected Health Information.** Any other provision of the Other Agreement(s) notwithstanding, this Agreement and the Other Agreement(s) may be immediately terminated by the Affiliated Covered Entity upon written notice to Business Associate in the event that Business Associate breaches any provision contained in this Agreement; provided, however, that in the event that termination of this Agreement and the Other Agreement(s) is not feasible, in the Affiliated Covered Entity's sole discretion, Business Associate hereby acknowledges that the Affiliated Covered Entity shall have the right to report the breach to the Secretary, notwithstanding any other provision of this Agreement or any Other Agreement(s) to the contrary.

**Return or Destruction of Protected Health Information upon Termination.** Upon termination of this Agreement or of the business relationship between Affiliated Covered Entity and Business Associate, Business Associate shall either return or destroy all PHI received from the Affiliated Covered Entity or created or received by Business Associate on behalf of the Affiliated Covered Entity and which Business Associate still maintains in any form. Business Associate agrees to recover or arrange for the destruction of any PHI in the possession of its subcontractors or agents. In the event that Business Associate destroys PHI, it shall provide a certificate of destruction to Affiliated Covered Entity upon Affiliated Covered Entity's request. Neither Business Associate nor any of its subcontractors or agents shall retain any copies of such PHI in its possession. In the event that Business Associate believes that returning or destroying the PHI is not feasible, within seven (7) days of any termination hereof Business Associate shall provide written notice to the Affiliated Covered Entity setting forth the conditions that Business Associate believes make return or destruction of the PHI not feasible. To the extent that the Affiliated Covered Entity agrees that it is not feasible to return or destroy such PHI, the terms and provisions of this Agreement shall survive such termination and Business Associate shall use or disclose such PHI solely for the purpose or purposes that made the return or destruction of the PHI infeasible.

**The Affiliated Covered Entity's Right of Cure.** At the expense of Business Associate, the Affiliated Covered Entity shall have the right to cure any breach of Business Associate's obligations under this Agreement. The Affiliated Covered Entity shall give Business Associate notice of its election to cure any

such breach and Business Associate shall cooperate fully in the efforts by the Affiliated Covered Entity to cure Business Associate's breach. All requests for payment for reasonable expenses associated with such cure by the Affiliated Covered Entity shall be paid within thirty (30) days.

**Transition Assistance.** Following the termination of this Agreement, and the Other Agreement(s) for any reason, Business Associate agrees to provide transition services for the benefit of the Affiliated Covered Entity, including the continued provision of the Services required under the Other Agreement(s) until notified by the Affiliated Covered Entity that the alternative provider of the transition services is able to take over the provision of the Services and the transfer of the PHI and other data held by Business Associate related to the Services under the Other Agreement(s).

**Compliance with Red Flag Regulations.** Business Associate agrees to develop and implement policies and procedures designed to prevent, detect and mitigate against the reasonably foreseeable risks of personal and medical identity theft in compliance with the requirements of the Identity Theft, Red Flags and Address Discrepancies under the Fair and Accurate Credit Transaction Act of 2003 ("Red Flag Rules").

**Miscellaneous.**

**Regulatory References.** Any reference made herein to any provision of law or regulation shall be a reference to such Section as in effect and as same may be amended or superseded from time to time, and for which compliance is required.

**Amendment.** This Agreement may not be amended except in a writing signed by both parties hereto. Notwithstanding the foregoing, Affiliated Covered Entity may amend this Agreement upon written notice to Business Associate to the extent necessary or appropriate to assure compliance with any and all state or federal laws, rules, or regulations, including without limitation the Standards, HITECH and any other future laws, rules or regulations.

**Interpretation.** Any ambiguity in this Agreement shall be resolved to permit the parties hereto to comply with the Standards and other applicable privacy-related laws and regulations.

**Successors and Assigns.** This Agreement and all rights and obligations hereunder shall be binding upon and shall inure to the benefit of the respective successors and assigns of both parties hereto.

**Survival.** The respective rights and obligations of Business Associate set forth in Section 3.3 hereof shall survive any termination of this Agreement.

**Severability.** In the event that any provision of this Agreement is adjudged by any court of competent jurisdiction to be void or unenforceable, all remaining provisions hereof shall continue to be binding on the parties hereto with the

same force and effect as though such void or unenforceable provision had been deleted.

**Waiver.** No failure or delay in exercising any right, power or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or remedy hereunder preclude any other further exercise thereof or the exercise of any other right, power or remedy. The rights provided hereunder are cumulative and not exclusive of any rights provided by law.

**Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and supersedes any prior or contemporaneous verbal or written agreements, communications and representations relating to the subject matter hereof.

**Choice of Law.** This Agreement shall be governed, construed and interpreted in accordance with the laws of the State of Oregon, without regard to such state's conflict of laws provisions.

**Counterparts, Facsimile.** This Agreement may be signed in two or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument. A copy of this Agreement bearing a facsimile signature shall be deemed to be an original.



**Definitions for Use in this Agreement.**

**Electronic PHI** shall have the meaning set forth for "electronic protected health information" in the Standards, limited to information that Business Associate creates, receives, maintains, or transmits on Affiliated Covered Entity's behalf.

**Individual** shall have the meaning set forth for "individual" in the Standards and shall include a person who qualifies as a personal representative under the Standards.

**Protected Health Information** (PHI) shall have the meaning set forth for "protected health information" in the Standards, limited to information that Business Associate creates, receives, maintains, or transmits on Affiliated Covered Entity's behalf.

**Unsecured Protected Health Information** shall have the meaning set forth for "protected health information" in the Standards, limited to information that Business Associate creates, receives, maintains, or transmits on Affiliated Covered Entity's behalf.

INTENDING TO BE LEGALLY BOUND, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

214 Sample contract between XXX Health Plans and YYY Council of Governments.

| AFFILIATED COVERED ENTITY: | BUSINESS ASSOCIATE: |
|---|---|
| By:_____ | By:_____ |
| Title: VP-COO | Title:_____ |
| Date:_____ | Date:_____ |

TRIMET

For TriMet use only

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# APPLICATION FOR TRIMET LIFT SERVICE

**General Information: Please read carefully. All questions must be answered. Incomplete or unsigned applications will be returned.**

## Part A. Personal Information

Name: _____
Last First Middle

Home Address: Apt. No.:

Name of facility or apartment building:

City: State: ZIP:

Mailing address if different : Apt. No.:

City: State: ZIP:

Phone Number(s) (list below) :

Home:

Other:

What is your language of choice?

Date of birth: ☐ Female ☐ Male

## Part B. Contact Person(s)

Emergency Contact Person:

Relationship to Applicant:

Emergency phone number(s) (list below):

Primary:

Other:

You may list additional emergency contacts on an additional sheet.

## Part C. Tell us about your disability or disabling health condition.

1. What is the primary disability or health condition that prevents you from being able to use TriMet's regular bus and or MAX service? Please be specific (for example: stroke, emphysema, schizophrenia, etc.). _____

   _____

   _____

   Date of diagnosis or onset: _____

2. Do you have other physical or mental health disabilities or conditions that limit your ability to use TriMet's bus and/or MAX service? ☐ Yes ☐ No
   If yes, please explain: _____

   _____

3. Do the effects of your disability or condition vary from day to day? ☐ Yes ☐ No
   If yes, please explain: _____

   _____

4. Is your disability or condition:
   ☐ Permanent ☐ Temporary How long: _____ Month(s) _____ Year(s)
   If you answered temporary, please explain: _____

   _____

## Part D. Tell us about your use of TriMet's regular bus and/or MAX

1. Have you used regular TriMet buses or MAX trains? ☐ Yes ☐ No

2. Are you able to reach the TriMet bus stop nearest your home?
   ☐ Yes ☐ No ☐ Sometimes
   If your answer is no or sometimes, please explain:

   _____

3. What best describes your ability to use TriMet's regular bus and/or MAX service?
   ☐ I can use the regular bus or MAX for most trips.
   ☐ I could use the regular bus or MAX but it would be difficult.
   ☐ I can use bus or MAX but only for specific trips or destinations
   ☐ I have never tried to use the regular bus or MAX.
   ☐ I cannot use the regular bus or MAX without a personal care attendant.
   ☐ I cannot use the regular bus or MAX at all because: _____

## Part E. Mobility equipment, aids or personal assistance required for travel

1. Mark any and all mobility equipment and aids that you expect to use when you travel.

| | | | | | |
|---|---|---|---|---|---|
| | None | | Manual wheelchair | | Service animal |
| | Cane | | Power wheelchair | | Portable oxygen |
| | Walker | | Power scooter | | Respirator |
| | Crutches | | Extended footrests | | Picture board |
| | White cane | | Chest restraint | | Alphabet board |
| | Prosthetic device | | Lift mechanism (to board and leave the bus) | | |
| | Other (Please describe): | | | | |

2. If you use a wheelchair or scooter:

   a. Would you be able to transfer to a seat? ☐ Yes ☐ No

   b. What is the width of your wheelchair or scooter? _____ inches

   c. What is the length of your wheelchair or scooter? _____ inches

3. TriMet operators are unable to perform the duties of a Personal Care Attendant (PCA). Will you need to travel with a PCA or someone to assist you when use LIFT?

   ☐ Always ☐ Sometimes ☐ Never

   If always or sometimes, how does a PCA or other person assist you?

   _____

3. Some persons cannot be left alone at their residence or other destination; for example, persons with dementia or Alzheimer's disease. Does someone always need to meet you when you arrive at a destination?

   ☐ Yes ☐ No

**NOTE:** If you answered yes, there **must** be someone to meet you on all trips you take on LIFT. If no one is available at your destination, LIFT would call the contact person listed in Part B.

## Part F. Please read the following and sign the application.

**For the applicant:** Applications must be signed. Unsigned applications will be returned.

I understand that the purpose of this application is to determine whether I am eligible to use TriMet LIFT paratransit services. I certify that the information in this application is true and correct. I understand that providing false information may result in denial of service as well as penalty under the law. I understand that information I provide will be disclosed only as needed to evaluate eligibility for LIFT paratransit, and to provide LIFT services if I am determined to be eligible, unless I give other specific authorization. I understand that it may be necessary for me to participate in an in-person evaluation at TriMet's expense, to determine my eligibility for LIFT services. I understand that TriMet may review my current ADA LIFT eligibility status at any time whatsoever where circumstances may warrant that I am no longer eligible to receive ADA LIFT transportation service.

**If a legal representative signs this application:**

I acknowledge that I may be present with the applicant during the in-person evaluation, or I may designate someone to be present on my behalf.

_____

Applicant or legal representative Date

**If this application was completed by someone other than the applicant:**

If someone other than the applicant assisted in completing this application, that person must complete and sign the following:

Relationship to applicant: _____

Name: _____

Address: _____

Phone: _____-_____-_____ Other: _____-_____-_____

Organization or agency affiliation: _____

I have knowledge of the applicant's disability or health condition. ☐ Yes ☐ No

I am aware of how the applicant's disability or health condition limits or prevents use of regular TriMet bus and/or MAX. ☐ Yes ☐ No

_____

Representative's Signature Date

## PART G. Instructions regarding signatures and submitting application to LIFT

Before returning the application, please make sure that:

1. You answer all questions in Parts A through E.

2. You sign Part F on Page 4.
   NOTE: If another person (not the applicant) completed the application, please have that person complete the information in Part F and sign the application.

3. You complete and sign the attached **Medical Release – Authorization For Use and Disclosure Of Protected Health Information** on Page 6. The Medical Release form is available in large print upon request .

   It may be necessary for TriMet to contact a health professional who is familiar with your disability or health condition. TriMet will not release any medical information obtained with the release(s) you provide to any other party.

Please use the enclosed self-addressed envelope or mail your application to:

TriMet Transit Mobility Center
515 NW Davis Street
Portland, OR 97209

You may instead fax the application to (503)962-8229.

If you have any questions or need assistance in completing the application, including an alternative format, please call the Transit Mobility Center at 503-962-8200, Option #4, TTY 503-962-8058.

- MEDICAL RELEASE -

TRIMET

## AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION

All sections must be completed.

I, _____ authorize:
(Applicant or Patient Name)

Name of professional _____

Address _____

Phone _____ FAX _____

to disclose Protected Health Information (PHI) to the TriMet LIFT (paratransit) Program, 515 NW Davis Street, Portland, OR 97209, for the purpose of assessing whether I am eligible under the Americans with Disabilities Act for TriMet's LIFT transportation service. Only those persons with disabilities whose disabilities prevent their use of regular TriMet buses and/or MAX service are eligible to use LIFT service.

My PHI may include medical records, diagnostic reports, physical therapy records, and any personal and medical information pertinent to my application for LIFT eligibility. If the information to be disclosed contains any of the types of records or information listed below, additional laws relating to the use and disclosure of the information may apply. I understand and agree that this information will be disclosed only if I place my initials in the space next to the type of information:

_____ Chemical dependency
_____ Sexually transmitted diseases
_____ HIV/AIDS
_____ Genetic information
_____ Mental health information (excludes psychotherapy notes)
_____ Reproductive health (including abortion)

I may cancel this authorization at any time by sending a written request to the TriMet LIFT Program, 515 NW Davis Street, Portland, OR 97209. My cancellation of this authorization will not affect any uses or disclosures made before my request is received. If I do not revoke this authorization, it will automatically expire in 90 days.

I understand that I am not legally obligated to sign this authorization and that TriMet will not refuse to accept my application for LIFT eligibility based on my refusal to sign this authorization. I also understand that if TriMet is unable to obtain information necessary to determine my disability or health condition and how the disability or health condition limits or prevents my use of regular bus and/or MAX services, my application for LIFT eligibility may not be processed or may be denied.

I understand that the information used or disclosed pursuant to this authorization may be subject to re-disclosure and no longer be legally protected. However, I also understand that federal or state law may restrict redisclosure of HIV/AIDS information, mental health information, genetic information and drug/alcohol information.

I understand that by signing this statement I am authorizing TriMet to provide a copy of this statement to the above listed professional for the purposes of compliance with the Health Insurance Portability and Accountability Act (HIPAA).

_____
Signature of applicant or legal representative Date

Applicant's Date of Birth _____

# LIFT ELIGIBILITY PROCESS INSTRUCTIONS

## Step 1: WHO MAY BE ELIGIBLE FOR LIFT SERVICE?

The TriMet LIFT service provides paratransit transportation to persons who are certified as eligible under the standards of the Americans with Disabilities Act (ADA). The ADA is a federal law that requires paratransit transportation be provided for persons when their disability in combination with their functional abilities prevents them from using regular public transportation.

Please read the enclosed brochure entitled *LIFT Eligibility and the Americans with Disabilities Act* and the information about TriMet's services including bus and MAX before completing your application.

### Requirements for LIFT Eligibility

The ADA includes two requirements for LIFT eligibility:

1. you must have a disability, and
2. your disability must prevent you from using regular bus and/or MAX services on your own, either some or all of the time.

The basis for the eligibility decision is your ability to use TriMet's regular bus and/or MAX services and the most limiting conditions presented by your disability and the environment.

LIFT eligibility is **not** based on:

- age alone
- a disability or medical diagnosis by itself
- a lack of TriMet bus or MAX service in an area
- an inability to drive
- personal finances

LIFT eligibility may be granted upon the following basis:

- Unconditional (the person may use LIFT service for all trips)
- Conditional (the person may use LIFT service under some conditions for some trips)
- Temporary (the person may have conditional/unconditional eligibility for a defined period of time because limitations are expected to change)

# Step 2: HOW IS YOUR ELIGIBILITY DETERMINED?

The TriMet LIFT eligibility determination process includes:

1. Submission of a completed application and signed Medical Release Form,
2. Professional verification of disability and abilities,
3. An in-person interview with a TriMet LIFT Eligibility Coordinator, and
4. A functional and/or cognitive assessment as needed.

## Interview

At the interview, the Eligibility Coordinator will review the application with you and discuss your travel abilities and limitations in more detail. This information will help the Eligibility Coordinator to identify the best mobility option based on your functional abilities.

The interview will take up to 30 minutes. At the end of the interview, the Eligibility Coordinator will determine if a functional ability assessment is required.

If you will require a non-English language interpreter at the interview, please indicate your language on the application form. A third-party interpreter will be provided at no cost to you.

## Functional Ability Assessment

You may be asked to complete an assessment of your functional abilities immediately following the interview. The assessment is designed to help determine whether you have the ability to use fixed-route services and if so, under what circumstances.

The functional assessment will be conducted by an independent Mobility Assessor and consist of demonstrating your abilities on a simulated course that includes slopes, inclines, negotiating a curb and curb cut and crossing the street. Skills evaluated also include balance, strength, coordination and range of motion.

The assessment may also include a walk outside in the neighborhood and/or a short trip on bus and/or MAX. Please dress appropriately for the weather.

The Functional Assessment of Cognitive Transit Skills (FACTS) may be administered to applicants with cognitive disabilities. This assessment tool uses a set of photos of a simulated bus trip to assess a person's transit skills including bus travel, community safety and general orientation.

### Personal Care Assistance

If you require personal assistance in any daily life functions including using the bathroom, you will need to have someone accompany you to the evaluation to provide this assistance. **TriMet staff is not trained and is unable to assist you with personal care issues.**

Depending on the time of day for your appointment, you may also want to bring a light snack with you and any required medications.

### Mobility Equipment

Please bring the mobility equipment you will use on LIFT and/or in your daily mobility (i.e. mobility device, walker, cane, etc.).

### Transportation to the Evaluation

LIFT eligibility evaluations take place at the TriMet Transit Mobility Center (TMC) at 515 NW Davis Street, Portland, OR 97209. The TMC is located on the MAX Green and Yellow Lines between NW 5th and 6th Avenues and NW Davis and Everett Streets. LIFT will provide transportation for your trips to and from the evaluation at no charge to you if necessary. This location is also served by several bus routes and there is parking available at your cost.

## STEP 3: HOW WILL I KNOW IF I AM ELIGIBLE?

### Notice of Eligibility Determination

You will be notified of the eligibility determination by letter within 21 days after completion of the evaluation process. If you are eligible, you will also receive a *LIFT Rider's Guide* with information about how to use the service.

### Appeals Process

If you have any questions about your eligibility determination, you may contact your LIFT Eligibility Coordinator as indicated in the letter to review his or her decision.

Applicants who are determined not eligible or who do not agree with the conditions established for their use of the LIFT service may request an appeal which must be filed within 65 days from the date of the initial eligibility determination. Information on how to request an appeal will be included with the eligibility determination letter.

## STEP 4: INSTRUCTIONS FOR COMPLETING THE APPLICATION

1. **Answer all questions completely and to the best of your ability.**

2. Be sure to sign the application in **Part F on Page 4. Incomplete and/or unsigned applications may be returned to you.**

3. Complete and sign the attached **Medical Release Form** (the last page of the application). Incomplete or unsigned Medical Release Forms may be returned to you.

   **PLEASE NOTE: This is not a request for medical records or a requirement for you to get a signature from your health professional. Once your application has been received, TriMet will contact your health professional to confirm your disability.**

   **Examples of health professionals include:**

   Certified Orientation & Mobility Specialist
   Chiropractor
   DSHS/DDD Case/Resource Manager
   HCS/AAA Case Manager
   MSW employed by a medical facility
   Occupational Therapist
   Physician
   Physician Assistant
   Physical Therapist
   Psychiatrist
   Psychologist
   Recreation Therapist
   Registered Nurse/Nurse Practitioner
   Special Education Teacher
   Vocational Rehabilitation Counselor

4. Return the completed application and Medical Release Form by mail to:

   TriMet Transit Mobility Center
   515 NW Davis Street
   Portland, OR 97209

   Instead of mailing, you may also fax the application to 503-962-8229.

5. After your application has been reviewed, you will be contacted by phone by LIFT staff to schedule your appointment for the in-person evaluation.

Questions? Please call the LIFT office at 503-962-8200 or TTY at 503-962-8058, 8 a.m. – 5 p.m., Monday through Friday. Materials are available in large print and other alternative formats. Assistance for non-English applicants is also available.

# APPENDIX D


**SURVEY QUESTIONS**
**TCRP, STUDY TOPIC 15-04**
**HOW THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) AND OTHER PRIVACY LAWS AFFECT PUBLIC TRANSPORTATION OPERATIONS**

Agency Name: _____
Name of Employee: _____
Job Title: _____
Contact telephone/ cell phone number: _____/ _____
Email address: _____
How many years have you been with the agency? _____

**NOTES**:

a. The survey questions relate only to health information or records that your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers.

b. The survey does not seek information relating to any employee health information or records or to any health insurance plan provided or sponsored by your agency.

c. Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(i) Entities subject to HIPAA are referred to as *covered entities* – namely, a health care provider, a health plan, or a health care clearinghouse.

(ii) *Hybrid entity* means a single legal entity (1) that is a covered entity; (2) whose business activities include both covered and non-covered functions; and (3) that designates health care components in accordance with HIPAA regulations.

(iii) A *health care provider* includes doctors, clinics, psychologists, dentists, chiropractors, nursing homes, and pharmacies.

(iv) (3) *Business associate* includes: (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information. (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity. (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate.

d. HIPAA's Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate in any form or media whether electronic, paper, or oral. Under the Privacy Rule the information is referred to as "protected health information." The foregoing type of information is included in the term "health information or records" used in the survey.

**Questions and Requests**

1. Does your agency receive, create, transmit or maintain health information or records on individuals for whom your agency provides transportation to doctors, hospitals, clinics, or other health care providers?

**YES __NO __**

a. If your answer is "No," please **STOP** and return the survey as requested on page 9.

b. If your answer is "Yes," please continue with the survey and provide copies of any documents requested.

2. Has your agency been advised, or have agency officials assumed for any reasons, that it is subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) because your agency possesses health information or records on patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please provide details and a copy, if possible, of any advice or opinion regarding the applicability of HIPAA to your agency.

_____

_____

_____

3. Does your agency receive health information or records from, or transmit health information or records to, a health care provider, health plan, or health care clearinghouse as those terms are defined in the HIPAA laws and regulations regarding patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please provide details.

_____

_____

_____

4. (a) Is your agency a *business associate* of a covered entity as those terms are defined in the HIPAA laws and regulations?

**YES __NO __**

If your answer is "Yes," please provide details.

_____

_____

_____

(b) Is your agency a subcontractor to a business associate of a *covered entity* as those terms are defined in the HIPAA laws and regulations?

**YES __NO __**

If your answer is "Yes," please provide details.

_____

_____

_____

(c) Is your agency a *hybrid entity* as defined in the HIPAA regulations, for example, a department of a covered entity providing transportation services in connection with health care services subject to HIPAA?

**YES __NO __**

If your answer is "Yes," please provide details.

_____

_____

_____

5. If your agency receives, creates, transmits, or maintains health information or records on patrons for whom your agency provides transportation services, please describe how and under what circumstances your agency receives, transmits, or maintains health information or records on its patrons.

_____

_____

_____

6. In regard to question 5, to the extent the information has not been provided already, please describe the manner in which your agency receives, creates, transmits, or maintains health information or records, including but not limited to electronic information.

_____

_____

_____

7. Has your agency ever provided to its patrons or others a notice of its privacy policies or practices on the use or disclosure of patrons' health information or records that your agency receives, creates, transmits, or maintains in connection with transporting patrons to health care providers?

**YES __NO __**

If your answer is "Yes," please provide details and a copy of the privacy notice(s) provided to patrons or others. (The question does not concern any such notice provided by your agency to employees or in connection with any health insurance plan for employees of your agency.)

_____

_____

_____

8. Does your agency have security arrangements such as those required by the HIPAA laws and regulations for safeguarding health information or records, including those in electronic format, that your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please provide and/or describe the arrangements.

_____

_____

_____

9. Does your agency have now or has it had previously a contract with a covered entity as defined by the HIPAA laws and regulations to provide transportation to the named covered entity or to health care providers?

**YES __NO __**

If your answer is "Yes," please (a) provide details, including what kind of health information or records your agency receives, creates, transmits, or maintains and (b) provide a copy of any contract or contracts with a covered entity relating to such services.

_____

_____

_____

10. Has your agency been required or requested to provide health information or records concerning patrons of your agency pursuant to a subpoena, including a Grand Jury subpoena, a discovery request, or a court order?

**YES __NO __**

If your answer is "Yes," please (a) provide details and if possible a copy of the subpoena, discovery request, or court order and (b) state whether the agency furnished the health information or records.

_____

_____

_____

11. Has your agency been requested or required to provide health information or records that your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers pursuant to a request under a Freedom of Information Act or a Public Records Disclosure Law?

**YES __NO __**

If your answer is "Yes," please (a) provide details and if possible a copy of the request and (b) state whether the agency furnished the health information or records.

_____

_____

_____

12. Has your agency been the subject of any legal action or administrative proceeding in connection with the use or disclosure of health information or records that your agency receives, creates, transmits, or maintains in connection with transporting patrons to health care providers?

**YES __NO __**

If your answer is "Yes," please (a) describe the nature of the legal action or administrative proceeding; (b) state the outcome of the action or proceeding; and (c) provide a copy of any complaint, order, and/or decision related to the action or proceeding.

_____

_____

_____

13. Are you aware of any state laws applicable to your agency on the use or disclosure of any health information or records that you agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please provide citations to the applicable state law(s).

_____

_____

_____

14. Are you aware of an opinion by any court (federal, state, city, or county) in which an issue was whether HIPAA preempted state law on the use or disclosure of health information or records?

**YES __NO __**

If your answer is "Yes," please provide citations to the applicable state law(s).

_____

_____

_____

15. Excluding HIPAA, are you aware of any federal privacy laws that apply or may apply to your agency regarding its use or disclosure of health information or records that your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please provide citations to the federal privacy laws that apply or may apply to your agency.

_____

_____

_____

16. Has the state attorney general or another official in your state, city, or county issued any opinions regarding the applicability to your agency of state or federal privacy laws, including but not limited to HIPAA, concerning health information or records that your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please (a) provide citations to the opinions and (b) furnish a copy of the opinions.

_____

_____

_____

17. In particular, have any of the following federal laws had any effect on health information or records that your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers?

| | | |
|---|---|---|
| 1. | Patient Protection and Affordable Care Act | **YES __NO __** |
| 2. | Department of Transportation Regulations | **YES __NO __** |
| 3. | Drug and Alcohol Treatment Programs | **YES __NO __** |
| 4. | Americans with Disabilities Act and the Rehabilitation Act of 1973 | **YES __NO __** |
| 5. | Employee Retirement Income Security Act of 1974 | **YES __NO __** |
| 6. | Family Educational Rights and Privacy Act | **YES __NO __** |
| 7. | Privacy Act of 1974 | **YES __NO __** |
| 8. | Medicare and Medicaid | **YES __NO __** |
| 9. | Genetic Information Nondiscrimination Act | **YES __NO __** |
| 10. | Other Federal Privacy Laws (please identify below) | **YES __NO __** |

If your answer to any of the foregoing subparts 1–10 is "Yes," please provide details.

_____

_____

_____

18. To the extent information has not been provided already, has your agency been sued in tort, for breach of contract, or otherwise regarding an alleged, unauthorized or improper use or disclosure of health information or records your agency receives, creates, transmits, or maintains on patrons for whom your agency provides transportation to health care providers?

**YES __NO __**

If your answer is "Yes," please provide details and a citation to any decision(s) that resulted from the action.

_____

_____

_____

19. Does your agency have a plan or policy regarding the handling of health information or records in your agency's possession on patrons when providing them with transportation during an emergency?

**YES __NO __**

If your answer is "Yes," please (a) provide details; (b) state whether the plan or policy includes provisions on the use or disclosure of the health information or records in your agency's possession; and (c) provide a copy of the plan or policy.

_____

_____

_____

20. Please explain (a) what your agency considers the industry practices or standards to be on receiving, creating, transmitting, or maintaining health information or records and/or on the use or disclosure of health information or records on patrons for whom your agency provides transportation to health care providers and (b) provide copies of any industry practices or standards and/or your agency's polices or procedures in regard to the foregoing.

_____

_____

_____

Thank you for your cooperation and for copies of contracts and other documents provided with your responses. As noted, please provide the copies by e-mail or on a disk or provide them via an Internet link if the contracts or other documents are available on line.

**********

**Please return your completed survey <u>preferably via e-mail</u> to:**
**The Thomas Law Firm**
**ATTN: Larry W. Thomas**
**1701 Pennsylvania Avenue, N.W.**
**Suite 300**
**Washington, D.C. 20006**
**Tel. (202) 465-5050**
**<u>lwthomas@cox.net</u>**

## APPENDIX E—SUMMARY OF TRANSIT AGENCIES' RESPONSES TO SURVEY

1. Forty-eight transit agencies responded to a survey that asked whether the agency receives, creates, transmits or maintains health information or records on individuals for whom the agency provides transportation to doctors, hospitals, clinics, or other health care providers. Seventeen agencies responded affirmatively and provided additional information in response to the survey-questions as summarized herein.[96]

2. Five transit agencies replied that they had not been advised, nor had they assumed, that they are subject to HIPAA because the agencies possess health information or records on patrons for whom the agencies provide transportation to health care providers.

However, 12 agencies responded that they had assumed or been advised that HIPAA applied to them and provided the following information:

EBPC on behalf of AC Transit replied affirmatively that it had assumed that HIPAA applies to the agency but noted that it had nothing in writing.

GATRA replied affirmatively and also stated that HIPAA policy and procedures are subject to annual review by the Massachusetts Executive Office of Health and Human Services (EOHHS). Copies of its agreements with the EOHHS are included in Appendix C.

KAT stated that it has not been advised that HIPAA applies but "just work[s] under the assumption the information would be covered under HIPAA law."

MATA stated that it has a paratransit division that "maintains medical information on patrons that [apply] for the service; therefore, MATA must comply with HIPAA Laws."

MTA reported that it had not been "formally advised but it has long been our assumption that we were subject to HIPAA, having no evidence to the contrary."

New Haven Transit stated that the agency has clients who sign a release of information if they wish to access transit service.

North County Transit reported that it is stated in the agency's eligibility application that a patron acknowledges the use of patron's protected health information.

Pierce Transit answered the question both yes and no, stating that "[t]he agency is not assumed to be a designated HIPAA organization, but we do handle some information that is protected under HIPAA."

Riverside likewise said that as part of the ADA certification process, the agency is provided with confidential medical information by applicants to be used to determine "barriers to accessing the fixed route system." Space Coast states that as a county agency the agency follows HIPAA law.

Utah Transit also said that "[a]s we receive information from healthcare providers on our clients' disabilities, we assume that we are to treat such information as confidential."

---

[96] East Bay Paratransit Consortium (EBPC) on behalf of AC Transit, Oakland, CA; Greater Attleboro-Taunton Regional Transit Authority (GATRA), Taunton, MA; Greater New Haven Transit District (New Haven Transit), Hamden, CT; Hillsborough Area Regional Transit Authority (HART), Tampa, FL; Kitsap Transit (Kitsap), Bremerton, WA; Knoxville Area Transit (KAT), Knoxville, TN; Manchester Transit Authority (MTA), Manchester, NH; Memphis Area Transit Authority (MATA), Memphis, TN; Metro Transit (Metro Transit), Madison, WI; North County Transit District (North County Transit), Oceanside, CA; Pierce County Transportation Benefit Area Authority (Pierce Transit), Lakewood, WA; Riverside Transit Agency (Riverside), Riverside, CA; Salem-Keizer Transit (Salem-Keizer), Salem, OR; Space Coast Area Transit (Space Coast), Cocoa, FL; Utah Transit Authority (Utah Transit), Salt Lake, UT; Votran (Volusia County) (Votran), Daytona Beach, FL; and Whatcom Transportation Authority (Whatcom), Bellingham, WA.

Votran stated that section 8 of its paratransit eligibility application asks for information about a medical condition that does not permit an applicant to use regular, fixed route service.

3. Twelve agencies that advised that they receive health information or records from, or transmit health information or records to, a health care provider, health plan, or health care clearinghouse, as those terms are defined in the HIPAA laws and regulations, regarding patrons for whom they provide transportation to health care providers provided additional information.[97]

EBPC stated:

> In order to use the ADA (Americans with Disabilities Act) paratransit program provided by the East Bay Paratransit Consortium, applicants must complete a certification process, which is a requirement under the ADA. For EBPC, this includes a paper application, an in-person interview, and at times a medical verification received from a health care provider.
>
> All information in the rider's file is strictly confidential and EBPC does not transmit this information to anyone.

HART stated that it requires that medical certification forms be completed by physicians on patrons for eligibility for paratransit services.

KAT reported that it receives medical information regarding a client's need for paratransit service.

Kitsap said that in some cases it may be necessary to contact named medical professionals for additional information about an applicant's disability or "functional abilities regarding independent travel."

MATA requires certification of all patrons whose medical information is "received and stored on site."

Metro Transit advised that it collects health information for patrons for two purposes. First, "Metro receives application for ADA Complementary Paratransit that includes health related information from a health care provider." Second, "Metro receives applications for Reduced Fare Disabled Permits that include health related information from a health care provider. The applications are for determining eligibility only and are not required in service delivery."

MTA stated that during the application process clients must submit documentation from their health care provider that illustrates disability and its impact on the clients' ability to use fixed routes.

North County Transit said that it receives health information from medical providers to determine eligibility of service.

Pierce Transit stated that as part of its ADA paratransit eligibility process the agency seeks "professional verification and reports from health care providers."

Space Coast stated that it receives "health information from health agencies and patrons."

Utah Transit said that the agency receives documentation of diagnosis for individuals that may affect functional ability to ride public transportation, information that is received by fax or provided to it by the client.

Whatcom said that it seeks professional verification from physicians and other providers to assist an eligibility specialist in making an ADA paratransit determination.

Four agencies replied that they do not receive or transmit such information: GATRA, New Haven Transit, Salem-Keizer, and Votran.

4. (a) Fourteen of the 17 agencies receiving or transmitting medical records stated that they are not a *business associate* of a covered entity as the term is defined in the HIPAA laws and regulations.

However, three agencies reported as follows:

---

[97] Riverside referred to its answer to question 2.

MATA stated that its agency is a business associate of a covered entity because it transports patrons to health care providers daily.

GATRA stated that it is a business associate of a covered entity: the Massachusetts Executive Office of Health and Human Services.

Space Coast reported that as a county agency it is covered by HIPAA.

(b) Sixteen agencies responding to the survey stated that they are not a subcontractor of a business associate of a *covered entity* as the term is defined in the HIPAA laws and regulations. Salem-Keizer answered the question affirmatively; the agency stated that it has a "contract with the State of Oregon to provide rides for [the] Oregon Health Plan [and] Medicaid eligible participants."[98] A copy of agreements that Salem-Keizer provided are included in Appendix C.

(c) Fifteen agencies stated that their agency is not a *hybrid entity* as the term is defined in the HIPAA regulations (*e.g.*, the agency is not a department of a covered entity providing transportation services in connection with health care services subject to HIPAA). Metro Transit reported that although it is a department of the municipal government it is not a hybrid entity under HIPAA but that "[s]ome other departments of the municipality have been designated…hybrid entities."

Two agencies described themselves as hybrid agencies.

North County Transit stated that it is a hybrid entity because it is "transporting some passengers to health care covered entities."

Pierce Transit identified itself as a hybrid entity. The agency stated that as much as 25% of the ADA paratransit trips it provides are Medicaid-eligible trips.

5. and 6. Questions 5 and 6 are consolidated for the purpose of the summary of the agencies' responses. The agencies that stated that they receive, create, transmit, or maintain health information or records on patrons for whom they provide transportation services and described how and under what circumstances they receive, transmit, or maintain such information or records on their patrons.

EBPC advised that it "does receive and maintain certain health information on riders certified to use the ADA paratransit program. Information comes directly from the applicant and on occasion is verified by a medical health professional. A paper file is created for each applicant and is stored in a filing cabinet in a room with secured access."

Furthermore, EBPC stated that "[i]n order to schedule rides for certified riders, an electronic client file is established in the data base. The client file only contains information necessary for the rider's trip to be scheduled in a way that is safe for the rider and the driver."

According to EBPC, certain information is included in the client database and shared with a driver: whether mobility devices are used; whether a service animal accompanies a rider; whether a rider has vision issues and cannot see a vehicle approaching; whether a rider travels with a personal care attendant; whether a rider can never be left alone; whether a rider cannot walk up steps and requires a boarding chair to enter a van; and whether a rider travels with oxygen tanks.

GATRA stated that "transportation authorizations are received via secured FTP transmission [and] are posted for subcontractors via secure FTP on our portal (web)." GATRA also stated that information or records are received via telefax and "secure e-mail" and that GATRA stores documents in a secured area.

HART stated that certifications provided by physicians are only accepted in "hard copy format through regular mail."

KAT reported that information may be delivered to the agency in person, by mail, or by telefax.

[98] One agency did not respond to the question.

Kitsap reported that requests are sent by telefax or by mail to a named medical professional including a cover sheet, a questionnaire, and a release form. The response is returned to Kitsap, reviewed, and kept with the applicant's file. The application is filed and retained on site. Inactive and archived passenger files are destroyed after 6 years.

MATA stated that with respect to applications for paratransit service information on applicants' medical conditions are received to help determine eligibility. The applications are received by mail, by email, or by hand and after being reviewed are stored in locked files.

Metro Transit's response was that the agency "maintains ADA paratransit application forms…in a secure area with limited access" and that "[o]nly hard copy files are maintained, no electronic copies." Furthermore, Metro Transit reported that it maintains the confidentiality of the records in accordance with the ADA Paratransit Eligibility Manual (1993) prepared for the FTA and distributed by the US DOT.

Metro Transit also stated that "paratransit service manifests are generated for distribution to directly operated service drivers and to contracted service drivers for transportation purposes only. These manifests contain the passenger's name, address for pick up, drop off and pick up times, and mobility device type or space type. No health related information is provided on the manifests. Manifests are distributed manually and electronically." Metro Transit reported that its Reduced Fare Disabled Permit applications are maintained as hard copies but are not secured.

MTA stated that "[c]lients of paratransit service must apply and be approved based on a disability that prevents access to [a] fixed route. [An] applicant must provide health information on disability [and] its effect on using [a] fixed route." However, MTA does not deal with electronic information as "applications are filled out on paper and physically stored."

New Haven Transit advised that clients mail their applications to the agency with their health information and that the applications are kept in locked files.

North County Transit replied that it receives health information via mail, telefax, and e-mail from covered health care provides for eligibility purposes. North County Transit noted that the ADA Paratransit Eligibility Manual, (available at http://ntl.bts.gov/DOCS/ada.html), in a section entitled "Observing Privacy Rights" states:

> The medical information that may be gathered as part of the ADA paratransit eligibility certification process should not be shared with any other party. This would include specific diagnosis provided by professionals and information about the nature of disabilities provided by the applicant. Access to eligibility files should be limited and those with access to these files should be informed and instructed to respect the privacy of applicants. This should include in-house staff as well as any third-party contractors used in the determination process.
>
> Information regarding a person's functional ability to use fixed route service, derived from the determination process can, however, be shared with other transit providers. Other entities may call to obtain more detailed information about a person's ability to travel if that person has requested service in another area as a visitor.

Pierce Transit's response to the survey stated that applications for paratransit as well as its requests for professional verification may be sent to Pierce by mail or by telefax and that the agency stores paper files. A copy of Pierce Transit's Notice of Privacy Practices is included in Appendix C.

Riverside stated that applicants submit a physician's verification form documenting their disability, a document that becomes part of the certification file. However, the document is an internal one that is not "transmitted for any reason." Riverside also said that documents are stored "electronically as part of the certification file and used for comparison over time."

Salem-Keizer only receives information by mail or by telefax that are kept in "locked files."

Space Coast receives information by mail and by telefax.

Whatcom said that it "receives health information related to paratransit eligibility applicants. The information is authorized by consent of [the] applicant and the information is stored in locked, physical files

and password protected computer files." Moreover, "[t]he information received is used only in making ADA determinations and in providing most effective/comfortable service to customers once approved."

7. Eleven of 17 agencies, with one agency not responding to the question, stated that they had never provided to their patrons or others a notice of their privacy policies or practices on the use or disclosure of patrons' health information or records that the agency receives, creates, transmits, or maintains in connection with transporting patrons to health care providers.[99] As for the other five transit agencies responding to the survey,

EBPC reported:

> An applicant must sign a certification as part of the written application giving EBPC the right to seek verification from a health care professional, if it is needed and it will be used only to verify eligibility for paratransit services.…
>
> The applicant must also sign a second certification acknowledging he/she understands all information given to EBPC is confidential and only used to certify whether the applicant is eligible for the ADA paratransit service.

Kitsap stated that a notice of privacy practices is included in the preapplication information with each application for service. Copies of Kitsap's Medical Verification Release form and Notice of Privacy Practices are included in Appendix C.

MATA noted that each application contains a section explaining that medical information will be kept confidential.

Pierce Transit provided a copy of its Notice of Privacy Practices. *See* Appendix C.

Although answering "no" to the question, Metro Transit stated that it provides a notice of confidentiality regarding the application for ADA paratransit eligibility. The Release of Information states:

> I, the applicant, understand that the purpose of this application form is to determine my eligibility to use Metro Paratransit Service. I agree to release the information requested to Metro and any eligibility review panel, and understand that the information contained herein will be treated confidentially. I understand further the Metro reserves the right to request additional information at its discretion. Original signature required. Copies, faxes or emails will not be accepted (please send or deliver the original application).

On the other hand, Metro Transit states that the agency does not provide similar information for its Reduced Fare Disabled Permit application.

8. Four agencies stated that they did not have security arrangements such as those required by the HIPAA laws and regulations for safeguarding health information or records, including those in electronic format, which the agencies receive, create, transmit, or maintain on patrons for whom they provide transportation to health care providers. However, 13 agencies stated that that they did have security for such records.[100] They described the security arrangements as follows.

EBPC stated that electronic files are password protected and maintained in a locked-room that requires a pass code. EBPC also stated that there is limited medical information on clients in its database; that its staff understands that client-details are never to be "given out"; and that clients' print-files are maintained in a secured room that requires a pass code.

GATRA cited "employee training" and its service agreement with a subcontractor.

HART said that medical certifications provided by physicians on patrons are stored in a locked file cabinet in a locked file room and that only authorized personnel in the paratransit department have access to the information, meaning two or three employees of the agency.

KAT stated that applications are kept in a locked file cabinet.

MATA stated that all paratransit applications are stored in a secured area with "lockable files."

---

[99] Utah Transit stated that it communicates "[o]nly verbally in [an] interview with [the] client [that] all information is confidential and not shared without written request signed by client or agent of client."

[100] One agency did not respond to the question.

Metro Transit stated that its "paratransit application records are kept confidential. No electronic encryption has been implemented as of yet. All faxes for supplemental eligibility materials are sent to a fax machine in the secure area with limited access."

MTA similarly reported that all client health information is stored on site in a locked file cabinet with restricted access.

North County Transit referred to a contractor's HIPAA standards.

Pierce Transit referred to its previously mentioned Notice of Privacy Practices, a copy of which is included in Appendix C.

Riverside advised that its documents are "only stored electronically" and that "the software used to store the data has security measures built in to ensure the privacy and confidentiality of these documents."

Utah Transit states that all information is stored in a secure locked file room on all clients and that no information is shared except on the client's or the client's agency's request.

Votran referred to its eligibility application that contains documentation from a medical professional concerning the nature of the applicant's disability that does not permit the applicant to use regular fixed route service.

Whatcom stated that the agency did not "fall under HIPAA" but that Whatcom is "committed to maintenance of customer confidentiality."

9. Fifteen agencies stated that they did not have now nor had they previously had a contract with a covered entity as defined by the HIPAA laws and regulations to provide transportation to the named covered entity or to health care providers.

GATRA, which replied replying affirmatively to the question, attached a copy of the amendments to a contract it has with the Massachusetts EOHHS.

Metro Transit replied affirmatively because it had a contract with a covered entity but also explained that "none of the health records come from the covered entity. Health records come directly from the patron. The covered entity obtains a release from the patron to voluntarily participate in the program."

10. Twelve agencies reported that the agencies had not been required or requested to provide health information or records concerning the agencies' patrons pursuant to a subpoena, including a Grand Jury subpoena, a discovery request, or a court order.[101] However, three agencies replied affirmatively to the inquiry:

GATRA stated that it had a discovery request from a customer's legal representative and that the agency provided the requested documents.

MATA said that records of a paratransit patron's scheduled rides have been "requested by court order because of a patron's service complaint."

Riverside stated that information was requested "but due to HIPAA constraints, the Agency chose not to release the information."

11. Sixteen agencies reported that they had not been requested or required to provide health information or records that they receive, create, transmit, or maintain on patrons for whom they provide transportation to health care providers pursuant to a request under a Freedom of Information Act or a Public Records Disclosure Law.[102]

12. Although 2 agencies did not respond to the question, 15 agencies stated that they had not been the subject of any legal action or administrative proceeding in connection with the use or disclosure of health

[101] Two agencies did not respond to the question.

[102] One agency did not respond to the question.

information or records that the agencies receive, create, transmit, or maintain in connection with transporting patrons to health care providers.

13. Although 3 agencies did not respond to the question, 14 agencies stated that they are unaware of any state laws that are applicable to the agency on the use or disclosure of any health information or records that they receive, create, transmit, or maintain on patrons for whom they provide transportation to health care providers. In responding affirmatively to the question GATRA referred to Massachusetts General Law 66A (discussed in this digest).

14. Although 1 agency did not respond to the question, 16 agencies reported that they were unaware of any opinion by a court (*e.g.*, federal, state, city, or county) in which an issue was whether HIPAA preempted any state law on the use or disclosure of health information or records.

15. Although 1 agency noted the possible applicability of HIPAA to the agency, 16 agencies reported that they were unaware of any federal privacy laws that apply or that may apply to them regarding their use or disclosure of health information or records that the agencies receive, create, transmit, or maintain on patrons for whom the agencies provide transportation to health care providers.

16. Agencies were asked whether the state attorney general or another official in the agency's state, city, or county had issued any opinions regarding the applicability to the transit agency of any state or federal privacy laws, including but not limited to HIPAA, concerning health information or records that they receive, create, transmit, or maintain on patrons for whom they provide transportation to health care providers. Fifteen agencies reported that they were unaware of any such opinions; two agencies did not respond to the question.

17. The agencies were asked whether any of 10 federal laws identified in the survey[103] had had any effect on health information or records that they receive, create, transmit, or maintain on patrons for whom the agency provides transportation to health care providers. Eleven agencies reported that they had not been affected by the laws.[104] Utah Transit identified the Privacy Act of 1974 as being applicable to the agency. Three agencies identified the ADA as being applicable:

EBPC reported that it is required to follow all ADA-regulations.

Pierce Transit stated that "DOT/ADA Rules require a paratransit eligibility process which has required Pierce Transit to handle HIPAA-related information."

Whatcom noted that its agency is subject to DOT and ADA laws and regulations. Its response noted that the agency collects and maintains files "in accordance with ADA and DOT regulations for the specific purpose of authorizing and providing complementary paratransit service for disabled passengers."

18. Sixteen transit agencies stated that they had not been sued in tort, for breach of contract, or otherwise regarding an alleged unauthorized or improper use or disclosure of health information or records they receive, create, transmit, or maintain on patrons for whom they provide transportation to health care providers.[105]

19. As for whether the agencies have a plan or policy regarding the handling of health information or records in their possession on patrons when providing them with transportation during an emergency, 14

[103] 1) Patient Protection and Affordable Care Act; 2) Department of Transportation regulations; 3) Drug and Alcohol Treatment Programs; 4) Americans with Disabilities Act and the Rehabilitation Act of 1973; 5) Employee Retirement Income Security Act of 1974; 6) Family Educational Rights and Privacy Act; 7) Privacy Act of 1974; 8) Medicare and Medicaid; 9) Genetic Information Nondiscrimination Act; and 10) any other Federal Privacy Laws identified by the agency.

[104] Two agencies did not respond to the question.

[105] One agency did not respond to the question.

agencies reported that they did not have a plan or policy.[106] Two agencies did not respond to the question. MATA reported stated that "[f]or any medical emergency during transport paramedics are called and they transport [a patron] to medical providers."

20. Fourteen of 17 agencies explained (a) what they consider the industry practices or standards to be on receiving, creating, transmitting, or maintaining health information or records and/or on the use or disclosure of health information or records on patrons for whom they provide transportation to health care providers and (b) some provided copies of any industry practices or standards and/or the agency's polices or procedures in regard to the foregoing.[107]

EPBC stated that its staff knows that that all records must be treated confidentially; that there are two confidentiality certifications in the ADA application; that the information in electronic files is limited to pertinent information about trip requirements only; and that print-files are kept in a secure location.

HART stated that applications for paratransit service are stored in a secure/locked cabinet accessible only by "select/appropriate staff (two to three employees) in a locked file room."

Kitsap reported that all passenger records are treated as confidential and only reviewed by staff as is necessary to provide safe transportation. "Appropriate database securities are in place to prevent access to these records by nonessential personnel or the general public."

KAT stated that the information is private and that the records must be secured. "Operators are instructed not to share any information to anyone outside of KAT."

MATA "only receive[s] medical information from health care providers and that information is only used for patron certification. The information is filed and secured."

Metro Transit addressed the issue as follows:

> Metro provides some 265,000 one way paratransit trips each year and 788,822 reduced fare fixed route trips each year for people with disabilities in the Madison metropolitan area. Some of those trips are to health care appointments and some are coordinated with humans service agencies. Many trips are for employment purposes.
>
> Metro transit is not a health care provider and it does not make claims for service. Care organizations opt to make use of transit infrastructure to further their programs and for cost efficiencies.
>
> Utilizing public transit has a direct impact on patient care, costs, and access. *Applying HIPAA regulations to public transit at each point of service would result in an increase cost to the service and potentially a reduction in service available.* Public transportation entails requesting information about the nature of the trip which could potentially contain protected health information, if HIPAA regulations applied to public transit, it would in turn require that public transit comply with all HIPAA regulations, including providing privacy notices and acknowledgment of said notice (via gathering signatures at the time of each applicable boarding) and implementing security measures for electronic transmissions of manifests and direct service as opposed to shared ride service to avoid inappropriate disclosure to unauthorized persons at the time of boarding. The implication if HIPAA is applied to public transit is a fundamental change in the manner in which public transit is delivered, increased costs, and decreased access not just for health care, but all trip purposes and would adversely affect all involved parties.

MTA explained that it is a small paratransit service and that it does not transmit or create any records and that it only receives and maintains what is submitted in or with an application.

New Haven Transit provided a copy of its Request for Professional Verification, Authorization to Release Confidential Information, and Physician or Other Professional Information. *See* Appendix C.

Pierce Transit referred to its Notice of Privacy Practices provided with its response to the survey. *See* Appendix C.

---

[106] Utah Transit explained that a client would have to call 911 because the agency does not do "same day emergency transportation."

[107] One agency did not respond to the question.

Riverside stated that it requires medical documentation supporting a claim of disability as allowed under the ADA regulations for certification to access paratransit service, information that is "confidential[] and is treated as such in our process."

Salem-Keizer reported that the information it receives "is functional (as far as ADA service eligibility) and eligibility data from the State of Oregon [is] covered by [a] confidentiality clause." Copies of agreements provided by Salem-Keizer are included in Appendix C.

Utah Transit reiterated that any information received from a client is confidential and is not shared without a client's or a client's agent's written consent. Records are secured in locked room.

Votran stated that "[h]ealth information is not disclosed to parties other than the necessary staff responsible for processing paratransit eligibility applications or performing functional assessments."

Whatcom stated that the industry best practice is that of "maintaining confidential files in secure physical setting and/or password protected computer files."

# APPENDIX F—LIST OF TRANSIT AGENCIES RESPONDING TO SURVEY

Ann Arbor Transportation Authority, Ann Arbor, MI
Antelope Valley Transit Authority, Lancaster, CA
Bay Area Rapid Transit District, Oakland, CA
Capital District Transportation Authority, Albany, NY
Casco Bay Island Transit District, Portland, ME
Central Arkansas Transit Authority
Centre Area Transportation Authority, State College, PA
City of Arcadia Transit, Arcadia, CA
City of Phoenix Public Transit Department, Phoenix, AZ
CT Transit, Hartford, CT
East Bay Paratransit Consortium (EBPC), on behalf of AC Transit, Oakland, CA
Gary Public Transportation Corporation, Gary, IN
Gold Coast Transit, Oxnard, CA
Greater Attleboro-Taunton Regional Transit Authority, Taunton, MA
Greater New Haven Transit District, Hamden, CT
GRTC Transit System, Richmond, VA
Hillsborough Area Regional Transit Authority, Tampa, FL
ITP, The Rapid, Grand Rapids, MI
Kitsap Transit, Bremerton, WA
Knoxville Area Transit, Knoxville, TN
La Crosse Municipal Transit Utility, La Crosse, WI
Lake Charles Transit System, City of Lake Charles, LA
Manchester Transit Authority, Manchester, NH
Memphis Area Transit Authority, Memphis, TN
Mass Transportation Authority, Flint, MI
Metropolitan Council, St. Paul, MN
Metro Transit, Madison, WI
MTA Bus Company, New York, NY
Niagara Frontier Transportation Authority, Buffalo, NY
North County Transit District, Oceanside, CA
Norwalk Transit System, Norwalk, CA
Pierce County Transportation Benefit Area Authority, Lakewood, WA
Port Authority Transit Corporation, Lindenwold, NJ
Pueblo Transit System, Pueblo, CO
Rhode Island Transit Authority, Providence, RI
Riverside Transit Agency, Riverside, CA
Salem-Keizer Transit, Salem, OR
San Joaquin Regional Transit District, Stockton, CA
Santa Clara Valley Transportation Authority, San Jose, CA
Santa Cruz Metropolitan Transit District, Santa Cruz, CA

Shoreline Metro, Sheboygan, WI
Southwest Ohio Regional Transit Authority, Cincinnati, OH
Space Coast Area Transit, Cocoa, FL
Stark Area Regional Transit Authority, Canton, OH
Suffolk County Department of Public Works–Transportation Division, Yaphank, NY
Utah Transit Authority, Salt Lake, UT
Votran (Volusia County), Daytona Beach, FL
Whatcom Transportation Authority, Bellingham, WA

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Robert Brownstein**, Consultant, New York, New York; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Gwen Chisholm Smith** represents the TCRP staff.

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Washington, DC 20001



ISBN 978-0-309-28412-7


Subscriber Categories: Public Transportation

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