

BUSINESS ASSOCIATE ADDENDUM TO AGENT AGREEMENT

THIS BUSINESS ASSOCIATE AGREEMENT (the “AGREEMENT”) is made this 17th day of February, 2010 (the “Effective Date”), between **Delta Dental Plan of New Mexico, Inc.**, (Delta Dental) and **Agent** (“Business Associate” or “BA”). Delta Dental and Business Associate are sometimes collectively referred to herein as the “Parties”. The Parties intend to use this agreement to satisfy the business associate requirements in the regulations at 45CFR 164.502(e) and 164.504(e) issued under HIPAA and the obligations imposed on business associates under HITECH Act.

The Parties hereby agree as follows:

I. DEFINITIONS

- A. “Business Associate” or “BA” shall have the same meaning as the term “business associate” as defined in 45 CFR 160.103.
- B. “CFR” is the Code of Federal Regulations.
- C. “Covered Electronic Transactions” shall have the meaning given the term “transaction” in 45 CFR 160.103.
- D. “Covered Entity” shall have the same meaning as the term “covered entity” as defined in 45 CFR 160.103.
- E. “Electronic Protected Health Information” or “EPHI” shall have the same meaning as the term “electronic protected health information,” as defined in 45 CFR 160.103, limited to the electronic protected health information that is created, received, maintained, or transmitted to or on behalf of Delta Dental.
- F. “HIPAA” is the Health Insurance Portability and Accountability Act of 1996.
- G. “HITECH Act” is the Health Information Technology for Economic and Clinical Health Act of 2009 (Public Law 111-005).
- H. “Individual” shall have the same meaning as the term “individual” as defined in 45 CFR 164.501, and shall include a person who qualifies as a personal representative in accordance with 45 CFR 164.502(g).
- I. “Privacy Rule” means the, “Standards for Privacy of Individually Identifiable Health Information,” as found in 45 CFR parts 160 and 164, as promulgated pursuant to HIPAA.
- J. “Protected Health Information” shall have the same meaning as the term “protected health information” as defined in 45 CFR 164.501, limited to the information created, received or accessed by Business Associate from or on behalf of Delta Dental.
- K. “Required By Law” shall have the same meaning as the term “required by law” as defined in 45 CFR 164.501.
- L. “Secretary” shall mean the Secretary of the Department of Health and Human Services, or his designee.
- M. “Security Incident” shall have the same meaning as the term “security incident” in 45 CFR 164.304, which is the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations.
- N. “Security Rule” means the “Security standards and implementation specifications,” as found in 45 CFR parts 160, 162 and 164, as promulgated pursuant to HIPAA.

- O. “Standards for Electronic Transactions Rule” means the final regulations issued by HHS concerning standard transactions and code sets under the Administration Simplification provisions of HIPAA, 45 CFR Part 160 and Part 162.
- P. “Unsecured PHI” shall have the same meaning as the term “unsecured protected health information” as defined in Section 13402 of the HITECH Act.

II. AGREEMENTS

- A. **Obligations of Business Associate With Respect to the Security and Confidentiality of PHI:** In performing its duties and obligations under the Agreement, Business Associate hereby agrees as follows:

1. **Business Associate treated as Covered Entity.** The administrative, physical, technical safeguard, and policies and procedures documentation requirements of the HIPAA Security Rule set out in 45CFR 164.308, 164.310, 164.312, and 164.316 shall apply to Business Associate in the same manner that such sections apply to Covered Entity. The additional requirements of Subtitle D of the HITECH Act (Sections 13400 to 13411) that relate to privacy or security and that are made applicable with respect to covered entities shall also be applicable to Business Associate and are hereby incorporated into this agreement.
2. **Disclosure.** Business Associate shall not use or further disclose PHI other than as permitted or required by this Agreement or as Required By Law. Business Associate may use and disclose PHI that Business Associate obtains or creates only if such use or disclosure, respectively, is in compliance with each applicable requirement of 45CFR 164.504(e).
3. **Securing PHI.** Business Associate shall secure all PHI to the extent necessary to insure that it is not deemed Unsecured PHI. Business Associate will accomplish this by use of a technology standard that renders PHI unusable, unreadable, or indecipherable to unauthorized individuals and is accredited by the American National Standards Institute and is consistent with guidance issued by the Secretary of Health and Human Services specifying the technologies and methodologies that render PHI unusable unreadable or indecipherable to unauthorized individuals, including the use of standards developed under Section 13101 of the HITECH Act.
4. **Notification of Data Security Breaches.** If Business Associate accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses Unsecured PHI, Business Associate shall, within five (5) days following the discovery of a breach of such information, notify the Covered Entity of such breach. Such notice shall include the identification of each individual whose unsecured protected health information has been or is reasonably believed by the business associate to have been, accessed, acquired, or disclosed during such breach.
5. **Other Law.** Subject to Section II.A.(2) above, Business Associate shall not use or further disclose PHI in a manner that would be impermissible if used or disclosed by Delta Dental or in a manner that would violate the Privacy Rule or other applicable federal or state law or regulations.
6. **Minimum Necessary Standard.** For any disclosure or use of PHI, Business Associate shall determine and use the minimum necessary information to accomplish the intended purpose of the use or disclosure.
7. **Security.** Business Associate agrees to (a) implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the EPHI that it creates, receives, maintains, or transmits on behalf of Delta Dental and, upon request of Delta Dental from time to time, BA shall promptly provide Delta Dental with information regarding such safeguards, (b) ensure that any agent, including subcontractor, to whom BA provides EPHI agrees to implement

reasonable and appropriate safeguards to protect it, and (c) report to Delta Dental any violation of the Security Rule of which it becomes aware.

8. **Reporting Uses and Disclosures.** Business Associate shall report to Delta Dental any use or disclosure of PHI not provided for by this Agreement of which BA becomes aware. Notice of such use or disclosure shall be provided to Delta Dental in writing as soon as possible, but in no event later than five (5) business days from the date on which BA discovers said use or disclosure. The written notice shall:
- (a) contain a brief description of the PHI that was used or disclosed,
 - (b) state the name of the individual whose PHI was used or disclosed,
 - (c) state the name of the individual who inappropriately used the PHI or made the disclosure,
 - (d) identify to whom the use or disclosure was made,
 - (e) identify how the PHI was used or disclosed, and
 - (f) identify steps taken to discontinue and minimize the impact of any inappropriate use or disclosure.

Additionally, BA agrees that, to the extent practicable, it shall mitigate any harmful effect that is known to BA of a use or disclosure of PHI by BA in violation of the requirements of this Agreement.

9. **Reporting Security Incidents.** Business Associate shall report to Delta Dental any Security Incident of which it becomes aware in the following time and manner:
- (a) Any actual, successful Security Incident will be reported to Delta Dental in writing, within five (5) business days of the date on which Business Associate becomes aware of such Security Incident.
 - (b) Any attempted, unsuccessful Security Incident of which Business Associate becomes aware will be reported to Delta Dental in writing, on a reasonable basis at the written request of Covered Entity. If the Security Rule is amended to remove the requirement to report unsuccessful attempts at unauthorized access, this subsection shall no longer apply as of the effective date of the amendment of the Security Rule.
10. **Agents and Subcontractors.** Business Associate shall ensure that any subcontractors or agents to whom BA provides PHI received from Delta Dental, or that is created or received by BA on behalf of Delta Dental, agree to the same restrictions and conditions applicable to BA as set forth herein with respect to PHI. BA agrees to enter into a written contract with such contractors, subcontractors or agents to ensure that such contractors, subcontractors or agents abide by the same restrictions and conditions that apply to BA with regard to PHI. BA shall provide a copy of such contract(s) to Delta Dental upon request.
11. **Attorneys as Business Associates.** Notwithstanding anything contained in this agreement, in no event shall Business Associate be required to take any action or to omit to take any action, which action or omission likely would cause Business Associate to be in violation of the applicable Rules of Professional Conduct for attorneys.
12. **Requests for Information or Access.** Business Associate shall notify Delta Dental in writing within five (5) business days of any requests received by BA from individuals seeking access to or copies of PHI maintained by BA for or on behalf of Delta Dental, and respond to such requests when and as directed by Delta Dental.

13. **Books and Records.** Business Associate shall make its internal practices, books, and records relating to the use and disclosure of PHI received from Delta Dental, or created or received by BA on behalf of Delta Dental, available to the Secretary of Health and Human Services and to Delta Dental for purposes of determining Delta Dental's compliance with HIPAA, the Privacy and Security Rules and other applicable federal and/or state law or regulations. BA shall notify Delta Dental immediately of any such requests, and shall provide Delta Dental with a copy of the request and any documents or information provided in response to such requests.
14. **Requests to Amend.** Business Associate shall notify Delta Dental in writing within five (5) business days of the receipt by Business Associates of any requests from individuals seeking to amend PHI maintained by BA for or on behalf of Delta Dental, and respond to such requests when and as directed by Delta Dental. Additionally, when and as notified by Delta Dental, Business Associate shall incorporate any amendments, corrections and/or other documents or information to PHI maintained by Business Associate and shall notify its contractors and subcontractors who receive PHI of any such amendments, corrections and/or other documents or information.
15. **Violation of Business Associate Agreement Standards and Termination.** If either party knows or discovers a pattern of activity or practice of the other party that constitutes a material breach of the other party's obligations under this agreement or under applicable federal standards, the discovering party agrees to immediately notify the other party in writing as to the nature and extent of such breach and shall provide the other party a reasonable amount of time to cure such breach. A reasonable amount of time shall depend on the nature and extent of the breach, shall be clearly stated in the notice, but in no case shall the period for cure be less than five (5) business days. Notwithstanding the foregoing, should the discovering party determine that the breach is incurable, or that the other party has repeatedly engaged in such impermissible use or disclosure despite prior notice, the discovering party must terminate this agreement, if feasible, upon written notice to the breaching party, without damages or liability to Covered Entity; or, if termination is not feasible, report the problem to the Secretary.
16. **Return of PHI Upon Termination.** At termination of the Agreement, return or destroy all PHI received from Delta Dental, or created by or received by Business Associate on behalf of Delta Dental, that BA maintains in any form such that BA shall retain no copies of such PHI. Upon request of Delta Dental, BA shall provide a written certification of the return and/or destruction of PHI. If the parties concur that the return or destruction of such PHI by BA is not feasible, then BA shall continue to extend the protections required hereunder to the PHI for as long as BA maintains the PHI. Further, BA shall limit any further use or disclosure of the PHI to those purposes that make its return or destruction infeasible. This provision shall survive the termination of this Agreement. Delta Dental may terminate the Agreement immediately upon written notice to BA without damages or liability to Delta Dental if Delta Dental determines that BA has violated a material term of this Agreement. Notwithstanding the foregoing, Delta Dental, at its option and within its sole discretion, may (a) take steps to cure or cause BA to cure the breach; and (b) in the event of such a cure, elect to keep the Agreement in force.
17. **Accountings.** Business Associate shall notify Delta Dental in writing within five (5) business days of any requests made by an individual directly to Business Associate for an accounting of disclosures of PHI. If the request was made as a result of Covered Entity providing the individual with a list of business associates acting on behalf of Covered Entity under Section 13405 of the HITECH Act, Business Associate shall provide such accounting directly to the individual and shall provide Covered Entity with a copy of any such accounting in writing within five (5) business days of receiving the request. Business Associate shall respond to all other requests for an accounting when and as directed by Delta Dental, BA shall provide for an accounting of any and all disclosures of PHI made by or on behalf of BA during the six years prior to the date of the request. The accounting obligations of BA hereunder shall not apply to disclosures made for (a) purposes of treatment, payment or health care operations, (as defined in the Privacy

Rule), (b) disclosures made to the individual who is requesting the accounting, (c) disclosures made prior to April 14, 2003, or (d) disclosures made to law enforcement officers, correctional institutions or for national security purposes. BA shall maintain and make available to Delta Dental upon request a record of all disclosures of PHI made, including, at a minimum, the date of this disclosure, the name and address of the recipient of the PHI, a description of the PHI disclosed and the purpose of and basis for the disclosure.

18. **Permissible Uses and Disclosures of PHI by Business Associate.**

Subject to the foregoing provisions and in addition to the use and disclosure by Business Associate of PHI authorized elsewhere herein, BA may use and disclose PHI for the following additional purposes if applicable:

- (a) as necessary for data aggregation purposes relating to the health care operations of Delta Dental but only as separately authorized by Delta Dental in writing,
- (b) for the proper internal management and administration of Business Associate but only in connection with the direct performance by BA (through its employees) of services for Delta Dental to the Agreement, and
- (c) to carry out the legal responsibilities of the Business Associate.

For purposes (b) and (c) above, Business Associate may use or disclose PHI to third parties only if the disclosure is required by law, BA obtains reasonable assurances from the person to whom the PHI is disclosed that it will be held confidentially 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 the BA of any instances of which it is aware in which the confidentiality of the information has been breached.

- B. **Security.** The parties shall work together in good faith to cooperate with each other's current and future security policies and procedures to ensure the integrity, confidentiality and availability of PHI in a manner that complies with HIPAA and the Security Rule, as amended from time to time.
- C. **Electronic Transactions and Code Sets.** To the extent that the services performed by Business Associate pursuant to the Agreement involve transactions that are subject to the regulations governing electronic transactions and code sets issued pursuant to HIPAA, BA shall conduct such transactions in conformance with such regulations as amended from time to time.
- D. **Record Keeping.** Business Associate agrees to implement an appropriate record keeping process to enable it to comply with the HIPAA requirements applicable to it under this Agreement and the Privacy Rule.
- E. **Confidential and Proprietary Information.** Business Associate may receive, create, or have access to confidential and/or proprietary information of Delta Dental concerning its business affairs, property, operations, computer systems, dentists and providers, and strategies. BA agrees to hold such confidential and/or proprietary information in strict confidence, to maintain and safeguard the confidentiality of such information, and to use such information solely to perform services or provide goods to Delta Dental as required by this Agreement.
- F. **Amendment.** Except as otherwise provided in this section I.I.F, this Agreement may be amended, modified, or supplemented only by a written instrument executed by the parties. Upon enactment of any law or regulation affecting the use or disclosure of PHI, or the publication of any decision of a court of the State or the United States relating to any such law, or the publication of any interpretative policy or opinion of any government agency charged with the enforcement of any such law or regulation, Delta Dental, by written notice to Business Associate, may amend the Agreement in such manner as Delta Dental determines necessary to comply with such law or regulation, and BA agrees to be bound by such amendment unless within thirty (30) days of BA's receipt of notice of such amendment BA notifies

Delta Dental that it rejects such amendment. Upon receipt of such notice of rejection, Delta Dental may terminate the Agreement immediately upon written notice to BA.

- G. **Waiver.** No action taken pursuant to this Agreement, including, without limitation, any investigation by or on behalf of any party, shall be deemed to constitute a waiver by the party taking such action in compliance with any representations, warranties, covenants, or agreements contained herein. The waiver by a party of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach.
- H. **Third Party Beneficiaries.** Except as provided in Section II.A.(7), nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties, and the respective successors and permitted assigns of the Parties, any rights, remedies, obligations, or liabilities whatsoever.
- I. **Binding Effect.** Except as otherwise provided herein, the terms and conditions of the Agreement shall remain in full force and effect. Additionally, the terms and conditions of this Agreement shall remain in full force and effect following termination of the Agreement.
- J. **Reimbursement of Costs.** Business Associate shall reimburse Covered Entity for any and all costs and expenses, whether direct or indirect, incurred by Covered Entity in providing any notice required by law or regulation as a result of any unauthorized disclosure or data breach caused by Business Associate.
- K. **Indemnification.** Business Associate hereby agrees to indemnify defend and hold harmless Delta Dental, its board of directors, officers, members, agents, employees, contractors, and personnel (the "Indemnities") from and against any and all claims, demands, suits, actions, losses, expenses, costs (including reasonable attorney fees), obligations, damages, deficiencies, causes of action, and liabilities (collectively, "Claims") incurred by Delta Dental as a result of, or that are proximately caused by, (i) any breach of the duties and obligations of BA hereunder, including, without limitation, any negligence, intentional acts, errors or omissions by BA, its employees, subcontractors or agents, and (ii) any act or conduct of BA, its employees, subcontractors or agents, adjudged to constitute fraud, misrepresentation, or violation of any law, including, without limitation, violation of any statute or regulation applicable to the BA pursuant to this Agreement. Delta Dental shall provide prompt written notice of relevant information and reasonable assistance (at BA's expense), as may reasonably be requested by BA in connection with the defense of any Claim. Notwithstanding the foregoing: (i) BA shall not settle any such Claim without the consent of Delta Dental which consent shall not be unreasonably withheld, and (ii) the indemnification obligations of BA hereunder, shall not extend to Claims attributable solely to the negligence of Delta Dental.
- L. **Injunction.** The parties acknowledge and agree that in the event of a breach or threatened breach by Business Associate of its duties and obligations hereunder, Delta Dental shall be irreparably and substantially harmed, and that remedies at law will not be an adequate remedy for such breach. Accordingly, in such event, Delta Dental shall be entitled to immediate injunctive relief against such breach or a threatened breach. Such rights to injunctive relief shall be in addition to, and not in limitation of, any other legal and equitable relief available to Delta Dental under applicable law.
- M. **Assignment.** Business Associate may not sell, assign, transfer or otherwise convey any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other party.
- N. **Successors.** This Agreement will be binding upon and will inure to the benefit of the parties to this Agreement and their respective permitted successors and assigns subject to the transfer restrictions and expiration or termination provisions set forth above.
- O. **Severability.** The provisions of this Agreement are severable, and in the event any provision hereof is determined to be invalid or unenforceable, such invalidity or unenforceability shall not in any way affect the validity or enforceability of the remaining provisions hereof.
- P. **Statutory and Regulatory References.** A reference in this Agreement to a section of any statute or regulation means the section as currently in effect or amended, and for which compliance is required.



- Q. **Headings.** The headings of the articles and several paragraphs of this Agreement are inserted for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement.
- R. **Governing Law.** This Agreement shall be governed, construed and enforced in accordance with the laws of the State of New Mexico, without regard to conflict of law principles.
- S. **Notices.** All notices, requests, demands and other communications which are required or may be given pursuant to the terms of this Agreement shall be in written or electronic form and shall be deemed delivered (i) on the date of delivery when delivered by hand, (ii) on the date of transmission when sent by facsimile transmission during normal business hours with written confirmation of receipt, (iii) one day after dispatch when sent by overnight courier maintaining records of receipt, or (iv) three days after dispatch when sent by certified mail, postage prepaid, return-receipt requested; provided that, in any such case, such communication is addressed as follows:

If to Delta Dental, then to:

HIPAA Privacy Officer
 Delta Dental Plan of New Mexico, Inc
 2500 Louisiana Blvd. NE, Suite 600
 Albuquerque, NM 87110
 Telephone: (505) 883-4777
 Facsimile: (505) 883-7444

If to Business Associate, then to:

Name

Address

City, State, and Zip Code

Attn:

Telephone:

Facsimile:

IN WITNESS WHEREOF, the Parties have executed this Addendum effective as of _____ (the "Effective Date").

On Behalf of Delta Dental Plan of New Mexico, Inc.

Name of Agent

By: Maggie Nevins

By: _____

Its: Vice President Sales and Marketing

Its: _____

Date: _____

Date: _____

Signature:

Signature: _____