



## BUSINESS ASSOCIATE ADDENDUM

This **BUSINESS ASSOCIATE ADDENDUM** (this "**BA Addendum**") is an Addendum to the License Agreement by and between **EYEFINITY, INC.**, a Delaware corporation ("**EF**"), and the Eye Care Provider who is licensed to use certain of Eyefinity's Products and Services ("**Customer**"). EF and Customer may be referred to individually as a "**Party**" and collectively as the "**Parties**". Capitalized terms used in this BA Addendum without definition shall have the respective meanings assigned to such terms by the License Agreement between the Parties (the "**License Agreement**"), or the Administrative Simplification section of the Health Insurance Portability and Accountability Act of 1996, the Health Information Technology for Economic and Clinical Health Act and their implementing regulations as amended from time to time (collectively, "**HIPAA**").

### RECITALS

**WHEREAS**, EF receives Protected Health Information from or on behalf of Customer pursuant to the License Agreement ("**PHI**"); and

**WHEREAS**, the Parties desire to amend the License Agreement to add the Business Associate Agreement provisions set forth in this BA Addendum in order for the Parties to comply with HIPAA.

**NOW THEREFORE**, in consideration of the mutual premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### AGREEMENT

#### I. OBLIGATIONS OF EF

**Section 1.1. Use and Disclosure of PHI.** EF may use and disclose PHI as permitted or required under this BA Addendum or as Required by Law, but shall not otherwise use or disclose PHI. EF shall not use or disclose PHI received from Customer in any manner that would constitute a violation of HIPAA if so used or disclosed by Customer (except as set forth in Sections 1.1(b), (c), (d) and (e) of this BA Addendum). To the extent EF carries out any of Customer's obligations under the HIPAA Privacy Rule, EF shall comply with the requirements of the HIPAA Privacy Rule that apply to Customer in the performance of such obligations. Without limiting the generality of the foregoing, EF is permitted to use or disclose PHI as set forth below:

(a) EF and its Subcontractors may use and disclose PHI to carry out EF's duties and obligations and exercise their rights under the License Agreement.

(b) EF and its Subcontractors may use PHI internally for EF's or the Subcontractor's proper management and administrative services or to carry out their legal responsibilities;

(c) EF and its Subcontractors may disclose PHI to a third party for EF's or the Subcontractor's proper management and administration, provided that the disclosure is Required by Law or EF or the Subcontractor, as applicable, obtains reasonable assurances from the third party to whom the PHI is to be disclosed that the third party will (1) protect the confidentiality of the PHI, (2) only use or further disclose the PHI as Required by Law or for the purpose for which the PHI was disclosed to the third party and (3) notify, as applicable, EF or the Subcontractor of any instances of which the person is aware in which the confidentiality of the PHI has been breached;



(d) EF and its Subcontractors may use PHI to provide Data Aggregation services;  
and

(e) EF and its Subcontractors may use PHI to create de-identified health information in accordance with the HIPAA de-identification requirements. Without limiting any other rights of EF under the License Agreement, EF may use, create, sell, disclose to third parties and otherwise exploit de-identified health information for any purposes not prohibited by law. For the avoidance of doubt, the second sentence of this Section 1.1(e) shall survive the expiration or earlier termination of the License Agreement or this BA Addendum.

**Section 1.2. Safeguards.** EF shall use reasonable and appropriate safeguards to prevent the use or disclosure of PHI except as otherwise permitted or required by this BA Addendum. In addition, EF shall implement Administrative Safeguards, Physical Safeguards and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of PHI transmitted or maintained in Electronic Media (“**EPHI**”) that it creates, receives, maintains or transmits on behalf of Customer. EF shall comply with the HIPAA Security Rule with respect to EPHI.

**Section 1.3. Minimum Necessary Standard.** To the extent required by the “minimum necessary” requirements of HIPAA, EF shall only request, use and disclose the minimum amount of PHI necessary to accomplish the purpose of the request, use or disclosure.

**Section 1.4. Mitigation.** EF shall take reasonable steps to mitigate, to the extent practicable, any harmful effect (that is known to EF) of a use or disclosure of PHI by EF in violation of this BA Addendum.

**Section 1.5. Subcontractors.** EF shall enter into a written agreement meeting the requirements of 45 C.F.R. §§ 164.504(e) and 164.314(a)(2) with each Subcontractor that creates, receives, maintains or transmits PHI on behalf of EF. EF shall ensure that the written agreement with each Subcontractor obligates the Subcontractor to comply with restrictions and conditions that are at least as restrictive as the restrictions and conditions that apply to EF under this BA Addendum.

**Section 1.6. Reporting Requirements.**

(a) If EF becomes aware of a use or disclosure of PHI in violation of this BA Addendum by EF or by a third party to which EF disclosed PHI, EF shall report any such use or disclosure to Customer without unreasonable delay.

(b) EF shall report any Security Incident involving EPHI of which it becomes aware in the following manner: (a) any actual, successful Security Incident will be reported to Customer in writing without unreasonable delay, and (b) any attempted, unsuccessful Security Incident of which EF becomes aware will be reported to Customer orally or in writing on a reasonable basis, as requested by Customer. If the HIPAA Security Rule is amended to remove the requirement to report any unsuccessful Security Incidents, the requirement hereunder to report such unsuccessful Security Incidents will no longer apply as of the effective date of the amendment.

(c) EF shall, following the discovery of a Breach of Unsecured PHI, notify Customer of the Breach in accordance with 45 C.F.R. § 164.410 without unreasonable delay and in no case later than sixty (60) days after discovery of the Breach.





**Section 1.7. Access to Information.** EF shall make available PHI in the Products and/or Services identified in the License Agreement to Customer in accordance with the License Agreement for so long as EF maintains the PHI in a Designated Record Set. If EF receives a request for access to PHI directly from an Individual, EF shall forward such request to Customer within fifteen (15) business days. Customer shall have the sole responsibility for determining whether to approve a request for access to PHI and to provide such access to the Individual.

**Section 1.8. Availability of PHI for Amendment.** EF shall provide PHI in the Products and/or Services to Customer for amendment, and incorporate any such amendments in the PHI (for so long as EF maintains such information in the Designated Record Set), in accordance with this BA Addendum and as required by 45 C.F.R. § 164.526. If EF receives a request for amendment to PHI directly from an Individual, EF shall forward such request to Customer within fifteen (15) business days. Customer shall have the sole responsibility for determining whether to approve an amendment to PHI and to make such amendment.

**Section 1.9. Accounting of Disclosures.** Within thirty (30) business days of written notice by Customer to EF that it has received a request for an accounting of disclosures of PHI (other than disclosures to which an exception to the accounting requirement applies), EF shall make available to Customer such information as is in EF's possession and is required for Customer to make the accounting required by 45 C.F.R. § 164.528. If EF receives a request for an accounting directly from an Individual, EF shall forward such request to Customer within fifteen (15) business days. Customer shall have the sole responsibility for providing an accounting to the Individual.

**Section 1.10. Availability of Books and Records.** Following reasonable advance written notice, EF shall make its internal practices, books and records relating to the use and disclosure of PHI received from, or created or received by EF on behalf of, Customer available to the Secretary for purposes of determining Customer's compliance with HIPAA.

## II. OBLIGATIONS OF CUSTOMER

**Section 2.1. Permissible Requests.** Customer shall not request EF to use or disclose PHI in any manner that would not be permissible under HIPAA if done by Customer.

**Section 2.2. Minimum Necessary Information.** When Customer discloses PHI to EF, Customer shall provide the minimum amount of PHI necessary for the accomplishment of Customer's purpose.

**Section 2.3. Appropriate Use of PHI.** Customer and its employees, representatives, consultants, contractors and agents shall not submit any Protected Health Information to EF (A) outside of the Products or Services, including but not limited to submissions to any online forum made available by EF or its Subcontractors to their customers, email transmissions, and submissions through any support website, portal, or online help desk or similar service made available by EF or its Subcontractors outside of Products or Services; or (B) directly to any third party involved in the provision of an online forum, email, support website, online help desk or other service described in (A), above.

**Section 2.4. Permissions; Restrictions.** Customer warrants that it has obtained and will obtain any consent, authorization and/or other legal permission required under HIPAA and other applicable law for the disclosure of PHI to EF. Customer shall notify EF of any changes in, or revocation of, the permission by an Individual to use or disclose his or her PHI, to the extent that such changes may affect EF's use or disclosure of PHI. Customer shall not agree to any restriction





on the use or disclosure of PHI under 45 C.F.R. § 164.522 that restricts EF's use or disclosure of PHI under the License Agreement and this BA Addendum unless such restriction is Required By Law or EF grants its written consent.

**Section 2.5. Notice of Privacy Practices.** Except as Required By Law, with EF's consent or as set forth in this BA Addendum, Customer shall not include any limitation in Customer's notice of privacy practices that limits EF's use or disclosure of PHI under the License Agreement or this BA Addendum.

### III. TERMINATION OF THE LICENSE AGREEMENT AND THIS BA ADDENDUM

**Section 3.1. BA Addendum Term.** This BA Addendum shall continue in full force and effect for so long as EF maintains any PHI.

**Section 3.2. Termination Upon Breach of this BA Addendum.** Any other provision of the License Agreement notwithstanding, the License Agreement and this BA Addendum may be terminated by either Party (the "**Non-Breaching Party**") upon ninety (90) days written notice to the other Party (the "**Breaching Party**") in the event that the Breaching Party materially breaches this BA Addendum in any material respect and such breach is not cured within such ninety (90) day period. Any determination of whether a material breach has been cured shall be made by EF in its sole discretion.

**Section 3.3. Return or Destruction of PHI upon Termination.** Upon termination of the License Agreement, EF shall return or destroy all PHI received from Customer or created or received by EF on behalf of Customer and which EF still maintains as PHI. Notwithstanding the foregoing, to the extent that EF determines, in its sole discretion, that it is not feasible to return or destroy such PHI, this BA Addendum (including, without limitation, Section 1.1(e) of this BA Addendum) shall survive termination of the License Agreement and this BA Addendum and such PHI shall be used or disclosed solely for such purpose or purposes which prevented the return or destruction of such PHI.

### IV. MISCELLANEOUS PROVISIONS

**Section 4.1. Applicability.** This BA Addendum relates to PHI that EF or EF's Subcontractors receive pursuant to the License Agreement.

**Section 4.2. HIPAA Amendments.** The Parties acknowledge and agree that the Health Information Technology for Economic and Clinical Health Act and its implementing regulations impose requirements with respect to privacy, security and breach notification applicable to Business Associates (collectively, the "**HITECH BA Provisions**"). The HITECH BA Provisions and any other future amendments to HIPAA affecting Business Associate Agreements are hereby incorporated by reference into this BA Addendum as if set forth in this BA Addendum in their entirety, effective on the later of the Effective Date or such subsequent date as may be specified by HIPAA.

**Section 4.3. Regulatory References.** A reference in this BA Addendum to a section in HIPAA means the section as it may be amended from time-to-time.

**Section 4.4. Relationship of the Parties.** Neither the License Agreement nor this BA Addendum create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the Parties and the status of the Parties shall be independent parties to a





contractual arrangement. Neither Party shall have the authority to bind the other Party by contract or otherwise.

**Section 4.5. Entire Agreement.** The License Agreement and this BA Addendum constitute the entire agreement between the Parties as to their subject matter, and supersede all previous and contemporaneous agreements, proposals or representations, written or oral, concerning such subject matter. Except as otherwise set forth therein, no modification, amendment, or waiver of any provision of this BA Addendum shall be effective unless in writing and signed by the Party against whom the modification, amendment, or waiver is to be asserted.

**Section 4.6. Waiver.** No failure or delay by either Party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated therein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a Party at law or in equity.

**Section 4.7. Counterparts.** This BA Addendum may be executed in one or more counterparts, which may be delivered by fax or other electronic transmission, including email, each of which shall be deemed an original and which taken together shall form one legal instrument.

