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## DISCLOSING INFORMATION TO BUSINESS ASSOCIATES

**Policy Number:** [Enter]

**Effective Date:** [Enter]

### **I. Policy:**

#### **A. Policy Purpose:**

This policy establishes guidelines for the disclosure of patient health information to, and use by, a business associate.

#### **B. Policy Implementation**

##### **1. General Rule**

A business associate is a person or entity that performs certain functions, activities, or services for or on behalf of [Organization] that involves the use or disclosure of PHI.

If [Organization] enters into a Business Associate Agreement and obtains satisfactory assurance that the business associate will appropriately safeguard PHI, [Organization] may disclose PHI to the business associate and allow that business associate to create, receive, maintain, or transmit PHI on [Organization]'s behalf. [Organization] is not required to obtain such satisfactory assurances from a business associate that is a subcontractor.

*[GPM Note: Although Minnesota law generally requires that individuals consent to the release of PHI, Minnesota law does not require a specific form of consent. [Organization] may expressly address disclosures to its business associates in its standard consent form. Alternatively, [Organization] may release information to its business associates under the theory that the business associate is acting as its agent and the activities and services performed by the business associate fall within the permissions [Organization] secures via the consent form.]*

**Substance Use Disorder Patient Records.** 42 CFR Part 2 similarly permits [Organization] to disclose substance use disorder patient records to agencies that provide services to [Organization]. While the HIPAA Regulations call these agencies “business associates,” Part 2 calls these agencies “Qualified Service Organizations.” Prior to disclosing substance use disorder patient records, [Organization] must enter into a written agreement that meets the requirements of Part 2.

**For more information on disclosing Substance Use Disorder Patient Records, refer to policy number [Enter], Disclosures of Substance Use Disorder Patient Records.**

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Throughout this Policy, use of the term “protected health information” or “PHI” includes electronic protected health information (or “ePHI”), and vice versa.

## 2. Determining Who is a Business Associate

[*Organization*] shall determine whether or not an entity/vendor is a business associate of [*Organization*] through the following three questions:

- a. Does [*Organization*] have a contractual or other business or services relationship with the entity/vendor to perform services or activities on behalf of [*Organization*]?

**This includes functions or activities such as claims processing or administration; data analysis, processing, or administration; utilization review; quality assurance; certain patient safety activities; billing; benefit management; practice management; and re-pricing.**

**It also includes entities/vendors that provide legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services to or for [*Organization*].**

***A member of [*Organization*]'s workforce is NOT a business associate.***

- b. Does [*Organization*] need to supply the entity/vendor with PHI or access to PHI in order for the entity/vendor to perform its service or activity on behalf of [*Organization*]?
- c. Is the service or activity a service or activity other than treatment?

If the answer to all three of these questions is “Yes”, the entity/vendor is a business associate of [*Organization*].

**Who is NOT a business associate. When a contract is with another provider to provide treatment, the vendor/provider is NOT a business associate. Similarly, if [*Organization*] is a member of a health plan network and the only relationship between the health plan (payer) and [*Organization*] is one where [*Organization*] submits claims for payment to the plan, then [*Organization*] is not a business associate of the health plan. Each covered entity is acting on its own behalf when [*Organization*] submits a claim to a health plan, and when the health plan assesses and pays the claims.**

For additional help on making this determination, members of [*Organization*]'s workforce should consult the business associate flow chart entitled, “How to Identify a ‘Business Associate’”.

## 3. Business Associate Agreements

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[*Organization*] shall use a written agreement with its business associates to ensure and document that its business associates will appropriately safeguard PHI received from [*Organization*].

If [*Organization*] becomes aware of a pattern of activity or practice of the business associate that constitutes a material breach or violation of the business associate's obligation under the contract or other arrangement, [*Organization*] shall take reasonable steps to cure the breach or end the violation, as applicable. If the steps taken to cure the breach or end the violation are unsuccessful, [*Organization*] shall terminate the contract, if feasible.

If the business associate becomes aware of a pattern of activity or practice of the subcontractor that constitutes a material breach or violation of the subcontractor's obligation under the contract or other arrangement, the business associate shall take reasonable steps to cure the breach or end the violation, as applicable. If the steps taken to cure the breach or end the violation are unsuccessful, the business associate shall terminate the contract, if feasible.

**Substance Use Disorder Patient Records.** Prior to disclosing substance use disorder patient records, [*Organization*] must enter into a written agreement, often called a Qualified Service Organization Agreement, that meets the requirements of Part 2. See Section 4 below for information on how to satisfy these requirements.

#### 4. Requirements for Business Associate Agreements

A business associate agreement between [*Organization*] and a business associate must:

- a. Establish the permitted and required uses and disclosures of PHI by the business associate. The agreement may not authorize the business associate to use or further disclose the PHI in a manner that would violate the HIPAA Regulations or these policies if the use or disclosure was done by [*Organization*]; However:
  - i. The agreement may permit the business associate to use and disclose PHI for the proper management and administration of the business associate; and
  - ii. The agreement may permit the business associate to provide data aggregation services relating to the health care operations of [*Organization*].
- b. Provide that the business associate will not use or further disclose the PHI other than as permitted or required by the contract or as required by law;
- c. Provide that the business associate will use appropriate safeguards and comply, where applicable, with the HIPAA Regulations provisions pertaining to electronic protected health information, to prevent use or disclosure of ePHI other than as

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provided for by its contract;

- d. Provide that the business associate will report to [*Organization*] any use or disclosure of the PHI not provided for by its contract, whenever it becomes aware of such unauthorized use or disclosure, including breaches of unsecured PHI;
- e. Provide that the business associate will ensure that any subcontractors that create, receive, maintain, or transmit PHI on behalf of the business associate shall agree to the same restrictions and conditions that apply to the business associate with respect to the PHI;
- f. Provide individuals access to PHI in accordance with these policies and the HIPAA Regulations;
- g. Provide individuals the right to amend PHI in accordance with these policies and the HIPAA Regulations;
- h. Provide individuals the right to an accounting of disclosures of PHI in accordance with these policies and the HIPAA Regulations;
- i. Provide that to the extent the business associate is to carry out [*Organization*]'s obligations under the HIPAA Regulations, the business associate will comply with the requirements that apply to [*Organization*];
- j. Require the business associate to make its internal practices, books, and records relating to the use and disclosure of PHI received from [*Organization*] (or created or received by the business associate on behalf of [*Organization*]) available to the Secretary of Health and Human Services for purposes of determining [*Organization*]'s compliance with the HIPAA Regulations;
- k. Requires the business associate to report to [*Organization*] any security incident of which it becomes aware, including breaches of unsecured PHI;
- l. At termination of the agreement, if feasible, return or destroy all PHI received from [*Organization*] (or created or received by the business associate on behalf of [*Organization*]) that the business associate maintains in any form (including copies of such information). If the return or destruction of the PHI is not feasible, the business associate shall extend the protections of the contract to the information and limit further uses and disclosures of the PHI to those purposes that make the return or destruction of the information infeasible; and
- m. Authorize termination of the contract by [*Organization*], if [*Organization*] determines that the business associate has violated a material term of the contract.

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When entering into arrangements with business associates, [Organization] should use the Template Business Associate Agreement.

**Business Associate Agreements involving Substance Use Disorder Patient Records. Prior to disclosing substance use disorder patient records, [Organization] must enter into a written agreement with the vendor/entity under which that vendor/entity:**

- 1. Acknowledges that in receiving, storing, processing, or otherwise dealing with any patient records from the programs, it is fully bound by Part 2 and promises to safeguard such information; and**
- 2. If necessary, it will resist in judicial proceedings any efforts to obtain access to patient identifying information related to substance use disorder diagnosis, treatment, or referral for treatment, except as permitted by Part 2.**

**To satisfy this requirement, [Organization] staff should take [Organization]'s template Business Associate Agreement and insert the following language:**

*Business Associate acknowledges that in receiving, storing, processing or otherwise dealing with any patient records from [Organization], it is fully bound by the Confidentiality of Substance Use Disorder Patient Records regulations at 42 CFR Part 2. If necessary, Business Associate will resist in judicial proceedings any efforts to obtain access to patient identifying information related to substance use disorder diagnosis, treatment, or referral for treatment, except as permitted by these regulations.*

**For more information on disclosing Substance Use Disorder Patient Records generally, refer to policy number [Enter], Disclosures of Substance Use Disorder Patient Records.**

## **5. Special Situations Related to the Business Associate Agreement**

- a. *If a business associate is required by law to perform a function or activity on behalf of [Organization]:* If a business associate is required by law to perform a function or activity on behalf of [Organization] or to provide a service described in the HIPAA Regulations' definition of *business associate*, [Organization] may disclose PHI to the business associate to the extent necessary to comply with the legal mandate without a business associate contract or a memorandum of understanding, provided that [Organization] attempts in good faith to obtain satisfactory assurances as described in the requirements for a business associate contract, and, if such attempt fails, documents the attempt and the reasons that such assurances cannot be obtained.

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- b. *If authorization to terminate the contract is inconsistent with the statutory obligations: [Organization] may omit from its business associate agreement the authority to terminate the agreement for a material breach of the agreement, if such authorization is inconsistent with the statutory obligations of [Organization] or its business associate.*
- c. *If [Organization] and the business associate have a data use agreement: [Organization] may comply with the HIPAA Regulations if [Organization] discloses only a limited data set to a business associate for the business associate to carry out a health care operations function and [Organization] has a data use agreement with the business associate.*

**6. Use and Disclosure of PHI by a Business Associate for the Business Associate's Own Management and Administration**

The business associate agreement between [Organization] and a business associate may permit the business associate to **use** (not disclose) the PHI received by the business associate, if necessary:

- a. For the proper management and administration of the business associate; or
- b. To carry out the legal responsibilities of the business associate.

The business associate agreement between [Organization] and a business associate may permit the business associate to **disclose** the PHI received by the business associate for: (A) the proper management and administration of the business associate; or (B) carrying out the legal responsibilities of the business associate, if:

- a. The disclosure is required by law; or
- b. The business associate obtains reasonable assurances from the person to whom the PHI is disclosed that:
  - i. It will be held confidentially and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person; and
  - ii. The person notifies the business associate of any instances of which it is aware in which the confidentiality of the information has been breached.

**7. Business Associate Contracts with Subcontractors**

The requirements of this policy apply to contracts or other arrangements between a business associate and a business associate that is a subcontractor in the same manner as such requirements apply to contractors or other arrangements between [Organization] and business associate.

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When entering into arrangements with subcontractors, business associates should use the Template Subcontractor Business Associate Agreement.

**8. Documentation Regarding a Business Associate Contract**

[*Organization*] shall document and retain a business associate contract or memorandum of understanding, in written or electronic format for at least six (6) years from the date when the business associate contract or memorandum of understanding was last in effect.

**II. Procedure:**

- A. [*Organization*] and its employees will determine whether an entity/vendor is a business associate in accordance with this policy.
- B. If an entity/vendor is a business associate of [*Organization*], Director or designee must contact the Privacy Officer to set up the needed written agreements.
- C. [*Organization*] will only disclose PHI to a business associate in accordance with this policy and the written agreements.