

## eHealth Exchange Participant Testing Services Agreement

This **eHealth Exchange Participant Testing Agreement** (this “**Agreement**”) is made and entered into as of \_\_\_\_\_, 201\_\_ (the “**Effective Date**”) by and between Healthway, Inc. (dba The Sequoia Project) (“**The Sequoia Project**”), a Virginia non-stock, membership corporation and \_\_\_\_\_ (“**Applicant**”), a \_\_\_\_\_ (INSERT TYPE OF LEGAL ENTITY AND STATE OF DOMICILE). Each of The Sequoia Project and Applicant shall be referred to in this Agreement as a Party or collectively as Parties.

### RECITALS

**WHEREAS**, The Sequoia Project is organized as a non-profit corporation to provide operational support to the eHealth Exchange (formerly referred to as the Nationwide Health Information Network Exchange);

**WHEREAS**, eHealth Exchange Participant Testing Program tests compliance for health information exchange (HIE) standards as required by the eHealth Exchange Coordinating Committee for onboarding to the eHealth Exchange network;

**WHEREAS**, The Sequoia Project operates the Participant Testing Program for eHealth Exchange;

**WHEREAS**, Applicant wishes to have its HIE system qualify as a Participant on the eHealth Exchange.

**THEREFORE**, in consideration of the mutual agreements of the Parties as set forth in this Agreement and other good and valuable consideration, the adequacy and sufficiency of which is hereby acknowledged, the Parties do agree as follows:

### 1. Definitions

- a. “**Applicant’s HIE Technology**” means the health information exchange technology submitted by Applicant to the Coordinating Committee for the purpose of completing the Testing Process and demonstrating compliance with the Specifications.
- b. “**Data Use and Reciprocal Support Agreement**” means the legal, multi-party trust agreement that is entered into voluntarily by all entities, organizations and Federal agencies that desire to engage in electronic health information exchange with each other using an agreed upon set of Specifications.
- c. “**eHealth Exchange Participant Testing Program**” means the program of Testing as described herein and in the eHealth Exchange Validation Plan, as defined in the DURSA.
- d. “**HIT**” means health information technology.
- e. “**Specifications**” means the system requirements adopted for the eHealth Exchange.

- f. **“Specification Version”** means a set of Testing Program items (Specifications and Test Materials) that are associated with the eHealth Exchange Participant Testing Program, as described in the eHealth Exchange Validation Plan. For example, as of November 2013, the two Specification Versions are the 2010 Version eHealth Exchange Specifications and the 2011 Version eHealth Exchange Specifications.
- g. **“SPOC”** means Applicant’s designated single point of contact who will oversee and coordinate Applicant’s participation in the Participant Testing Program and respond to The Sequoia Project inquiries as necessary during each phase of the Testing Process.
- h. **“Test Materials”** means the set of testing requirements that must be successfully demonstrated and validated to comply with the Specifications. This may include, but is not limited to test cases, test scenarios, conformance checklists, etc.
- i. **“Testing Date”** means the date on which Applicant’s HIE Technology is issued a Testing Report.
- j. **“Testing Fee”** means the fee payable at the time of application by Applicant for the evaluation of Applicant’s HIE Technology for the testing process. The amount of the Testing Fee is set forth in Exhibit A attached hereto and may be modified for future programs.
- k. **“Testing Process”** means the process followed by The Sequoia Project as defined in the Operating Policies and Procedures and Validation Plan to evaluate the compliance of the Applicant’s HIE Technology with the Specifications and Test Materials and indicated on the Testing Report.
- l. **“Test Report”** means a written report issued by The Sequoia Project that documents the outcomes of the Testing Process; that is, the Applicant’s compliance with the Specifications and Test Materials.
- m. **“Testing”** means validation of Applicant’s HIE Technology that indicates that the Applicant’s HIE Technology is in compliance with the Specifications and Test Materials.
- n. **“Web Site”** means the eHealth Exchange web site at [www.ehealthexchange.com](http://www.ehealthexchange.com).

## 2. Testing Process

- a. **Application Process.** Applicant and The Sequoia Project shall follow the process described in the eHealth Exchange Operating Policies and Procedures for the submission, review and processing of Applicant’s application for Testing of Applicant’s HIE Technology.
- b. **Testing Process.** Applicant and The Sequoia Project shall follow the process described in the eHealth Exchange Operating Policies and Procedures and Validation Plan.
- c. **Testing Outcome.** The outcome of the Testing Process shall be communicated to Applicant by delivery of a Test Report.

- d. **Appeal Procedures.** Applicant may appeal the findings in a Test Report only if the Applicant failed testing and Applicant believes, in good faith, that The Sequoia Project rendered an incorrect decision about the technology compliance based upon how the technology was validated during the test due to perceived bias or error and that, as a result the Test Report does not accurately reflect the compliance of the Applicant's HIE technology with the Specifications and Test Materials based upon how the Applicant's HIE Technology was validated by The Sequoia Project. The Parties agree that neither of them will make any public statements or disclosures about Applicant's appeal during or after the appeal except as required by law.

### 3. Fees

- a. **Standard Testing Fee.** Applicant shall pay the "Testing Fee" set forth on Exhibit A attached hereto. Payment of the total Testing Fee must be received in full by The Sequoia Project before processing of the application will begin.
- b. **Standard Time for Testing.** Applicants will have sixty (60) calendar days from the application acceptance date to complete the entire Testing Process. If Applicant has not completed its Testing within this 60 day time period, The Sequoia Project may require an additional fee equal to 15% of the Testing Fee to complete the Testing Process. The Sequoia Project may, in its sole discretion, agree to extensions if unexpected delays occur as a result of The Sequoia Project's efforts.
- c. **Additional Sets of Test Results.** Applicants may practice with the testing tools on an unlimited basis. However, Applicants will be allowed to submit two (2) sets of test results to The Sequoia Project for evaluation as evidence of compliance for the Final Testing Report as a covered by the Standard Testing Fees. If Applicant needs to submit additional test results for review and evaluation to demonstrate its compliance, it may do so for an additional fee ("Retest Fee") set forth on Exhibit A attached hereto.
- d. **Refunds.** Applicant is not entitled to a refund of any Testing Fees except Applicant shall receive a refund of 85% of the Testing Fee where (i) the Applicant's application is incomplete and the Applicant is unable to resolve all deficiencies in the application to The Sequoia Project's satisfaction; or (ii) the eHealth Exchange Coordinating Committee fails to accept the Applicant's application for any reason. Applicant may reapply at any time in the future by resubmitting its application and the full Testing Fee.

### 4. The Sequoia Project Responsibilities

- a. **Test Summary Report.** Upon completion of the Testing, Applicant will be provided with a Test Report by The Sequoia Project. A copy of the report will be sent to the Coordinating Committee for their use in the eHealth Exchange onboarding process.

**The eHealth Exchange Coordinating Committee has sole authority to determine whether an Applicant has satisfied the requirements to become an eHealth Exchange Participant. Successful completion of Testing does not guarantee that an Applicant will be accepted by the Coordinating Committee as a Participant.**

- b. **Test Requirements.** The Sequoia Project will post on its web site the current eHealth Exchange Validation Plan and Test Materials, as modified from time to time in accordance with the DURSA.

## 5. Applicant Responsibilities

- a. **eHealth Exchange Participant Testing Program .** Applicant shall perform all of Applicant's obligations specified for all phases of the eHealth Exchange Participant Testing Program, in accordance with this Agreement and the eHealth Exchange Validation Plan and Test Materials which are incorporated by reference into this Agreement.
- b. **SPOC.** Applicant shall designate a SPOC, and make available during the Testing Process its SPOC and other Applicant personnel as necessary to effectively complete the Testing, as well as for review of the Test Report and any other elements contained in any other testing methods used in the eHealth Exchange Participant Testing Program and to answer questions and attend meetings as required by The Sequoia Project. Applicant will notify The Sequoia Project promptly in the event of a change in the SPOC for Applicant's HIE Technology.

- 6. **Ownership of Materials.** Applicant acknowledges that any copyrights, patent rights, trade secrets, trademarks and other intellectual property in or related to eHealth Exchange Participant Testing Program including, but not limited to, all related materials, information, reports, processes, seals, test cases, test case runner, gateway proxy, test repository database, test case templates, configuration files, and test tool documentation ("The Sequoia Project IP"), are the exclusive property of The Sequoia Project or its licensors. To the extent any corrections, enhancements, improvements, derivative works, relating to The Sequoia Project IP are developed by The Sequoia Project based upon ideas or suggestions submitted by Applicant, Applicant hereby irrevocably assigns its rights to such ideas or suggestions to The Sequoia Project, together with all copyrights, trade secrets, patent rights and other intellectual property rights related thereto. Applicant shall not challenge the validity of The Sequoia Project's ownership of such The Sequoia Project IP. Applicant shall not represent that it owns or has any rights in relation to The Sequoia Project IP. Applicant shall not apply for registration of any trademark, business name or company name that incorporates any name or logo the same as, substantially similar to or deceptively similar to any The Sequoia Project or eHealth Exchange marks without the prior written consent of The Sequoia Project. Applicant shall not create any derivative work, program or product based on or derived from The Sequoia Project IP, or use any The Sequoia Project trade secrets, business processes, or intellectual property related to the eHealth Exchange Participant Testing Program to create any other program or product.

## 7. Confidentiality

- a. **Confidential Information.** Confidential Information furnished by either party under this Agreement is provided solely for use in the eHealth Exchange Participant Testing Program and both parties desire to ensure the safeguarding of such information and limit its distribution. "**Confidential Information**" shall include the following:

- i. Applicant's HIE Technology documentation and technical information submitted to The Sequoia Project by Applicant under this Agreement;
  - ii. Test Reports (exclusive of reports sent to the Coordinating Committee as described in the Validation Plan);
  - iii. Item-by-item compliance results for Applicant's HIE Technology developed during the course of any Testing Process or Appeal; and
  - iv. Any other non-public information that is disclosed by one party (the "**Disclosing Party**") to the other (the "**Recipient**"), whether before or after the execution of this Agreement, provided that such information is marked in writing as "Confidential" or "Proprietary."
- b. **Exclusions.** Irrespective of any marking, Confidential Information shall not include:
- i. Applicant's company name, and contact information for Applicant's representatives;
  - ii. Item-by-item compliance results, when de-identified as to Applicant, and aggregated statistically with corresponding compliance results from other applicants;
  - iii. Information that is, or subsequently becomes, generally available to the public through no act or fault of the Recipient;
  - iv. Information that was in the possession of the Recipient prior to its disclosure;
  - v. Information that was lawfully acquired by the Recipient from a third party who was not under an obligation of confidentiality to the Disclosing Party; or
  - vi. Information that was independently developed by the Recipient by personnel without access to the Confidential Information.
- c. **Disclosure and Use Restrictions.** Except as otherwise provided herein, the Recipient shall:
- i. retain in confidence all Confidential Information, using at least the same degree of care in safeguarding the Disclosing Party's Confidential Information as it uses in safeguarding its own confidential information, subject to a minimum standard of reasonable diligence and protection;
  - ii. use and disclose Confidential Information only in the course of performing its obligations pursuant to this Agreement; and
  - iii. disclose Confidential Information within its organization only to those of its employees, faculty, agents or subcontractors who both have a need to know such information for the Recipient's performance under this Agreement and have a legal duty to protect it comparable to that of the Recipient.
- d. **Injunctive Relief.** Each party recognizes and acknowledges that any use or disclosure of the Confidential Information of the other party in a manner inconsistent with the

provisions of this Agreement may cause such other party irreparable damage for which remedies at law may be inadequate, and each party agrees that in any request to a court of competent jurisdiction by such other party for injunctive or other equitable relief seeking to restrain such use or disclosure, it will not maintain that such remedy is not appropriate under the circumstances.

## **8. Limitation of Liability; Right of Action**

- a. EXCEPT WITH RESPECT TO THE CONFIDENTIALITY OBLIGATIONS IN SECTION 8 OF THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE (WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY IN TORT OR BY STATUTE OR OTHERWISE) TO THE OTHER OR TO ANY THIRD PARTY FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE LOSS, DAMAGES OR EXPENSES (INCLUDING LOST PROFITS OR SAVINGS).
- b. No claim or cause of action, regardless of form, arising out of or related to the eHealth Exchange Participant Testing Program, this Agreement, or the breach thereof, or any other dispute between The Sequoia Project and Applicant may be brought in an arbitral, judicial, or other proceeding by any party more than one year after the cause of action has accrued, regardless of any statute, law, regulation, or rule to the contrary ("**Limitation Period**"). The Limitation Period shall commence the day after the day on which the cause of action accrued. Failure to institute a proceeding within the Limitation Period will constitute an absolute bar and waiver of the institution of any proceedings, whether in arbitration, court, or otherwise, with respect to such cause of action. A cause of action that has become time-barred may not be exercised by way of counter claim or relied upon by way of exception.

## **9. Warranties; Disclaimer.**

- a. Applicant warrants and represents that it has the full power and authority to execute the application to participate in eHealth Exchange and to enter into this Agreement and that any representative of Applicant who signed the Testing application or signs this Agreement had or has full power and authority to do so on behalf of Applicant.
- b. Applicant warrants and represents that the information submitted to The Sequoia Project in the Testing application, Applicant's Test Report, any other documentation or information provided by Applicant to The Sequoia Project is, to the best of Applicant's knowledge, accurate and complete.
- c. Applicant warrants and represents that the Applicant's HIE Technology is the same health information exchange technology that will be used by Applicant in production to participate in eHealth Exchange.
- d. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT: (a) NEITHER PARTY MAKES NOR WILL BE DEEMED TO MAKE OR HAVE MADE ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, DIRECTLY OR

INDIRECTLY, EXPRESS OR IMPLIED (EITHER IN FACT OR BY OPERATION OF LAW); AND, (b) EACH PARTY EXPRESSLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY, TITLE, DESIGN, NON-INFRINGEMENT, OPERATION OR FITNESS FOR A PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM CONDUCT, COURSE OF DEALING OR CUSTOM OR USAGE IN TRADE.

**10. Term and Termination**

- a. **Term.** This Agreement shall commence on the Effective Date and terminate upon termination of the Applicant's participation in eHealth Exchange, unless terminated earlier in accordance with Sections 10(b) or 10(c).
- b. **Termination by Applicant.** Applicant may terminate this Agreement at any time prior to receiving a Test Report by providing written notice to The Sequoia Project of its intent to so terminate this Agreement. Applicant will not be entitled to a refund of any Testing Fees paid prior to termination except as set forth in Section 3(d).
- c. **Termination by The Sequoia Project.** The Sequoia Project may terminate this Agreement with immediate effect by giving notice to Applicant if:
  - i. Applicant is in material breach of any of the terms and conditions of this Agreement and fails to remedy such breach within 30 days after receiving notice of such breach; or
  - ii. Applicant breaches a material provision of this Agreement where such breach is not capable of remedy.

**11. Notices.** Any formal notice or other significant communication given pursuant to this Agreement must be in writing and shall be deemed to have been received either (a) upon personal delivery (or refusal thereof) to the party for whom intended, (b) on the date receipt is confirmed by a courier service or the United States Post Office (sent certified mail, return receipt requested), in each case addressed to such party at the address specified below (or such other address designated by notice to the other party).

**For Applicant:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn: \_\_\_\_\_

**For Healtheway, Inc. (dba The Sequoia Project):**

1600 Tysons Boulevard, Suite 800  
McLean, VA 22102  
Attn: eHealth Exchange Program Director



## 12. General

- a. **Non-Disclosure of Applicant Status.** Except as specifically provided in the Validation Plan, without Applicant's prior written approval (which may be given by email), The Sequoia Project shall not: (i) advertise or otherwise name Applicant as a participant in the eHealth Exchange Participant Testing Program; nor (ii) publicly disclose the results of Applicant's participation in the eHealth Exchange Participant Testing Program, except in de-identified form. The foregoing limitations shall not prohibit The Sequoia Project from sharing information about Applicant or its Testing with the eHealth Exchange Coordinating Committee.
- b. **Force Majeure.** Neither party shall be responsible for any delays or failures in performance due to circumstances beyond its reasonable control, including, without limitation, failures of computers, computer-related equipment, hardware or software.
- c. **Severability.** If any provision of this Agreement shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be modified to the minimum extent necessary to achieve the purpose originally intended, if possible, and the remaining provisions of this Agreement shall remain in full force and effect and enforceable.
- d. **Survival of Rights and Obligations.** All Sections, which by their nature are meant to survive this Agreement, shall survive expiration or termination of this Agreement.
- e. **Governing Law, Forum and Jurisdiction.** In the event of a dispute between the parties, the applicable Federal and State conflicts of law provisions that govern the operations of the parties shall determine governing law.
- f. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be considered an original counterpart, and shall become a binding agreement when each party shall have executed one counterpart.
- g. **Captions.** Captions appearing in this Agreement are for convenience only and shall not be deemed to explain, limit or amplify the provisions of this Agreement.
- h. **Independent Parties.** Nothing contained in this Agreement shall be deemed or construed as creating a joint venture or partnership between Applicant and The Sequoia Project. Except as specifically set forth herein, neither party shall have the power to control the activities and operations of, or contractually bind or commit, the other party and their status with respect to one another is that of independent contractors.
- i. **No Third Party Beneficiary.** Nothing contained in this Agreement will be deemed to create, or be construed as creating, any third party beneficiary right of action upon any third party or entity whatsoever, in any manner whatsoever.
- j. **Assignment.** None of this Agreement, any of the rights hereunder nor any resulting certification shall be assignable by Applicant whether by operation of law or otherwise without the express written approval of The Sequoia Project.



- k. **Entire Agreement; Waiver.** This Agreement contains the entire understanding of the parties with regard to the subject matter contained herein and may not be amended except by mutual written agreement. The failure of either party to enforce at any time any provision of this Agreement shall not be construed to be a waiver of such provision, nor in any way affect the validity of this Agreement or any part hereof or the right of such party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other or subsequent breach, nor shall any delay by either party to exercise any right under this Agreement operate as a waiver of any such right.

**[Signature Page Follows]**

***[Signature Page to eHealth Exchange Application and Participant Testing Agreement]***

**FOR: [APPLICANT NAME]**

**FOR HEALTHEWAY, INC. (DBA THE SEQUOIA PROJECT)**

Date: \_\_\_\_\_  
Signature: \_\_\_\_\_  
Printed \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date: \_\_\_\_\_  
Signature: \_\_\_\_\_  
Printed **Mariann Yeager**  
Name: \_\_\_\_\_  
Title: **Executive Director and CEO**