

**AGREEMENT BETWEEN
THE NEW MEXICO HEALTH INSURANCE EXCHANGE
AND BERRYDUNN**

Agreement No. 2020.010

THIS Agreement ("Agreement") is made by and between the New Mexico Health Insurance Exchange, hereinafter referred to as "NMHIX" and Berry Dunn McNeil & Parker, LLC d/b/a BerryDunn, hereinafter referred to as the "Contractor" and collectively referred to as the "Parties."

WHEREAS, pursuant to the Procurement Code, NMSA 1978 13-1-28 et. seq. and Procurement Code Regulations, NMAC 1.4.1 et. seq. the Contractor has held itself out as an entity with the ability to provide the required services to implement the Scope of Work as contained herein and NMHIX has selected the Contractor as the offeror most advantageous to NMHIX; and

WHEREAS, all terms and conditions of RFP 2020-010 for Independent Security and Privacy Controls Assessment services and the Contractor's response to such document are incorporated herein by reference.

NOW, THEREFORE, THE FOLLOWING TERMS AND CONDITIONS ARE MUTUALLY AGREED BETWEEN THE PARTIES:

1. Definitions.

- A. "Business Hours" means 8:00 a.m. to 5:00 p.m. Mountain Time
- B. "RFP" means Request for Proposals as defined in statute and rule.
- C. "We," "us" or "our" refers to the New Mexico Health Insurance Exchange, State of New Mexico, agencies, commissions, institutions, political sub-divisions and local public bodies allowed by law to participate in the Agreement and whose accounts are created under this Agreement.
- D. "You" and "your" refers to Berry Dunn McNeil & Parker, LLC d/b/a BerryDunn

2. Scope of Work.

The Contractor shall perform the work as outlined in Exhibit A, attached hereto and incorporated herein by reference.

3. Compensation.

- A. Compensation Schedule. NMHIX shall pay to the Contractor in full payment for services satisfactorily performed as set forth in Exhibit A, such compensation not to exceed one

hundred seventy-four thousand eight hundred forty dollars (\$174,840.00), excluding gross receipts tax. The New Mexico gross receipts tax levied on the amounts payable under this Agreement totaling no more than ten thousand dollars (\$10,000.00) shall be paid by NMHIX to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed one hundred eighty-four thousand eight hundred forty dollars (\$184,840.00).**

B. Payment. The total compensation under this Agreement shall not exceed one hundred eighty-four thousand eight hundred forty dollars (\$184,840.00), including New Mexico gross receipts tax. This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The Parties do not intend for the Contractor to continue to provide Services without compensation when the total compensation amount is reached. Contractor is responsible for notifying NMHIX when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to services, in excess of the total compensation amount being provided.

Payment shall be made upon acceptance of services or deliverables and upon the receipt and acceptance of a detailed invoice. Payment will be made to the Contractor's designated mailing address. In accordance with Section 13-1-158 NMSA 1978, payment shall be tendered to the Contractor within thirty (30) days. All invoices, including a detailed statement accounting for all services performed and any expenses, shall be sent to NMHIX at accountspayable@nmhix.com and received by NMHIX no later than fifteen (15) business days after each calendar month in which services were performed or expenses incurred. Failure to timely submit an invoice shall be a material breach of this Agreement. If the Contractor fails to invoice NMHIX for services performed and expenses incurred in one calendar year by January 31 of the following calendar year, the Contractor will have waived all right to payment for the services performed and expenses incurred in the previous calendar year and expressly agrees that NMHIX shall have no obligation to pay for such services and expenses.

Payment is subject to availability of funds pursuant to the Funding Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 2, Scope of Work, and to approval by the GSD/SPD. All invoices MUST BE received by NMHIX no later than fifteen (15) days after the termination of this Agreement. Invoices received after such date WILL NOT BE PAID.

C. Taxes. The Contractor shall be reimbursed by NMHIX for applicable New Mexico gross receipts taxes, excluding interest or penalties assessed on the Contractor by any authority. PLEASE NOTE NO PROPERTY TAX WILL BE PAID TO THE CONTRACTOR BY THE STATE. The payment of taxes for any money received under this Agreement shall be the Contractor's sole responsibility and should be reported under the Contractor's Federal and State tax identification number(s).

Contractor and any and all subcontractors shall pay all Federal, state and local taxes applicable to its operation and any persons employed by the Contractor. Contractor shall require

all subcontractors to hold NMHIX harmless from any responsibility for taxes, damages and interest, if applicable, contributions required under Federal and/or state and local laws and regulations and any other costs, including transaction privilege taxes, unemployment compensation insurance, Social Security and Worker's Compensation.

4. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE FINAL REQUIRED SIGNATORY. This Agreement shall begin on the date approved by the Final Required Signatory and shall end on 3/31/2022 unless terminated pursuant to this Agreement's Termination Clause or Funding Clause. NMHIX reserves the right to renew the Agreement through a written amendment signed by all required signatories and in accordance with the term of the request for proposals, if this contract was based on a request for proposals.

5. **Termination**

A. **Grounds.** NMHIX may terminate this Agreement for convenience or cause. The Contractor may only terminate this Agreement based upon NMHIX's uncured, material breach of this Agreement.

B. **Notice; NMHIX Opportunity to Cure.**

1. Except as otherwise provided in sub-paragraph A of this paragraph and the Funding clause of this Agreement, NMHIX shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

2. Contractor shall give NMHIX written notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all NMHIX's material breaches of this Agreement upon which the termination is based and (ii) state what NMHIX must do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if NMHIX does not cure all material breaches within the thirty (30) day notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, NMHIX does not, within the thirty (30) day notice period, notify the Contractor of its intent to cure and begin with due diligence to cure the material breach.

3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by NMHIX; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to the Funding clause of this Agreement.

C. **Liability.** Except as otherwise expressly allowed or provided under this Agreement, NMHIX's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within

thirty (30) days of receiving or sending the notice of termination. This provision is not exclusive and does not waive NMHIX's other legal rights and remedies caused by the Contractor's default or breach of this Agreement.

D. Termination Management. Immediately upon receipt by either NMHIX or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of NMHIX; 2) comply with all directives issued by NMHIX in the notice of termination as to the performance of work under this Agreement; and 3) take such action as NMHIX shall direct for the protection, preservation, retention or transfer of all property titled to NMHIX and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of NMHIX upon termination and shall be submitted to NMHIX as soon as practicable.

6. **Funding**

The terms of this Agreement are contingent upon continued authorization of the NMHIX by the Legislature of New Mexico and the ability of NMHIX to obtain necessary funds by assessments, grants, or other means. In the absence of legislative authorization or funding, this Agreement shall terminate immediately upon written notice by NMHIX to the Contractor. NMHIX's determination regarding legislative authorization and funding shall be accepted by the Contractor and shall be final. If NMHIX proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

7. **Status of Contractor**

The Contractor and its agents and employees are independent contractors performing professional or general services for NMHIX and are not employees of the NMHIX or the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of NMHIX or the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment, business income tax, and gross receipts tax. The Contractor agrees not to purport to bind NMHIX unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

9. **Conflict of Interest; Governmental Conduct Act**

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA

1978. Without in any way limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with NMSA 1978, § 10-16-4.3, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any NMHIX employee while such employee was or is employed by NMHIX and participating directly or indirectly in NMHIX's contracting process;

2) this Agreement complies with NMSA 1978, § 10-16-7(A) because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State; (iii) the Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if the Contractor is a public officer or employee of the State, a member of the family of a public officer or employee of the State, or a business in which a public officer or employee of the State or the family of a public officer or employee of the State has a substantial interest, public notice was given as required by NMSA 1978, § 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

3) in accordance with NMSA 1978, § 10-16-8(A), (i) the Contractor is not, and has not been represented by, a person who has been a public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Contractor is not, and has not been assisted in any way regarding this transaction by, a former public officer or employee of the State whose official act, while in State employment, directly resulted in NMHIX's making this Agreement;

4) this Agreement complies with NMSA 1978, § 10-16-9(A) because (i) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Contractor is a legislator, a member of a legislator's family, or a business in which a legislator or a legislator's family has a substantial interest, disclosure has been made as required by NMSA 1978, § 10-16-7(A), this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with NMSA 1978, § 10-16-13, the Contractor has not directly participated in the preparation of specifications, qualifications or evaluation criteria for this Agreement or any procurement related to this Agreement; and

6) in accordance with NMSA 1978, § 10-16-3 and § 10-16-13.3, the Contractor has not contributed, and during the term of this Agreement shall not contribute, anything of value to a public officer or employee of NMHIX.

C. Contractor's representations and warranties in paragraphs A and B of this Clause are material representations of fact upon which NMHIX relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to NMHIX if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in paragraphs A and B of this Clause were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in paragraphs A and B of this Clause were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to NMHIX and

notwithstanding anything in the Agreement to the contrary, NMHIX may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this Agreement.

10. **Amendment**

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

B. If NMHIX proposes an amendment to the Agreement to unilaterally reduce funding due to budget, funding, or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in the Termination clause of this Agreement, or to agree to the reduced funding.

11. **Merger**

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

12. **Penalties for Violation of Law**

The Procurement Code, NMSA 1978 §§ 13-1-28 through 13-1-199, imposes civil and criminal penalties for violation of the statute. In addition, the New Mexico criminal statutes impose felony penalties for illegal acts, including bribes, gratuities and kickbacks.

13. **Equal Opportunity Compliance**

Contractor agrees to abide by all federal and state laws and rules and regulations pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

14. **Workers Compensation**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by NMHIX.

15. **Applicable Law; Dispute Resolution**

A. **Applicable Law.** The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions.

B. **Dispute Resolution.** Parties to this Agreement shall utilize methods of alternative dispute resolution to resolve disputes arising under this Agreement. NMHIX and Contractor agree to resolve disputes first through good faith negotiation, and if unsuccessful, through mediation and/or arbitration. No dispute arising under or relating to this Agreement may be brought in a court of law. The process for alternative dispute resolution is as follows:

- (1) **Negotiation.** The parties are encouraged to resolve disputes through negotiation prior to mediation or arbitration. In the event of any dispute, claim, question, or disagreement arising from or relating to a contract or the breach thereof, the parties shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, NMHIX and Contractor shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 30 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be mediated or finally settled pursuant to the Uniform Arbitration Act, NMSA, § 44-7A-1.
- (2) **Mediation.** If a dispute arises out of or relates to this Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties may first try in good faith to settle the dispute by mediation. The Parties may agree upon a mediator and the terms of the mediation including scheduling, pre-mediation information exchange and attendance of appropriate parties at the mediation conference. The mediation shall be scheduled within 30 days of notice to the other party that one party seeks to mediate the dispute.
- (3) **Arbitration.** If negotiation and mediation fail to resolve the dispute, or the time frames established for negotiation or mediation pass, a controversy or claim arising out of this Agreement, or the breach of this Agreement, shall be settled by arbitration pursuant to the Uniform Arbitration Act, NMSA, § 44-7A-1 and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(4) Time periods. The time periods established in this Paragraph 15 may be amended by mutual agreement of the parties.

16. **Records and Financial Audit**

A. The Contractor shall maintain detailed time and expenditure records that indicate the date, time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of ten (10) years from the date of completion of this Agreement. The records shall be subject to inspection by NMHIX and the Department of Finance and Administration, and may be disclosed by NMHIX to third parties as required or allowed by law.

B. NMHIX shall have the right to audit billings both before and after payment, including but not limited to a financial statement audit performed in accordance with government accounting standards for financial reporting. The Contractor agrees to be subject to findings and sanctions assessed as a result of any audit and will make repayment of any excessive or illegal payments by NMHIX. Payment under this Agreement shall not foreclose the right of NMHIX to recover excessive or illegal payments.

17. **Invalid Term or Condition**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

18. **Enforcement of Agreement**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

19. **Non-Collusion**

In signing this Agreement, Contractor certifies Contractor has not, either directly or indirectly, entered into action in restraint of free competitive bidding in connection with this offer submitted to NMHIX.

20. **Notices**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To NMHIX:

Kevin Swinson, Director of Technology Operations
7601 Jefferson St. NE, Ste. 120
Albuquerque, NM 87109

To the Contractor:

William Brown, Principal
100 Middle St.
Portland, ME 04101

21. **Succession**

This Agreement shall extend to and be binding upon the successors and assigns of the Parties.

22. **Headings**

Any and all headings herein are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement. Numbered or lettered provisions, sections and subsections contained herein, refer only to provisions, sections and subsections of this Agreement unless otherwise expressly stated.

23. **Default/Breach**

In case of default or breach by the Contractor, for any reason whatsoever, NMHIX may procure the goods or services from another source and hold Contractor responsible for any resulting excess costs and/or damages, including, but not limited to, direct damages, indirect damages, consequential damages, and special damages, and NMHIX may also seek all other remedies under the terms of this Agreement and under law or equity.

24. **Equitable Remedies**

Contractor acknowledges that its failure to comply with any provision of this Agreement will cause NMHIX irrevocable harm and that a remedy at law for such a failure would be an inadequate remedy for NMHIX, and the Contractor consents to NMHIX's obtaining from a court of competent jurisdiction, specific performance, or injunction, or any other equitable relief in order to enforce such compliance. NMHIX's rights to obtain equitable relief pursuant to this Agreement shall be in addition to, and not in lieu of, any other remedy that NMHIX may have under applicable law, including, but not limited to, monetary damages.

25. **Indemnification**

A. **General Indemnification.** Contractor shall defend, indemnify and hold harmless NMHIX, its Board of Directors, employees, officers and agents, and the State of New Mexico, from all third party actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which are caused by the negligent act or negligent failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, to the extent resulting in injury or damage to persons or personal property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is

performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor for which Contractor is obligated to indemnify NMHIX, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of NMHIX and the Risk Management Division of the New Mexico General Services Department by certified mail.

B. Indemnification for Professional Acts, Errors, or Omissions. Except for professional acts, errors or omissions that are the result of established gross negligence or willful or wanton conduct on the part of the Contractor or its employees, agents, representatives or subcontractors, the General Indemnification shall not apply to professional acts, errors or omission unless covered by Contractor's Professional Liability insurance.

26. **Default and Force Majeure.**

NMHIX reserves the right to cancel all or any part of any orders placed under this Agreement without cost to NMHIX, if the Contractor fails to meet the provisions of this Agreement and, except as otherwise provided herein, to hold the Contractor liable for any excess cost occasioned by NMHIX due to the Contractor's default. The Contractor shall not be liable for any excess costs if failure to perform the order arises out of causes beyond the control and without the fault or negligence of the Contractor; such causes include, but are not restricted to, acts of God or the public enemy, acts of the State or Federal Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather and defaults of subcontractors due to any of the above, unless NMHIX shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery scheduled. The rights and remedies of NMHIX provided in this Clause shall not be exclusive and are in addition to any other rights now being provided by law or under this Agreement.

27. **Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of NMHIX.

28. **Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of NMHIX. No such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from NMHIX.

29. **Inspection of Plant.**

The State Purchasing Agent or NMHIX may inspect, at any reasonable time during Contractor's regular business hours and upon prior written notice, the Contractor's plant or place

of business, or any subcontractor's plant or place of business, which is related to the performance of this Agreement.

30. **Commercial Warranty.**

The Contractor agrees that the tangible personal property or services furnished under this Agreement shall be covered by the most favorable commercial warranties the Contractor gives to any customer for such tangible personal property or services, and that the rights and remedies provided herein shall extend to the State and NMHIX in addition to and do not limit any rights afforded to the State and NMHIX by any other Clause of this Agreement or order. Contractor agrees not to disclaim warranties of fitness for a particular purpose or merchantability.

31. **Release.**

Final payment of the amounts due under this Agreement shall operate as a release of NMHIX, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

32. **Confidentiality.**

Any confidential information provided to the Contractor by NMHIX or, developed by the Contractor based on information provided by NMHIX in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of NMHIX. Upon termination of this Agreement, Contractor shall deliver all confidential information in its possession to NMHIX within thirty (30) Business Days of such termination. Contractor acknowledges that failure to deliver such confidential information to NMHIX will result in direct, special and incidental damages.

Contractor agrees and acknowledges that during the course of performing services under this Agreement Contractor may create, collect, receive, use or otherwise gain access to personally identifiable information, federal tax information, or other private and confidential information. Contractor shall use or disclose such information only to the extent required for the performance of the services under this Agreement and then only to the extent allowed by law. Contractor further agrees that it is a condition of this Agreement that with regard to such information Contractor, and any subcontracts engaged by Contractor to perform services under this Agreement, shall comply with and impose privacy and security standards as outlined in Exhibit B and equal to or more stringent than the standards described in 45 C.F.R. 155.260(a), as those standards may be amended from time to time.

33. **Contractor Personnel.**

A. **Key Personnel.** Contractor's key personnel shall not be diverted from this Agreement without the prior written approval of NMHIX. Key personnel are those individuals considered by NMHIX to be mandatory to the work to be performed under

this Agreement. Key personnel shall be: William Brown, Matt Bria, Rick Gamache, Mitch Darrow, Louis Krupp

B. Personnel Changes. Replacement of any personnel shall be made with personnel of equal ability, experience, and qualification and shall be approved by NMHIX. For all personnel, NMHIX reserves the right to require submission of their resumes prior to approval. If the number of Contractor's personnel assigned to the Project is reduced for any reason, Contractor shall, within ten (10) Business Days of the reduction, replace with the same or greater number of personnel with equal ability, experience, and qualifications, subject to NMHIX approval. NMHIX, in its sole discretion, may approve additional time beyond the ten (10) Business Days for replacement of personnel. The Contractor shall include status reports of its efforts and progress in finding replacements and the effect of the absence of the personnel on the progress of the Project. The Contractor shall also make interim arrangements to assure that the Project progress is not affected by the loss of personnel. NMHIX reserves the right to require a change in Contractor's personnel if the assigned personnel are not, in the sole opinion of NMHIX, meeting NMHIX's expectations.

34. **Incorporation by Reference and Precedence.**

If this Agreement has been procured pursuant to a request for proposals, this Agreement is derived from (1) the request for proposal, (including any written clarifications to the request for proposals and any NMHIX response to questions); (2) the Contractor's best and final offer; and (3) the Contractor's response to the request for proposals.

In the event of a dispute under this Agreement, applicable documents will be referred to for the purpose of clarification or for additional detail in the following order of precedence: (1) amendments to the Agreement in reverse chronological order; (2) the Agreement, including the scope of work and all terms and conditions thereof; (3) the request for proposals, including attachments thereto and written responses to questions and written clarifications; (4) the Contractor's best and final offer if such has been made and accepted by NMHIX; and (5) the Contractor's response to the request for proposals.

35. **Inspection of Services.**

If this Agreement is for the purchase of services, the following terms shall apply.

A. Services, as used in this Clause, include services performed, workmanship, and material furnished or utilized in the performance of services.

B. The Contractor shall provide and maintain an inspection system acceptable to NMHIX covering the services under this Agreement. Complete records of all inspection work performed by the Contractor shall be maintained and made available to NMHIX during the term of performance of this Agreement and for as long thereafter as the Agreement requires.

C. NMHIX has the right to inspect and test all services contemplated under this Agreement to the extent practicable at all times and places during the term of the Agreement.

NMHIX shall perform inspections and tests in a manner that will not unduly delay or interfere with Contractor's performance.

D. If NMHIX performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in Agreement price, all reasonable facilities and assistance for the safe and convenient performance of such inspections or tests.

E. If any part of the services do not conform with the requirements of this Agreement, NMHIX may require the Contractor to re-perform the services in conformity with the requirements of this Agreement at no increase in Agreement amount. When the defects in services cannot be corrected by re-performance, NMHIX may:

(1) require the Contractor to take necessary action(s) to ensure that future performance conforms to the requirements of this Agreement; and

(2) reduce the Agreement price to reflect the reduced value of the services performed.

F. If the Contractor fails to promptly re-perform the services or to take the necessary action(s) to ensure future performance in conformity with the requirements of this Agreement, NMHIX may:

(1) by Agreement or otherwise, perform the services and charge to the Contractor any cost incurred by NMHIX that is directly related to the performance of such service; or

(2) terminate the Agreement for default.

THE PROVISIONS OF THIS CLAUSE ARE NOT EXCLUSIVE AND DO NOT WAIVE NMHIX'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

36. **Insurance**

A. Professional Liability. For the Contractor and all of the Contractor's employees who are to perform professional services under this Agreement, the Contractor shall keep in full force and effect, Professional Liability insurance for any professional acts, errors or omissions. Such policy shall provide a limit of not less than \$1,000,000 per claim and \$2,000,000 annual aggregate. The Contractor shall ensure both that: (1) the policy retroactive date is on or before the date of commencement of the first work performed under this Agreement; and (2) the policy will be maintained in force for a period of three years after substantial completion of the project or termination of this Agreement whichever occurs last. If professional services rendered under this Agreement include work relating to environmental or pollution hazards, the Contractor's policy shall not contain exclusions for those activities.

B. Contractor shall maintain in force during the entire term of this Agreement the following insurance coverages, naming NMHIX as additional insured:

- Workers Compensation (including accident and disease coverage) at the statutory limit. Employers liability: \$100,000.
- Comprehensive general liability (including endorsements providing broad form property damage, personal injury coverage and contractual assumption of liability for all liability the Contractor has assumed under this Agreement). Limits shall not be less than the following:

- Bodily injury: \$1,000,000 per person /\$1,000,000 per occurrence.
- Property damage or combined single limit coverage: \$1,000,000.
- Automobile liability (including non-owned automobile coverage): \$1,000,000.
- Umbrella: \$1,000,000.

Contractor shall maintain the above insurance for the term of this Agreement and name NMHIX as an additional insured and provide for 30 days cancellation notice on any Certificate of Insurance form furnished by Contractor. Such certificate shall also specifically state the coverage provided under the policy is primary over any other valid and collectible insurance and provide a waiver of subrogation.”

C. The Contractor shall not begin the services required under this Agreement until it has: (a) obtained, and upon NMHIX’s request provided to NMHIX, insurance certificates reflecting evidence of all insurance required herein; however, the NMHIX reserves the right to request, and the Contractor shall submit, copies of any policy upon reasonable request by NMHIX; (b) obtained NMHIX approval of each company or companies as required below; and (c) confirmed that all policies contain the specific provisions required. Contractor’s liabilities, including but not limited to Contractor’s indemnity obligations, under this Agreement, shall not be deemed limited in any way to the insurance coverage required herein. Maintenance of specified insurance coverage is a material element of this Agreement and Contractor’s failure to maintain or renew coverage or to provide evidence of renewal during the term of this Agreement may be treated as a material breach of Agreement by NMHIX.

Further, the Contractor shall not modify any policy or endorsement thereto which increases NMHIX’s exposure to loss for the duration of this Agreement.

The Contractor shall provide an endorsement that the insurer waives the right of subrogation against NMHIX and its respective officials, officers, employees, agents, volunteers and representatives.

D. Cancellation. Except as provided for under New Mexico law, all policies of insurance required hereunder must provide that the NMHIX is entitled to thirty (30) days prior written notice (10 days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies. Cancellation provisions in insurance certificates shall not contain the qualifying words “endeavor to” and “but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives.”

E. Insurer Requirements. All insurance required by express provision of this Agreement shall be carried only by responsible insurance companies that have rated “A-” and “V” or better by the A.M. Best Key Rating Guide, that are authorized to do business in the State of New Mexico, and that have been approved by the NMHIX. The NMHIX will accept insurance provided by non-admitted, “surplus lines” carriers only if the carrier is authorized to do business in the State of New Mexico.

F. Deductibles. All deductibles or co-payments on any policy shall be the responsibility of the Contractor.

G. All policies required herein are primary and non-contributory to any insurance that may be carried by the NMHIX and its officials, officers, employees, agents, volunteers and representatives, as reflected in an endorsement which shall be submitted to the NMHIX.

H. The Contractor agrees that for the time period defined above, there will be no changes or endorsements to the policy that increase the NMHIX's exposure to loss.

I. Before performing any Professional Services, the Contractor shall provide the NMHIX with all Certificates of Insurance accompanied with all endorsements.

J. The NMHIX reserves the right, from time to time, to review the Contractor's insurance coverage, limits, and deductible and self-insured retentions to determine if they are acceptable to the NMHIX. The NMHIX will reimburse the Contractor for the cost of the additional premium for any coverage requested by the NMHIX in excess of that required by this Agreement without overhead, profit, or any other markup.

K. The Contractor may obtain additional insurance not required by this Agreement.

37. **Federal Tax Information**

A. Performance. In performance of this Agreement, and to the extent required by law, Contractor agrees to comply with and assume responsibility for compliance by Contractor's employees with the following requirements:

- (1) All work will be performed under the supervision of the Contractor or the Contractor's responsible employees.
- (2) Any Federal tax returns or return information (hereafter referred to as returns or return information) made available shall be used only for the purpose of carrying out the provisions of this Agreement. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of this Agreement or as otherwise required by law. Inspection by or disclosure to anyone other than an officer or employee of the Contractor is prohibited.
- (3) All returns and return information will be accounted for upon receipt and properly stored before, during, and after processing. In addition, all related output and products will be given the same level of protection as required for the source material.

- (4) No work involving returns and return information furnished under this Agreement will be subcontracted without ensuring compliance with appropriate safeguards.
- (5) The Contractor will maintain a list of employees authorized access. Such list will be provided to NMHIX and, upon request, to the IRS reviewing office.
- (6) NMHIX will have the right to void the Agreement if the Contractor fails to provide the safeguards described above.

B. Criminal/Civil Sanctions for Disclosure of Protected Information. In performance of this Agreement, and to the extent required by law, Contractor agrees to the following requirements:

- (1) Each officer or employee of any person to whom returns or return information is or may be disclosed shall be notified in writing by such person that returns or return information disclosed to such officer or employee can be used only for a purpose and to the extent authorized herein, and that further disclosure of any such returns or return information for a purpose or to an extent unauthorized herein constitutes a felony punishable upon conviction by a fine of as much as \$5,000 or imprisonment for as long as five (5) years, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized future disclosure of returns or return information may also result in an award of civil damages against the officer or employee in an amount not less than \$1,000 with respect to each instance of unauthorized disclosure. These penalties are prescribed by Internal Revenue Code (IRC) Sections 7213 and 7431 and set forth at 26 CFR 301.6103(n)-1.
- (2) Each officer or employee of any person to whom returns or return information is or may be disclosed shall be notified in writing by such person that any returns or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Agreement. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of this Agreement. Inspection by or disclosure to anyone without an official need to know constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as \$1,000 or imprisonment for as long as one (1) year, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized inspection or disclosure of returns or return information may also result in an award of civil damages against the officer or employee [United States for Federal employees] in an amount equal to the sum of the greater of \$1,000 for each act of unauthorized inspection or disclosure with respect to which such defendant is found liable or the sum of the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure plus in the case of a willful inspection or disclosure which is the result of gross

negligence, punitive damages, plus the costs of the action. The penalties are prescribed by IRC Sections 7213A and 7431.

- (3) Additionally, it is incumbent upon the Contractor to inform its officers and employees of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to contractors by 5U.S.C. 552a(m)(1), provides that any officer or employee of a Contractor, who by virtue of his/her employment or official position, has possession of or access to NMHIX records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

Granting a Contractor access to Federal Tax Information (FTI) must be preceded by certifying that each individual understands NMHIX's security policy and procedures for safeguarding IRS information. The Contractors must maintain their authorization to access FTI through annual recertification. The initial certification and recertification must be documented and placed in NMHIX's files for review. As part of the certification and at least annually afterwards, contractors should be advised of the provisions of IRC Sections 7431, 7213, and 7213A. The training provided before the initial certification and annually thereafter must also cover the incident response policy and procedure for reporting unauthorized disclosures and data breaches (See IRS Publication 1075, Tax Information Security Guidelines). For both the initial certification and the annual certification, the Contractor should sign, either with ink or electronic signature, a confidentiality statement certifying their understanding of the security requirements

38. **New Mexico Tort Claims Act**

Any liability incurred by NMHIX in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, *et seq.*, as amended. NMHIX and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense, and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

39. **Communications**

NMHIX desires to maintain a consistent and coherent public message regarding the work of the NMHIX, its contracting partners, and the contractual relationship between the NMHIX and its contracting partners. Contractor expressly acknowledges the NMHIX's interest in this regard and agrees that the Contractor shall not communicate with the media or the public regarding this Agreement or the work performed pursuant to this Agreement, during the term of the Agreement and for a reasonable period of time following the termination of this Agreement, without requesting and receiving authorization from the NMHIX to engage in the communications. Contractor also agrees to comply with the NMHIX Communications Policy, as it may be amended from time to time.

40. **Compliance with Law**


The Contractor agrees to comply with all laws and regulations that are applicable to this Agreement and the Contractor's Scope of Work now enacted or that become effective during the term of this Agreement, including but not limited to, laws and regulations enacted pursuant to the Affordable Care Act.

IN WITNESS WHEREOF, the Parties hereby execute this Agreement, which will take effect on the last signature date of the required approval authorities below. Each of the signatories, below, may execute this Agreement by hard copy original, facsimile, digital or electronic signature, any of which shall be deemed to be a true and original signature hereunder.

By:  Date: 12/28/2020
Agency: New Mexico Health Insurance Exchange

By:  Date: 12/28/2020
Agency's Legal Counsel – Certifying legal sufficiency

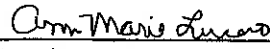
By:  Date: 12/28/2020
Agency's Chief Financial Officer

By:  Date: 12/23/2020
Contractor

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.


ID Number: 03-323100-00-1

Taxation and Revenue is only verifying the registration and will not confirm or deny taxability statements contained in this contract

By:  Date: 12/30/2020
Taxation and Revenue Department

NOTE: Taxation and Revenue is only verifying the registration and will not confirm or deny taxability statements contained in this contract.

This Agreement has been approved by the State of New Mexico Contracts Review Bureau:

By:  Date: 01/14/21
Contracts Review Bureau
State of New Mexico

IN WITNESS WHEREOF, the Parties hereby execute this Agreement, which will take effect on the last signature date of the required approval authorities below. Each of the signatories, below, may execute this Agreement by hard copy original, facsimile, digital or electronic signature, any of which shall be deemed to be a true and original signature hereunder.

By: _____ Date: _____
Agency: New Mexico Health Insurance Exchange

By: _____ Date: _____
Agency's Legal Counsel – Certifying legal sufficiency

By: _____ Date: _____
Agency's Chief Financial Officer

By:  _____ Date: 12/23/2020
Contractor

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: _____

By: _____ Date: _____
Taxation and Revenue Department

NOTE: Taxation and Revenue is only verifying the registration and will not confirm or deny taxability statements contained in this contract.

This Agreement has been approved by the State of New Mexico Contracts Review Bureau:

By: _____ Date: _____
Contracts Review Bureau
State of New Mexico

EXHIBIT A

Scope of Work

The CMS *Framework for the Independent Assessment of Security and Privacy Controls*, attached to the RFP as Appendix G, provides an overview of the independent security and privacy assessment requirements and the associated CMS reporting process for Administering Entities, such as NMHIX. Using the guidance in this document, the Contractor will complete the following:

1. Prepare an Administering Entity Security and Privacy Assessment Plan (SAP).

Contractor will prepare an Administering Entity Security and Privacy Assessment Plan (SAP) using the CMS template, attached to the RFP as Appendix H. The SAP should be prepared using the security and privacy control assessment procedures in the *MARS-E Document Suite, version 2.0 Volume III: Catalog of Minimum Acceptable Risk Security and Privacy Controls for Exchanges*. The SAP will be completed in coordination with the Exchange, and must be approved by CMS prior to the start of the assessment.

Anticipated timeline: January 4, 2021 – January 22, 2021

2. Complete the Security and Privacy Controls Assessment (SCA).

The Contractor will perform a full controls assessment pursuant to the approved SAP and utilizing the CMS AE Security and Privacy Assessment Worksheet, attached to the RFP as Appendix I.

Tests and analyses performed during an assessment should include the following: security control technical testing; adherence to the organization's security and privacy program, policies, and guidance; network and component scanning; configuration assessment; documentation review; personnel interviews; and observations.

The SBM will utilize a cloud provider technology service similar to Amazon Web Services (AWS). The Contractor must be able to test the privacy and security of various technology "stacks" (software and, where applicable, hardware), including systems and solutions hosted and/or maintained by the Exchange and its contracted vendors, including (but not necessarily limited to) Optum, NFP, and Salesforce. The Contractor must also be able to test physical security controls in multiple locations in Albuquerque, NM, including the Exchange offices, the Exchange's contracted print vendor site, and possibly the Exchange's contracted Customer Engagement Center, and at contracted vendor sites in Reston, VA (Optum) and Braintree, MA (NFP), and possibly others.

The Contractor also will review policies and procedures related to the security and privacy of Personally Identifiable Information (PII) and other confidential information maintained and/or hosted by the Exchange system and third-party systems and solutions.

Anticipated timeline: March 1, 2021 – May 21, 2021

3. Prepare a Security and Privacy Assessment Report (SAR).

Upon completion of the SCA, Contractor will prepare and provide to the Exchange a MARS-E v2.0 (NIST 800-53 Rev 4) Security and Privacy Assessment Report (SAR) using the CMS template, attached to the RFP as Appendix J. The report should include the following information: SCA methodology and testing performed; factual findings in accordance with the SCA tests performed; management information to render informed decisions regarding the application of resources and staffing to correct system weaknesses and vulnerabilities; and remediation or compensating control recommendations. The report should outline the risks identified from the SCA and be consistent with the objectives of the assessment.

The Exchange reserves the right to require additional services to assist in its efforts to meet CMS security and privacy assessment and report requirements, should CMS make changes to the MARS-E v2.0 framework during the project or if follow-up validation is needed from the Contractor to validate remediated findings during or after fieldwork.

Anticipated timeline: March 1, 2021 – May 21, 2021

EXHIBIT B

Privacy and Security Standards

Definitions. Capitalized terms not otherwise specifically defined in this specific term and condition shall have the meaning set forth in Section B.

Authorized Functions. Contractor may collect, handle, disclose, access, maintain, store, and/or use PII of Consumers, Applicants, Qualified Individuals, Qualified Employers, Qualified Employees, or Enrollees, or from these individuals' legal representative(s) or Authorized Representative(s), only to perform the required duties described in section 1311(i)(3) of the Affordable Care Act, 45 CFR 155.210(e), the Cooperative Agreement to Support Navigators in Federally-Facilitated and State Partnership Exchanges Funding Opportunity Announcement ("Navigator FOA"), and 45 CFR 155.215(a)(1)(iii), as well as in Contractor's approved work and project plans.

The required duties that will most likely involve the collection, handling, disclosure, access, maintenance, storage and/or use of PII of Consumers, Applicants, Qualified Individuals, Qualified Employers, Qualified Employees, or Enrollees, or from these individuals' legal representatives(s) or Authorized Representatives, include the following:

- Provide information and services in a fair, accurate, and impartial manner. Such information must acknowledge other health programs such as Medicaid and CHIP;
- Facilitate selection of a QHP;
- Provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under Section 2793 of the PHS Act, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and
- Provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange, including individuals with limited English proficiency, and ensure accessibility and usability of Health care guide tools and functions for individuals with disabilities in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

Such information may not be reused for any other purpose.

Other Required Duties: Contractor may also maintain expertise in eligibility, enrollment, and program specifications; however, it is not expected or required that Contractor collect, handle, disclose, access, maintain, store and/or use PII of Consumers, Applicants, Qualified Individuals, Qualified Employers, Qualified Employees, or Enrollees, or from these individuals' legal representatives(s) or Authorized Representatives for this function. To the extent that Contractor does so, it must comply with all of the provisions of this specific term and condition, as well as Sections A and B that apply to Contractor's activities.

PII Received. Subject to the terms and conditions of this Agreement and applicable laws, in performing the tasks contemplated under this Agreement, Contractor may create, collect,

disclose, access, maintain, store, and/or use the following PII from Consumers, Applicants, Qualified Individuals, Qualified Employers, Qualified Employees, or Enrollees, or from these individuals' legal representative(s) or Authorized Representative(s):

- APTC percentage and amount applied
- Auto disenrollment information
- Applicant Name
- Applicant Address
- Applicant Birthdate
- Applicant Telephone number
- Applicant Email
- Applicant spoken and written language preference
- Applicant Medicaid Eligibility indicator, start and end dates
- Applicant Children's Health Insurance Program eligibility indicator, start and end dates
- Applicant QHP eligibility indicator, start and end dates
- Applicant APTC percentage and amount applied eligibility indicator, start and end dates
- Applicant household income
- Applicant Maximum APTC amount
- Applicant CSR eligibility indicator, start and end dates
- Applicant CSR level
- Applicant QHP eligibility status change
- Applicant APTC eligibility status change
- Applicant CSR eligibility status change
- Applicant Initial or Annual Open Enrollment Indicator, start and end dates
- Applicant Special Enrollment Period eligibility indicator and reason code
- Contact Name
- Contact Address
- Contact Birthdate
- Contact Telephone number
- Contact Email
- Contact spoken and written language preference
- Enrollment group history (past six months)
- Enrollment type period
- FFE Applicant ID
- FFE Member ID
- Issuer Member ID
- Net premium amount
- Premium Amount, start and end dates
- Pregnancy status indicator
- PII related to any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination as described in 45 CFR §155.210(e)(4)
- Special enrollment period reason
- Subscriber Indicator and relationship to subscriber
- Social Security Number

Tobacco use indicator and last date of tobacco

Storing PII. Contractor is not expected or required to maintain or store any of the above listed PII as a result of carrying out the Authorized Functions described above or any other required duties, other than in connection with the storage of consent forms required by this specific term and condition. To the extent that Contractor does maintain or store information, it must comply with all of the provisions of this specific term and condition and Sections A and B that address maintenance or storage of PII.

Privacy and Security Obligations of Contractor. As a condition of this contract, Contractor will implement and comply with all Exchange privacy and security standards set forth in this specific term and condition as well as Sections A and B, and the Minimum Acceptable Risk Standards for Exchanges (MARS-E) , which is available at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2-MARS-E-v2-0-Minimum-Acceptable-Risk-Standards-for-Exchanges-11102015.pdf>.

Consent Form. Prior to collecting any PII, Contractor must obtain the consent of Consumers, Applicants, Qualified Individuals, Qualified Employers, Qualified Employees, or Enrollees or these individuals' legal representative(s) or Authorized Representative(s) to assist them with the Marketplace eligibility and enrollment process or other post-enrollment assistance. A template consent form has been provided separately to all Contractors.

Applicability to Workforce. Contractor must impose the same standards described in this specific term and condition and in Sections A and B on all Workforce members, including subcontractors, working with the Contractor on this contract program.

Survival. Contractor covenants and agrees to destroy all PII of Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, and Qualified Employers, or those individuals' legal representatives or Authorized Representatives in its possession at the end of the record retention period required under this specific term and condition and Sections A and B. If, upon the termination or expiration of this contract, the Health care guide has in its possession PII for which no retention period is specified in this specific term and condition and/or Sections A and B, such PII shall be destroyed within 30 Days of the termination or expiration of this contract. Contractor's duty to protect and maintain the privacy and security of PII, as provided for in accordance with this specific term and condition, and Sections A and B, shall continue in full force and effect until such PII is destroyed and shall survive the termination or withdrawal of the Health care guide Contractor and/or expiration of this Agreement.

Section A: Special Terms and Conditions

PRIVACY AND SECURITY STANDARDS

AND

IMPLEMENTATION SPECIFICATIONS FOR NON-EXCHANGE ENTITIES

Statement of Applicability:

These standards and implementation specifications are established in accordance with Section 1411(g) of the Affordable Care Act (42 U.S.C. § 18081(g)) and 45 CFR 155.260. All terms used herein carry the meanings assigned in Section B, which is also included in this document.

The standards and implementation specifications that are set forth in this Section A and Version 2.0 of the MARS-E suite of documents (which can be found at <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/>) are the same as, or more stringent than, the privacy and security standards and implementation specifications that have been established for the Federally-Facilitated Exchanges (“FFE”) under Section 1321(c) of the Affordable Care Act (42 U.S.C. § 18041(c)).

The New Mexico Health Insurance Exchange (NMHIX) will enter into contracts (hereinafter “Agreement” or “Agreements”) with Non-Exchange Entities that gain access to Personally Identifiable Information (“PII”) exchanged with the FFE and NMHIX, or directly from Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, and Qualified Employers, or these individuals’ legal representatives or Authorized Representatives. That Agreement, and including this Section A, govern any PII that is created, collected, disclosed, accessed, maintained, stored, or used by Non-Exchange Entities in the context of the FFE. In signing that Agreement, in which this Section A has been incorporated, Non-Exchange Entities agree to comply with the standards and implementation specifications laid out in this document and the referenced MARS-E suite of documents while performing the Authorized Functions outlined in their respective Agreements.

NON-EXCHANGE ENTITY PRIVACY AND SECURITY STANDARDS AND IMPLEMENTATION SPECIFICATIONS

In addition to the standards and implementation specifications set forth in the MARS-E suite of documents noted above, Non-Exchange Entities must meet the following privacy and security standards and implementation specifications to the extent they are not inconsistent with any applicable MARS-E standards.

(1) *Individual Access to PII: In keeping with the standards and implementation specifications used by the FFE, Non-Exchange Entities that maintain and/or store PII must provide Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, and Qualified Employers, or these individuals’ legal representatives and Authorized Representatives, with a simple and timely means of appropriately accessing PII pertaining to them and/or the person they represent in a physical or electronic readable form and format.*

a. **Standard:** Non-Exchange Entities that maintain and/or store PII must implement policies and procedures that provide access to PII upon request.

i. **Implementation Specifications:**

1. Access rights must apply to any PII that is created, collected, disclosed, accessed, maintained, stored, and used by the Non-Exchange Entity to perform any of the Authorized Functions outlined in their respective agreements with the NMHIX.

2. The release of electronic documents containing PII through any electronic means of communication (e.g., e-mail, web portal) must meet the verification requirements for the release of “written documents” in Section (5)b below.
3. Persons legally authorized to act on behalf of the Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, and Qualified Employers regarding their PII, including individuals acting under an appropriate power of attorney that complies with applicable state and federal law, must be granted access in accordance with their legal authority. Such access would generally be expected to be coextensive with the degree of access available to the Subject Individual.
4. At the time the request is made, the Consumer, Applicant, Qualified Individual, Enrollee, Qualified Employees, Qualified Employers, or these individuals’ legal representatives or Authorized Representatives should generally be required to specify which PII he or she would like access to. The Non-Exchange Entity may assist them in determining their Information or data needs if such assistance is requested.
5. Subject to paragraphs (1) a.i.6 and 7 below, Non-Exchange Entities generally must provide access to the PII in the form or format requested, if it is readily producible in such form or format.
6. The Non-Exchange Entity may charge a fee only to recoup their costs for labor for copying the PII, supplies for creating a paper copy or a copy on electronic media, postage if the PII is mailed, or any costs for preparing an explanation or summary of the PII if the contractors has requested and/or agreed to receive such summary. If such fees are paid, the Non-Exchange Entity must provide the requested copies in accordance with any other applicable standards and implementation specifications.
7. A Non-Exchange Entity that receives a request for notification of, or access to PII must verify the requestor’s identity in accordance with Section (5)b.
8. A Non-Exchange Entity must complete its review of a request for access or notification (and grant or deny said notification and/or access) within 30 days of receipt of the notification and/or access request.
9. Except as otherwise provided in (1)a.i.10, if the requested PII cannot be produced, the Non-Exchange Entity must provide an explanation for its denial of the notification or access request, and, if applicable,

information regarding the availability of any appeal procedures, including the appropriate appeal authority's name, title, and contact information.

10. Unreviewable grounds for denial. Non-Exchange Entities may deny access to PII that they maintain or store without providing an opportunity for review, in the following circumstances:
 - a. If the PII was obtained or created solely for use in legal proceedings;
 - b. If the PII is contained in records that are subject to a law that either permits withholding the PII or bars the release of such PII.

(2) Openness and Transparency. *In keeping with the standards and implementation specifications used by the FFE, Non-Exchange Entities must ensure openness and transparency about policies, procedures, and technologies that directly affect Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employers, and Qualified Employees, and their PII.*

- a. Standard: Privacy Notice Statement. Prior to collecting PII, the Non-Exchange Entity must provide a notice that is prominently and conspicuously displayed on a public facing Web site, if applicable, or on the electronic and/or paper form the Non-Exchange Entity will use to gather and/or request PII.

- i. Implementation Specifications.

1. The statement must be written in plain language and provided in a manner that is accessible and timely to people living with disabilities and with limited English proficiency.
2. The statement must contain at a minimum the following information:
 - a. Legal authority to collect PII;
 - b. Purpose of the information collection;
 - c. To whom PII might be disclosed, and for what purposes;
 - d. Authorized uses and disclosures of any collected information;
 - e. Whether the request to collect PII is voluntary or mandatory under the applicable law;
 - f. Effects of non-disclosure if an individual chooses not to provide the requested information.
3. The Non-Exchange Entity shall maintain its Privacy Notice Statement content by reviewing and revising as necessary on an annual basis, at a minimum, and before or as soon as possible after any change to its privacy policies and procedures.

4. If the Non-Exchange Entity operates a Web site, it shall ensure that descriptions of its privacy and security practices, and information on how to file complaints with NMHIX and the Non-Exchange Entity, are publicly available through its Web site.

(3) Individual choice. *In keeping with the standards and implementation specifications used by the FFE, Non-Exchange Entities should ensure that Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, and Qualified Employers, or these individuals' legal representatives or Authorized Representatives, are provided a reasonable opportunity and capability to make informed decisions about the creation, collection, disclosure, access, maintenance, storage, and use of their PII.*

- a. Standard: Informed Consent. The Non-Exchange Entity may create, collect, disclose, access, maintain, store, and use PII from Consumers, Applicants, Qualified Individuals, Enrollees, or these individuals' legal representatives or Authorized Representatives, only for the functions and purposes listed in the Privacy Notice Statement and any relevant agreements in effect as of the time the information is collected, unless the NMHIX, the FFE or Non-Exchange Entity obtains informed consent from such individuals.

- i. Implementation specifications:

1. The Non-Exchange Entity must obtain informed consent from individuals for any use or disclosure of information that is not permissible within the scope of the Privacy Notice Statement and any relevant agreements that were in effect as of the time the PII was collected. Such consent must be subject to a right of revocation.
2. Any such consent that serves as the basis of a use or disclosure must:
 - a. Be provided in specific terms and in plain language;
 - b. Identify the entity collecting or using the PII, and/or making the disclosure;
 - c. Identify the specific collections, use(s), and disclosure(s) of specified PII with respect to a specific contractor(s);
 - d. Provide notice of an individual's ability to revoke the consent at any time.
3. Consent documents must be appropriately secured and retained for 10 years.

(4) Creation, collection, disclosure, access, maintenance, storage, and use limitations. *In keeping with the standards and implementation specifications used by the NMHIX and by the FFE, Non-Exchange Entities must ensure that PII is only created, collected, disclosed, accessed, maintained, stored, and used, to the extent necessary to accomplish a specified purpose(s) in the Agreement and any appendices. Such information shall never be used to*

discriminate against a Consumer, Applicant, Qualified Individual, Enrollee, Qualified Employee, or Qualified Employer.

- a. Standard: Other than in accordance with the consent procedures outlined above, the Non-Exchange Entity shall only create, collect, disclose, access, maintain, store, and use PII:

1. To the extent necessary to ensure the efficient operation of the Exchange;
2. In accordance with its published Privacy Notice Statement and any applicable agreements that were in effect at the time the PII was collected, including the consent procedures outlined above in Section (3) above; and/or
3. In accordance with the permissible functions outlined in the regulations and agreements between NMHIX and the Non-Exchange Entity.

- b. Standard: Non-discrimination. The Non-Exchange Entity should, to the greatest extent practicable, collect PII directly from the Consumer, Applicant, Qualified Individual, Enrollee, Qualified Employee, or Qualified Employer, when the information may result in adverse determinations about benefits.

- c. Standard: Prohibited uses and disclosures of PII

- i. Implementation Specifications:

1. The Non-Exchange Entity shall not request Information regarding citizenship, status as a national, or immigration status for an individual who is not seeking coverage for himself or herself on any application.
2. The Non-Exchange Entity shall not require an individual who is not seeking coverage for himself or herself to provide a social security number (SSN), except if an Applicant's eligibility is reliant on a tax filer's tax return and their SSN is relevant to verification of household income and family size.
3. The Non-Exchange Entity shall not use PII to discriminate, including employing marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in QHPs.

- (5) Data quality and integrity. *In keeping with the standards and implementation specifications used by NMHIX and by the FFE, Non-Exchange Entities should take reasonable steps to ensure that PII is complete, accurate, and up-to-date to the extent such data is necessary for the Non-Exchange Entity's intended use of such data, and that such*

data has not been altered or destroyed in an unauthorized manner, thereby ensuring the confidentiality, integrity, and availability of PII.

- a. Standard: Right to Amend, Correct, Substitute, or Delete PII. In keeping with the standards and implementation specifications used by NMHIX and by the FFE, Non-Exchange Entities must offer Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, and Qualified Employers, or these individuals' legal representatives or Authorized Representatives, an opportunity to request amendment, correction, substitution, or deletion of PII maintained and/or stored by the Non-Exchange Entity if such individual believes that the PII is not accurate, timely, complete, relevant, or necessary to accomplish an Exchange-related function, except where the Information questioned originated from other sources, in which case the individual should contact the originating source.

- i. Implementation Specifications:

- 1. Such individuals shall be provided with instructions as to how they should address their requests to the Non-Exchange Entity's Responsible Official, in writing or telephonically. They may also be offered an opportunity to meet with such individual or their delegate(s) in person.
- 2. Such individuals shall be instructed to specify the following in each request:
 - a. The PII they wish to correct, amend, substitute or delete;
 - b. The reasons for requesting such correction, amendment, substitution, or deletion, along with any supporting justification or evidence.
- 3. Such requests must be contracted or denied within no more than 10 working days of receipt.
- 4. If the Responsible Official (or their delegate) reviews these materials and ultimately agrees that the identified PII is not accurate, timely, complete, relevant or necessary to accomplish the function for which the PII was obtained/provided, the PII should be corrected, amended, substituted, or deleted in accordance with applicable law.
- 5. If the Responsible Official (or their delegate) reviews these materials and ultimately does not agree that the PII should be corrected, amended, substituted, or deleted, the requestor shall be informed in writing of the denial, and, if applicable, the availability of any appeal procedures. If available, the notification must identify the appropriate appeal authority including that authority's name, title, and contact information.

- b. Standard: Verification of Identity for Requests to Amend, Correct, Substitute or Delete PII. In keeping with the standards and implementation specifications used by the NMHIX and the FFE, Non-Exchange Entities that maintain and/or store PII must develop and implement policies and procedures to verify the identity of any person who requests access to; notification of; or amendment, correction, substitution, or deletion of PII that is maintained by or for the Non-Exchange Entity. This includes confirmation of an individuals' legal or personal authority to access; receive notification of; or seek amendment, correction, substitution, or deletion of a Consumer's, Applicant's, Qualified Individuals', Enrollee's, Qualified Employee's, or Qualified Employer's PII.

i. Implementation Specifications:

1. The requester must submit through mail, via an electronic upload process, or in-person to the Non-Exchange Entity's Responsible Official, a copy of one of the following government-issued identification: a driver's license, school identification card, voter registration card, U.S. military card or draft record, identification card issued by the federal, state or local government, including a U.S. passport, military dependent's identification card, Native American tribal document, or U.S. Coast Guard Merchant Mariner card.
2. If such requester cannot provide a copy of one of these documents, he or she can submit two of the following documents that corroborate one another: a birth certificate, Social Security card, marriage certificate, divorce decree, employer identification card, high school or college diploma, and/or property deed or title.

- c. Standard: Accounting for Disclosures. Except for those disclosures made to the Non-Exchange Entity's Workforce, or sub-contractor, who have a need for the record in the performance of their duties; and the disclosures that are necessary to carry out the required functions of the Non-Exchange Entity, Non-Exchange Entities that maintain and/or store PII shall maintain an accounting of any and all disclosures.

i. Implementation Specifications:

1. The accounting shall contain the date, nature, and purpose of such disclosures, and the name and address of the person or agency to whom the disclosure is made
2. The accounting shall be retained for at least 10 years after the disclosure, or the life of the record, whichever is longer.

3. Notwithstanding exceptions in Section (1)a.10, this accounting shall be available to Consumers, Applicants, Qualified Individuals, Enrollees, Qualified Employees, Qualified Employers, or these individuals' legal representatives or Authorized Representatives, on their request per the procedures outlined under the access standards in Section (1) above.

(6) Accountability. *In keeping with the standards and implementation specifications used by the FEE, Non-Exchange Entities should adopt and implement the standards and implementation specifications in this document and the cited MARS-E document suite, in a manner that ensures appropriate monitoring and other means and methods to identify and report Incidents and/or Breaches.*

- a. Standard: Reporting. The Non-Exchange Entity must implement Breach and Incident handling procedures that are consistent with CMS' Incident and Breach Notification Procedures¹ and memorialized in the Non-Exchange Entity's own written policies and procedures. Such policies and procedures would:
 - i. Identify the Non-Exchange Entity's Designated Privacy Official, if applicable, and/or identify other personnel authorized to access PII and responsible for reporting and managing Incidents or Breaches to CMS.
 - ii. Provide details regarding the identification, response, recovery, and follow-up of Incidents and Breaches, which should include information regarding the potential need for CMS to immediately suspend or revoke access to the Hub for containment purposes; and
 - iii. Require reporting any Incident or Breach of PII to the CMS IT Service Desk by telephone at (410) 786-2580 or 1-800-562-1963 or via email notification at cms_it_service_desk@cms.hhs.gov within required time frames.
- b. Standard: Standard Operating Procedures. The Non-Exchange Entity shall incorporate privacy and security standards and implementation specifications, where appropriate, in its standard operating procedures that are associated with functions involving the creation, collection, disclosure, access, maintenance, storage, or use of PII.
 - i. Implementation Specifications:
 1. The privacy and security standards and implementation specifications shall be written in plain language and shall be available to all of the Non-Exchange Entity's Workforce members,

¹ Available at http://www.cms.gov/Research-Statistics-Data-and-Systems/CMS-Information-Technology/InformationSecurity/Downloads/RMH_VIII_7-1_Incident_Handling_Standard.pdf

or sub-contractors, whose responsibilities entail the creation, collection, maintenance, storage, access, or use of PII.

2. The procedures shall ensure the Non-Exchange Entity's cooperation with CMS in resolving any Incident or Breach, including (if requested by CMS) the return or destruction of any PII files it received under the Agreement; the provision of a formal response to an allegation of unauthorized PII use, reuse or disclosure; and/or the submission of a corrective action plan with steps designed to prevent any future unauthorized uses, reuses or disclosures.
 3. The standard operating procedures must be designed and implemented to ensure the Non-Exchange Entity and its Workforce, or sub-contractor, comply with the standards and implementation specifications contained herein, and must be reasonably designed, taking into account the size and the type of activities that relate to PII undertaken by the Non-Exchange Entity, to ensure such compliance.
- a. Standard: Training and Awareness. The Non-Exchange Entity shall develop training and awareness programs for members of its Workforce that create, collect, disclose, access, maintain, store, and use PII while carrying out any Authorized Functions.
- i. Implementation Specifications:
 1. The Non-Exchange Entity must require such individuals to successfully complete privacy and security training, as appropriate for their work duties and level of exposure to PII, prior to when they assume responsibility for/have access to PII.
 2. The Non-Exchange Entity must require periodic role-based training on an annual basis, at a minimum.
 3. The successful completion by such individuals of applicable training programs, curricula, and examinations offered through the FFE is sufficient to satisfy the requirements of this paragraph.
- b. Standard: Security Controls. The FFE shall adopt and implement the Security Control standards cited in the MARS-E document suite for protecting the confidentiality, integrity, and availability of PII.
- i. Implementation Specifications:
 1. Implementation specifications for each Security Control are provided in the MARS-E document suite.

Section B: Special Terms and Conditions

DEFINITIONS

- (1) **Affordable Care Act (ACA)** means the Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the Health Care and Education Reconciliation Act of 2010 (Public Law 111-152), which are referred to collectively as the Affordable Care Act.
- (2) **Access** means availability of a SORN Record to a subject individual.
- (3) **Advance Payments of the Premium Tax Credit (APTC)** has the meaning set forth in 45 CFR 155.20.
- (4) **Applicant** has the meaning set forth in 45 CFR 155.20.
- (5) **Authorized Function** means a task performed by a Non-Exchange Entity that the Non-Exchange Entity is explicitly authorized or required to perform based on applicable law or regulation, and as enumerated in Attachment B of the Special Terms and Conditions that incorporates this Attachment.
- (6) **Authorized Representative** means a person or organization meeting the requirements set forth in 45 CFR 155.227.
- (7) **Breach** is defined by OMB Memorandum M-07-16, Safeguarding and Responding to the Breach of Personally Identifiable Information (May 22, 2007), as the compromise, unauthorized disclosure, unauthorized acquisition, unauthorized access, loss of control or any similar term or phrase that refers to situations where persons other than authorized users or for an other than authorized purpose have access or potential access to Personally Identifiable Information (PII), whether physical or electronic.
- (8) **CCIO** means the Center for Consumer Information and Insurance Oversight within the Centers for Medicare & Medicaid Services (CMS).
- (9) **CMS** means the Centers for Medicare & Medicaid Services.
- (10) **CMS Data Services Hub (Hub)** is the CMS Federally-managed service to interface data among connecting entities, including HHS, certain other Federal agencies, and State Medicaid agencies.
- (11) **Consumer** means a person who, for himself or herself, or on behalf of another individual, seeks information related to eligibility or coverage through a Qualified Health Plan (QHP) or other Insurance Affordability Program, or whom an agent or broker (including Web-brokers), Health care guide, Issuer, Certified Application Counselor, or other entity assists in applying for a coverage through QHP, applying for APTCs and CSRs, and/or completing enrollment in a QHP through its web site for individual market coverage.
- (12) **Cost-sharing Reduction (CSR)** has the meaning set forth in 45 CFR 155.20.
- (13) **Day or Days** means calendar days unless otherwise expressly indicated in the relevant provision of the Notice of Award terms and conditions that incorporates this Section B.
- (14) **Designated Privacy Official** means a contact person or office responsible for receiving complaints related to Breaches or Incidents, able to provide further information about matters covered by the notice, responsible for the development and implementation of the privacy and security policies and procedures of the Non-Exchange Entity, and ensuring

the Non-Exchange Entity has in place appropriate safeguards to protect the privacy and security of PII.

- (15) **Enrollee** has the meaning set forth in 45 CFR 155.20.
- (16) **Exchange** has the meaning set forth in 45 CFR 155.20.
- (17) **Federally-facilitated Exchange (FFE)** means an **Exchange** (or **Marketplace**) established by HHS and operated by CMS under Section 1321(c)(1) of the ACA for individual or small group market coverage, including the Federally-facilitated Small Business Health Options Program (**FF-SHOP**). **Federally-facilitated Marketplace (FFM)** has the same meaning as FFE. The FFE is serving as the individual exchange in New Mexico for 2015.
- (18) **Health Insurance Coverage** has the meaning set forth in 45 CFR 155.20.
- (19) **HHS** means the U.S. Department of Health & Human Services.
- (20) **Incident**, or **Security Incident**, means the act of violating an explicit or implied security policy, which includes attempts (either failed or successful) to gain unauthorized access to a system or its data, unwanted disruption or denial of service, the unauthorized use of a system for the processing or storage of data; and changes to system hardware, firmware, or software characteristics without the owner's knowledge, instruction, or consent.
- (21) **Information** means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual.
- (22) **Issuer** has the meaning set forth in 45 CFR 144.103.
- (23) **Minimum Acceptable Risk Standards—Exchanges (MARS-E)** means a CMS-published suite of documents, version 1.0 (August 1, 2012), that defines the security standards required pursuant to 45 CFR 155.260 and 45 CFR 155.270, for any Exchange, individual, or entity gaining access to information submitted to an Exchange or through an Exchange using a direct, system-to-system connection to the Hub, available on the CCHIO web site.
- (24) **Health care guide** has the meaning set forth under "Navigator" in 45 CFR 155.20.
- (25) **Non-Exchange Entity** has the meaning at 45 CFR 155.260(b), and includes but is not limited to Health care guides.
- (26) **OMB** means the Office of Management and Budget.
- (27) **Personally Identifiable Information (PII)** has the meaning contained in OMB Memoranda M-07-16 (May 22, 2007) and means information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, *etc.*, alone, or when combined with other personal or identifying information that is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, *etc.*
- (28) **Qualified Employee** has the meaning set forth in 45 CFR 155.20.
- (29) **Qualified Employer** has the meaning set forth in 45 CFR 155.20.
- (30) **Qualified Health Plan (QHP)** has the meaning set forth in 45 CFR 155.20.
- (31) **Qualified Individual** has the meaning set forth in 45 CFR 155.20.
- (32) **Responsible Official** means an individual or officer responsible for managing a Non-Exchange Entity or Exchange's records or information systems, or another individual designated as an individual to whom requests can be made, or the designee of either such officer or individual who is listed in a Federal System of Records Notice as the system manager, or another individual listed as an individual to whom requests may be made, or the designee of either such officer or individual.

- (33) **Security Control** means a safeguard or countermeasure prescribed for an information system or an organization designed to protect the confidentiality, integrity, and availability of its information and to meet a set of defined security requirements.
- (34) **State** means the State where the Health care guide that is a party to the contract is operating.
- (35) **State Partnership Exchange** means a type of FFE in which a State assumes responsibility for carrying out certain activities related to plan management, consumer assistance, or both.
- (36) **Subject Individual** means that individual to whom a SORN Record pertains.
- (37) **System of Records Notice (SORN)** means a notice published in the Federal Register notifying the public of a System of Records maintained by a Federal agency. The notice describes privacy considerations that have been addressed in implementing the system.
- (38) **Workforce** means a Non-Exchange Entity's or FFE's employees, agents, contractors, subcontractors, officers, directors, agents, representatives, volunteers and any other individual who may create, collect, disclose, access, maintain, store, or use PII in the performance of his or her duties.