arcserve®

BUSINESS ASSOCIATE AGREEMENT

This Business Associate Agreement ("Agreement") is entered into between Arcserve (USA) LLC ("Arcserve") and the Customer who has accepted this Agreement as part of its acceptance of the Terms of Service For Cloud-Based Services between the parties ("Cloud Services Agreement"), and only applies to Backup Data that constitutes Protected Health Information (including Electronic Protected Health Information) that Arcserve receives, maintains, and transmits for or on behalf of Customer, who is either acting as a "Covered Entity" or "Business Associate", as those terms are defined within HIPPA and the HIPPA Rules (both as defined below), so that Arcserve may render services ("Services") to Customer under the terms of the Cloud Services Agreement. Arcserve and Customer are from time to time individually referred to as a "Party" and jointly as the "Parties."

BACKGROUND

A. Under the terms of the Cloud Services Agreement, the Services will be limited to the backing up and storing of certain encrypted data (possibly including certain Protected Health Information), on behalf of Customer and providing access to that data (and any included Protected Health Information) to Customer when needed for data recovery purposes. The Services will not include any manipulation or creation of any Protected Health Information (other than for backup purposes), nor will Services entail direct access to any Protected Health Information.

B. The Parties desire to comply with the HIPAA Rules requirement that Customers receive adequate assurances that Arcserve will comply with certain obligations with respect to the Protected Health Information received in the course of performance under the Cloud Services Agreement.

In consideration of the mutual covenants made in this Agreement, the Parties agree as follows:

AGREEMENT

1. **Definitions.** Capitalized terms used but not otherwise defined in this Agreement shall have the same meaning as those terms are defined in final regulations relating to privacy and security of individually identifiable health information at 45 CFR parts 160, 162, and 164 implementing the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH), as amended from time to time.

    A.   Breach Notification Rule: means the final regulatory provisions set forth at 45 CFR Subtitle A, Subchapter C, Parts 160 and 164, Subparts A and D.

    B.   Compliance Date: means the later of (1) the date that compliance is required under the relevant provision of the HIPAA Rules, and (2) the date this Agreement takes effect between the Parties.

    C.   HIPAA Rules: means, collectively, the Breach Notification Rule, Privacy Rule, and Security Rule.

    D.   Individual: has the same meaning as in the HIPAA Rules, as well as a person who qualifies as a personal representative in accordance with the HIPAA Rules.

    E.   Internal Material: means Arcserve's documented internal practices, books, and records,

including policies and procedures relating to the use and disclosure of PHI created, received, maintained, or transmitted by, Arcserve for or on behalf of Customer.

F.   Privacy Rule: means final regulatory provisions set forth at 45 CFR Subtitle A, Subchapter C, Parts 160 and 164, Subparts A and E.

G.   Protected Health Information or PHI, Electronic Protected Health Information or ePHI: have the same meaning as "protected health information" and "electronic protected health information" in the HIPAA Rules, but limited to the information created, received, maintained, or transmitted by Arcserve for or on behalf of Customer in performance of the Services.

H.   Security Rule: means final regulatory provisions set forth at 45 CFR Subtitle A, Subchapter C, Parts 160 and 164, Subparts A and C.

2.   **Obligations and Activities of Arcserve.**

A.   Arcserve agrees not to request, use or disclose PHI other than as necessary to render Services, as permitted or required by this Agreement, or as Required by Law.

B.   Arcserve agrees to use reasonable and appropriate safeguards to protect the privacy and prevent Use or Disclosure of PHI other than as permitted or required by this Agreement or as Required by Law.

C.   Arcserve agrees to comply with all applicable provisions of the Security Rule with respect to ePHI, including but not limited to reasonable and appropriate administrative, physical, and technical safeguards to prevent use or disclosure of the ePHI other than as provided for by this Agreement.

D.   Arcserve agrees to report to Customer any Use or Disclosure of PHI that is not permitted by this Agreement, including but not limited to any successful Security Incident. Any such report shall be made within thirty (30) days after Arcserve discovers such use or disclosure.

E.   Arcserve agrees to report to Customer any unsuccessful Security Incident, in the aggregate, in a reasonable manner and within thirty (30) days after receiving a written request from Customer, but not more than once in any 12-month period.

F.   Arcserve agrees to ensure that any of its Subcontractors that create, receive, maintain or transmit PHI for or on behalf of Arcserve agree in writing to the same restrictions and conditions that apply through this Agreement to Arcserve with respect to such PHI.

G.   Arcserve agrees to make available to the Secretary, Arcserve's Internal Material for use by the Secretary in determining whether Customer is in compliance with the HIPAA Rules. Customer's acceptance of this Agreement constitutes Customer's waiver of any and all confidentiality or privacy protections that would otherwise apply to the disclosure of such material by Arcserve to the Secretary.

H.   Arcserve agrees (1) to document its disclosures of PHI, other than disclosures made at the request or direction of Customer and disclosures made by Customer, and information related to such disclosures, and (2) to provide access to Customer to information collected in accordance with this Section 2(H), as necessary for Customer to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 CFR § 164.528.

I. Arcserve agrees to provide access to Customer, as required by the terms of the Cloud Services Agreement, to PHI as necessary for Customer to respond to an Individual's request for access to PHI pursuant to 45 CFR § 164.524. In the event that any Individual requests access to PHI directly from Arcserve, Arcserve's only obligation is to forward such request to Customer promptly.

J. Arcserve agrees to provide access to Customer, as required by the terms of the Cloud Services Agreement, to PHI as necessary for Customer to respond to an Individual's request to amend PHI pursuant to 45 CFR § 164.526, and Arcserve agrees to permit Customer to incorporate any amendment to PHI agreed to by Customer. In the event that any Individual makes a request to amend PHI directly to Arcserve, Arcserve's only obligation is to forward such request to Customer promptly.

K. Arcserve agrees to comply with the terms of the Cloud Services Agreement in providing access to PHI to Customer and shall not be responsible for Customer's compliance with requests by Individuals not to send PHI to a Health Plan in accordance with 45 CFR § 164.522(a).

L. Arcserve agrees to report to Customer any Breach of Unsecured PHI as required by the Breach Notification Rule.

M. To the extent that the terms of the Cloud Services Agreement require Arcserve to carry out any of Customer's obligations under the Privacy Rule, Arcserve will comply with the requirements of the Privacy Rule that would apply to Customer in the performance of such obligations.

N. Arcserve shall not directly or indirectly receive remuneration in exchange for any PHI as prohibited by 45 CFR § 164.502(a)(5)(ii).

O. Arcserve shall not make or cause to be made any communication about a product or service that is prohibited by 45 CFR §§ 164.501 and 164.508(a)(3).

P. Arcserve shall not make or cause to be made any written fundraising communication that is prohibited 45 CFR § 164.514(f).

Q. Arcserve will comply with the terms of the Cloud Services Agreement in providing Customer with access to PHI and shall not make any independent decisions regarding what constitutes the minimum PHI necessary to accomplish the purpose of any request, use, or disclosure permitted or required by this Agreement.

3. **Permitted Uses and Disclosures by Arcserve.** Arcserve may:

A. Use or disclose PHI solely (1) as necessary to provide the Services to Customer and in compliance with each applicable requirement of 45 CFR § 164.504(e), (2) as Required by Law or (3) as expressly otherwise authorized under this Agreement. Arcserve shall not use or disclose PHI for any other purpose or in any other manner.

B. Use PHI for the proper management and administration of Arcserve and to carry out the legal responsibilities of Arcserve.

C. Disclose PHI for the proper management and administration of Arcserve or to carry out Arcserve's legal responsibilities, provided that (1) such disclosures are Required by Law, or (2) Arcserve obtains reasonable advance written assurances from the recipient of the PHI that the PHI will remain

confidential and will be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the recipient, and that the recipient will promptly notify Arcserve of any instances of which the recipient is aware in which the confidentiality of the PHI has been breached. Any disclosure of PHI by Arcserve under this provision will not create a subcontractor relationship with the entity to which the disclosure is made and Arcserve will not be required to obtain a Arcserve agreement with such entity.

4. **Obligations of Customer.** Customer shall be responsible for:

A. Determining whether Uses or Disclosures made by or at its direction comply with any limitations in the Customer's Notice of Privacy Practices. Customer shall notify Arcserve of any limitation(s) in its Notice of Privacy Practices under 45 CFR 164.520, to the extent that such limitation may affect Arcserve's Use or Disclosure of PHI. Arcserve may terminate the Agreement if such limitation(s) materially affect Arcserve's ability to perform under the Cloud Services Agreement, including materially increasing the cost of performance.

B. Determining whether Uses or Disclosures made by or at its direction comply with any changes in, or revocation of, permission granted by any Individual to use or disclose PHI. Customer shall notify Arcserve of any changes in, or revocation of, the permission by an Individual to Use or Disclose his or her PHI, to the extent that such changes may affect Arcserve's use or disclosure of PHI. Arcserve may terminate the Agreement if such changes in, or revocation of, the permission by an Individual with regard to his or her PHI materially affect Arcserve's ability to perform under the Cloud Services Agreement, including materially increasing the cost of performance.

C. Determining whether Uses or Disclosures made by or at its direction with any restrictions on the use or disclosure of PHI that Customer has agreed to in accordance with 45 CFR § 164.522. Customer shall notify Arcserve of any restriction on the Use or Disclosure of PHI that Customer has agreed to or is required to abide by under 45 CFR 164.522, to the extent that such restriction may affect Arcserve's use or disclosure of PHI. Arcserve may terminate the Agreement if such restriction(s) materially affect Arcserve's ability to perform under the Cloud Services Agreement, including materially increasing the cost of performance.

5. **Permissible Requests by Customer**. Subject to Section 3 of this Agreement, Customer shall not request Arcserve to Use or Disclose PHI in any manner that would not be permissible under the HIPAA Rules if made by Customer.

6. **Term and Termination**

A. This Agreement shall become effective when the Customer accepts the Cloud Services Agreement and shall continue thereafter for so long as the Cloud Services Agreement remains in effect, unless earlier terminated by mutual written agreement of the Arcserve and Customer, or in accordance with this Section 6.

B. Termination for Cause: Upon Customer's knowledge of a violation of a material term of this Agreement by Arcserve, Customer shall notify Arcserve of such violation and:

(1) Provide an opportunity for Arcserve to cure the violation and, if Arcserve does not cure the violation within thirty (30) days after Customer gives notice, terminate this Agreement; or

(2) Immediately terminate this Agreement if Arcserve has violated a material term of this Agreement and cure is not possible.

C.   Effect of Termination:

(1)   Except as provided in Section 6(C)(2) of this Agreement, upon termination of this Agreement for any reason, Arcserve shall, within thirty (30) days after termination, return all PHI to Customer or destroy all PHI. This provision shall also apply to PHI that is in the possession of Subcontractors of Arcserve. Arcserve shall retain no copies of the PHI.

(2)   If Arcserve determines that returning or destroying the PHI is infeasible, Arcserve shall, within thirty (30) days after termination, provide to Customer notification of the conditions that make return or destruction infeasible and extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make return or destruction infeasible, for so long as Arcserve retains such PHI.

7.   **Miscellaneous**

A.   A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or amended, if such amendment is final and the Compliance Date for such amendment has passed.

B.   The Parties agree to negotiate in good faith to amend this Agreement from time to time as is necessary for Customer and Arcserve to comply with any new or revised final requirements of the HIPAA Rules, HIPAA, and HITECH. In the event that the Parties do not reach agreement as to an appropriate amendment to this Agreement, either Party may terminate this Agreement by giving written notice to the other Party at least ninety (90) days prior to the proposed termination date. Except as provided by paragraph (H), below, this Agreement may be amended only by a writing signed by both Arcserve and Customer.

C.   The rights and obligations of Arcserve under Section 6(C) of this Agreement shall survive the termination of this Agreement.

D.   If Customer or Arcserve determines that there is any ambiguity in this Agreement, they shall discuss the provision(s) in question and shall attempt, in good faith, to resolve the ambiguity in a manner that permits Customer to comply with the HIPAA Rules and that permits Arcserve to comply with the terms of this Agreement and to render Services.

E.   Nothing in this Agreement confers on any person other than Arcserve and Customer any rights, remedies, obligations, or liabilities.

F.   If any provision of this Agreement is held by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remaining provisions of this Agreement shall not be affected.

G.   A waiver by Arcserve or Customer of any requirement of this Agreement shall not be construed as a continuing waiver, a waiver of any other requirement, or a waiver of any right or remedy otherwise available.

H.   If Arcserve determines that it is not reasonably able to comply with any final new or amended provision of the HIPAA Rules, Arcserve may terminate this Agreement (and the Cloud Services Agreement) upon notice to Customer of not less than ninety (90) days.

I.   Any notice required by this BAA shall be provided pursuant to the terms of the Cloud Services Agreement.