



## **Draft Special Contract Provisions for EHR/EMR Purchase Discussions**

(As of May 26, 2009)

CORHIO has been designated by the Governor as the state-level entity for the purposes of ARRA support. In working to support organizations and practitioners in their efforts to utilize ARRA health technology funds to their best ability, CORHIO is offering the attached language for practitioners to use with any health information technology vendors that are offering solutions to meet the ARRA provisions and provide potential solutions to the issue of complying with the ARRA requirements that are still under development.

Two terms that are important for practitioners to focus on and understand that they are still being defined are:

“Meaningful Use” (more information available at [www.corhio.org/ARRA](http://www.corhio.org/ARRA) )

“certified EHR technology”

In order to help make sure that any purchased product serves the practitioners needs and will meet the ARRA requirements as well as be useful within the Colorado framework of standards and interoperability, the attached language can be attached to “license and service agreements” for electronic health records/electronic medical records (“EHR/EMRs”) agreement if the practitioner and the vendor agree.

This document is not a substitute for legal counsel during contract review or negotiation with a vendor. CORHIO strongly recommends that all providers maintain/attain legal review to assure appropriate compliance and terms related to any contract.

This information is being provided to you through your membership organization, please contact that organization if you have questions regarding legal counsel options.

CORHIO will continue to offer updates on ARRA on the website. Please visit the website [www.corhio.org/ARRA](http://www.corhio.org/ARRA) for more information.

## Attachment "A"

**The following Special HITECH Act Provisions shall apply to the [License and Services] Agreement and to the extent the [License and Services] Agreement is inconsistent with these Special Provisions (including any provision in the [License and Services] Agreement to the contrary) the terms of these Special Provisions shall control.**

1. Definitions. For purposes of the [License and Services] Agreement, the following terms and phrases shall have the following meanings:
  - 1.1. "Act" means the Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5).
  - 1.2. "Certified EHR Technology" means a Qualified Electronic Health Record (as defined in section 13000(13) of the Act) that is certified pursuant to section 13001(c)(5) of the Act as meeting standards adopted under section 13004 of the Act that are applicable to the type of record involved (as determined by the Secretary, such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).
  - 1.3. "Covered Professional Services" means has the meaning given such term in 42 U.S.C. §1395w-4(k)(3).
  - 1.4. "CORHIO" means the Colorado Regional Health Information Organization, appointed by the Governor of the State of Colorado to serve as Colorado's qualified State-designated entity pursuant to the HITECH Act, and otherwise to facilitate, establish standards for, and govern the ongoing development of a state-wide, electronically interoperable health information network.
  - 1.5. "EHR reporting period" means, with respect to a payment year, any period (or periods) as specified by the Secretary.
  - 1.6. "Eligible Professional" means a physician, as defined in 42 U.S.C. §1395x(r).
  - 1.7. "Incentives for Adoption and Meaningful Use of Certified EHR Technology" means the incentive payments described in section 4101 of the Act.
  - 1.8. "Meaningful Use" means use of Certified EHR Technology by an Eligible Professional, demonstrated to the satisfaction of the Secretary, such that an Eligible Professional may meet the following standards, or otherwise be treated by the Secretary as a Meaningful User:
    - 1.8.1. The Licensee, if an Eligible Professional, may use the Certified EHR Technology in a meaningful manner, which shall include the use of electronic prescribing as determined to be appropriate by the Secretary.
    - 1.8.2. The Licensee, if an Eligible Professional, may demonstrate, to the satisfaction of the Secretary that, during the period at issue, such certified EHR technology is electronically connected to CORHIO in a manner that provides, in accordance with law and standards applicable to the exchange of information, for the exchange of electronic health information, with, and the integration of such information from other sources (through CORHIO) to improve the quality of health care, such as promoting care coordination.
    - 1.8.3. The Licensee, if an Eligible Professional, may use such Certified EHR Technology to submit information for such periods, in a form and manner from time to time specified by the Secretary, on such clinical quality measures and such other measures as shall be selected by the Secretary from time to time.

- 1.8.4. The Licensee, if an Eligible Professional participating in a group practice, may use such Certified EHR Technology for those purposes set forth in Sections 1.7.1 through 1.7.3, above, in such alternative ways as the Secretary shall from time to time provide.
- 1.8.5. For purposes of this [Licensing and Services] Agreement, Vendor acknowledges that the Secretary has been directed to improve the use of electronic health records and health care quality over time by requiring more stringent measures of Meaningful Use and that such measures shall be incorporated into this definition of Meaningful Use as and when promulgated and without the need for the consent or further action of the Parties.
- 1.9. "Meaningful User" means an Eligible Professional who is entitled to be paid incentive payments pursuant to section 4101 of the Act.
- 1.10. "Qualified Electronic Health Record" means an electronic record of health-related information on an individual that, at a minimum:
  - 1.10.1. includes patient demographic and clinical health information, such as medical history and problem lists; and
  - 1.10.2. has the capacity:
    - 1.10.2.1. to provide clinical decision support;
    - 1.10.2.2. to support physician order entry;
    - 1.10.2.3. to capture and query information relevant to health care quality; and
    - 1.10.2.4. to exchange electronic health information with, and integrate such information from other sources.
- 1.11. "Secretary" means that person serving from time to time as the Secretary of Health and Human Services of the United States of America.
2. Federal and State Regulatory Requirements. Vendor warrants that the [Insert Name] Licensed Software will perform throughout the Term in compliance with all state and federal regulatory requirements, including the privacy and data security standards mandated in both HIPAA and the Act and, when installed on computers meeting the specifications set forth in the Documentation and/or Response to RFP, shall be capable (without further modifications except as shall be required to meet the applicable standards from time to time promulgated by the Secretary) of fully supporting (a) a direct electronically interoperable connection to CORHIO for the exchange of electronic health information with, and the integration of such information from other sources, and (b) such further use by Licensee as shall be required, from time to time, for Licensee to comply with the provisions of, and meet the standards set forth in, section 4101. of the Act (providing for Incentives for Eligible Professionals). This warranty of regulatory compliance is a special warranty of fitness for a particular purpose and shall be in effect throughout the Term.
3. Maintenance. Vendor agrees to maintain the Licensed Software throughout the Term of this [Licensing and Services] Agreement. Such maintenance shall include the issuance at regular intervals of Updates, Enhancements and New Releases to the Licensed Software and Documentation to improve functionality, provide Error correction, address federal and state regulatory requirements (including meeting the requirements set forth in Paragraph 2, above), address payor initiated changes and changes required by the Secretary, and ensure the Licensed Software is compatible with then-supported versions of [Microsoft] software products, all to ensure continued optimum performance of the Licensed Software. Vendor agrees to furnish all Updates, Enhancements and New Releases to the Licensed Software and Documentation to Licensee, on a timely basis, at no additional cost during the Term, provided that the then-current Annual Support and Maintenance Royalty has been paid.

4. Licensee's Warranty Remedy. In the event that the Licensed Software fails to perform as warranted, Vendor shall, within a reasonable time, exert reasonable efforts to correct documented Errors, provide functionality, or bring the Licensed Software into compliance with federal and state regulatory requirements at no additional charge to Licensee. If such correction is not practical and Licensee does not accept an offered work-around, Licensee may, as its exclusive remedy for breach of warranty, terminate this Agreement and/or obtain from Vendor payment of that portion of the Incentives for Adoption and Meaningful Use of Certified EHR Technology to which Licensee would have been entitled, pursuant to section 4101 of the Act, in the absence of said breach.