

REQUEST FOR COUNCIL ACTION



CITY COUNCIL MEETING DATE:

OCTOBER 20, 2020

TITLE:

**APPROVE AGREEMENT WITH IGOE
ADMINISTRATIVE SERVICES FOR
SECTION 125 PLAN ADMINISTRATION
AND FLEXIBLE SPENDING ACCOUNT
SERVICES
(NON-GENERAL FUND)**

CLERK OF COUNCIL USE ONLY:

APPROVED

- ☐ As Recommended
- ☐ As Amended
- ☐ Ordinance on 1st Reading
- ☐ Ordinance on 2nd Reading
- ☐ Implementing Resolution
- ☐ Set Public Hearing For _____

CONTINUED TO _____

FILE NUMBER _____

/s/ Kristine Ridge
CITY MANAGER

RECOMMENDED ACTION

Authorize the City Manager to execute an agreement with IGOE Administrative Services to provide Section 125 Plan Administration and Flexible Spending Account Services to employees effective January 1, 2021 with a yearly automatic renewal and a three-year rate guarantee, subject to non-substantive changes approved by the City Manager and City Attorney.

DISCUSSION

On September 5, 2017, the City Council authorized the City Manager and Clerk of the Council to execute an agreement with Total Administrative Services Corporation (TASC), to provide Section 125 Plan Administration, Flexible Spending Account services, and Retiree Dental Billing, effective April 1, 2017 and until terminated.

Keenan, the City's Benefits Broker, assisted in a market study to compare services and rates for Section 125 Plan Administrators and Flexible Spending Account providers. Two proposals were received from IGOE Administrative Services and Sterling Administrative Services. IGOE Administrative Services was selected to take over as the City's Section 125 Plan Administration and Flexible Spending Account Services. In the plan-takeover, IGOE Administrative Services will take over the administration of Section 125 Plan Administration and Flexible Spending Account Services from TASC effective January 1, 2021, with a yearly automatic renewal January 1, each year unless terminated effective upon thirty (30) days' notice to the other party. TASC will continue to provide administration of Retiree Dental Billing.

The Section 125 Plan is part of the IRS code that enables and allows employees to take taxable benefits, such as healthcare benefits and convert them into nontaxable benefits. The City's Flexible Benefits Plan offers eligible employees to have pre-tax payroll deductions for certain healthcare and dependent care qualified expenses, and commuter expense reimbursement accounts. The City of Santa Ana currently has approximately 170 eligible employees participating in Section 125 Flexible Spending Accounts (FSA) per year. Employees enrolled in the FSAs can take advantage of dependent care FSA for an annual maximum of \$5,000 for married couples filing taxes jointly and \$2,500 for singles, and commuter expenses, such as public transportation fare and qualified

parking expenses. Healthcare account funds not used in the calendar year are eligible to roll over into the next plan year for a maximum of \$500.

The City does not contribute to the employee's accounts; the employee pays for their contributions out of their paycheck. The City does pay a nominal administration fee on behalf of the employees to administer the plan.

FISCAL IMPACT

The IGOE Administrative Services agreement has a bundled rate which includes implementation and plans administration. There is a monthly flat rate of \$4.00 per participant. This rate is guaranteed until December 31, 2023 (Exhibit 1 and Exhibit 2). Each year, approximately 170 eligible City of Santa Ana employees participate in the Section 125 Flexible Spending Accounts. The number of participants varies, as well as certain fees (e.g., \$5 per manual enrollment, ACH Rejections, Reimbursement Reissuance) therefore a 10 percent contingency has been factored into the total cost. Funds are budgeted and available for Fiscal Year 2020-2021 in the Employee Group Insurance Fund, Insurance Payment Account (No. 08109053-64010) and will be budgeted every subsequent year thereafter.

Fiscal Year	Accounting Unit- Account#	Fund Description	Account Unit - Account Description	Amount
2020-21 (Jan. 2021 to Jun. 2021)	08109053-64010	Internal Service Fund	Employee Group Insurance, Insurance Payment	4,500.00
2021-22	08109053-64010	Internal Service Fund	Employee Group Insurance, Insurance Payment	9,000.00
2022-23	08109053-64010	Internal Service Fund	Employee Group Insurance, Insurance Payment	9,000.00
2023-24 (Jul. 2023 to Dec. 2023)	08109053-64010	Internal Service Fund	Employee Group Insurance, Insurance Payment	4,500.00
			Total	27,000.00

Fiscal Impact Verified By: Kathryn Down, CPA, Executive Director – Finance and Management Services Agency

Submitted by: Steven V. Pham, Executive Director – Human Resources Department

Exhibits: 1. IGOE Spending Account Services Agreement
2. IGOE Business Associate Agreement

Spending Account Administrative Services Agreement

Prepared for City of Santa Ana

The terms of this contract reflect the business practices of Igoe Administrative Services and are not negotiable. Igoe Administrative Services promotes a fair and equal business practice and as a result extends the same services, allocation of responsibilities, and liability statements to all clients.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 1

Recitals

The Spending Account Administrative Services Agreement (Agreement) is entered into as of the Effective Date defined in Section 2.a herein, by and between **Igoe & Company Incorporated, dba Igoe Administrative Services** (Contract Administrative Firm) with principal offices at 10905 Technology Place, Suite A, San Diego, CA 92127 and **City of Santa Ana** (Client) with principal offices at 20 Civic Center Plaza, Santa Ana CA 92701. The Contract Administrative Firm and the Client, however otherwise designated, collectively are referred to herein as the "Parties".

The Parties mutually agree and acknowledge that:

- Igoe provides a variety of administrative services to employers, including services related to the following types of spending accounts offered independently or as part of a cafeteria/flexible benefit plan under Internal Revenue Code (Code) § 125;
 - Medical Care Reimbursement Account (MCRA) – also referred to as medical or health flexible spending account (FSA) under Code § 105;
 - Dependent Care Reimbursement Account (DCRA) under Code § 129;
 - Limited Purpose Reimbursement Account (LPRA) – also referred to as a limited purpose medical or health FSA (LPFSA) under Code § 125
 - Premium Reimbursement Account (PRA) based on Revenue Ruling 61-146;
 - Health Reimbursement Account (HRA) based on Revenue Ruling 2002-41;
 - Transit Reimbursement Account (TRA) under Code § 132;
 - Parking Reimbursement Account (PRA) under Code § 132
- As of the Effective Date set forth in 2.a or, if later, the specific service effective date(s) as set forth in Exhibit B, Client wishes to engage Contract Administrative Firm to provide services related to spending accounts as identified in Exhibit B to this Agreement, which for the purposes of this Agreement collectively shall comprise and be referred to as the "Client's Spending Account Program".
- With regard to the Client's Spending Program as defined above, in consideration for the fees and charges detailed in Exhibit A to this Agreement, the Contract Administrative Firm hereby agrees to provide said administrative services to the following terms and conditions.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 2

1. Terms and Conditions

a. Spending Account Services – Contract Administrative Firm Duties

i. In accordance with the terms of this Agreement, including language specific to each component of Client's Spending Account Program as identified in Exhibit B to this Agreement, but excluding language pertaining to components not selected as part of the Client's Spending Account Program or components selected by Client but administered by a third party firm other than Igoe, or by Client itself, the Contract Administrative Firm shall provide the following administrative and clerical functions:

1. The Contract Administrative Firm shall consult with the Client on the design of the Client's Spending Account Program. The Contract Administrative Firm shall provide the Client with the following sample documentation in order to initiate the administrative function;
 - a. Data collection forms and/or annual client verification forms that outline the specific details of the Client's Spending Account Program;
 - b. Sample Spending Account documentation corresponding to the component reimbursement accounts comprising Client's Spending Account Program for review and potential adoption by the Client in its capacity as the Plan Administrator/Plan Sponsor as defined by the Employee Retirement and Securities Act of 1971 (ERISA) § 3(16) if applicable;
 - c. Sample written summaries of the reimbursement accounts comprising Client's Spending Account Program explaining the rights and responsibilities of participants thereunder for review and potential adoption by Client in its capacity as the Plan Administrator/Plan Sponsor as defined by ERISA § 3(16) if applicable;
 - d. A master set of spending account participant (Participant) communication and enrollment materials, if applicable, including:
 - i. Election forms to be used during the enrollment process; and
 - ii. Electronic file transfer specifications; and
 - iii. Reimbursement request forms, which include instructions for filing requests.

The Client is not required to use the sample election forms or enrollment materials provided, subject to review by the Contract Administrative Firm. The Contract Administrative Firm



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 3

makes no warranties or representations regarding adequacy of alternate materials. Additional fees may apply if the Client uses alternate materials that have not been reviewed and approved by the Contract Administrative Firm and result in custom data entry. Such fees must be provided in writing by the Contract Administrative Firm and agreed to in writing by the Client before such materials will be submitted for data entry by the Contract Administrative Firm. Electronic file transmissions must meet the Contract Administrative Firm's file specifications.

2. The Contract Administrative Firm will process reimbursement requests, including the provision of written instructions to Participants for re-submitting reimbursement requests in instances where required information may be missing. In the event of an appeal by a Participant, the Contract Administrative Firm agrees to reimburse expenses based on a final, written approval by the Client.
3. The Contract Administrative Firm will use a designated checking account owned and managed by the Client ("Funding Account") for the purpose of funding the following Spending Account activity as applicable:
 - a. All daily cumulative Benefits Card (Card) transactions via Automated Clearing House (ACH) transfer from the Funding Account directly to the Card provider
 - b. All daily cumulative Participant direct deposit transactions via ACH from the Funding Account directly to the Card provider.
 - c. All weekly manual (check) Participant reimbursements accumulated during the previous week and disbursed from a designated account owned and operated by the Contract Administrative Firm. Such reimbursements are produced daily as applicable. The Contract Administrative Firm will process an ACH on a designated day of the week equal to the amount of funds disbursed by the Contract Administrative Firm during the previous week, unless other arrangements have been made allowing the Client to push such funds to the Contract Administrative Firm. If a fund push is approved, funds must be received by the Contract Administrative Firm on a designated day of the week. Should funds not be received by the designated day of the week, the Contract Administrative Firm will automatically pull funds from the Funding Account via ACH and additional processing fees will apply as listed in Exhibit A.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 4

4. The Contract Administrative Firm will provide a check register or similar written report to the Client for all transactions posted during each reimbursement processing.
5. The Contract Administrative Firm will provide an electronic notification if the Client contracts Card services and a Participant uses his/her Card for a transaction that falls outside of the Card parameters set forth by the Internal Revenue Service (IRS). If no response is received within 14 days, a second request for substantiation will be sent. If no response is received within 7 days of this second request, the Card may be deactivated and the expense will be deemed ineligible. Once a transaction is deemed ineligible, resolution is required and can be made through one of the following methods:
 - a. Submission of adequate receipts as substantiation to the Contract Administrative Firm within the corresponding plan year. Upon receipt, the transaction will be approved therefore reactivating the Card (if applicable);
 - b. Refunding the applicable reimbursement account on an after-tax basis equal to the amount of the transaction. This refund must be made in accordance with the Client's internal policies. The Contract Administrative Firm will reverse the ineligible transaction and release the associated funds for future use upon written notification from the Client.
 - c. A written report outlining unresolved and therefore ineligible transactions will be provided to the Client on a monthly basis. At the end of the plan year, all remaining ineligible transactions must be added to the Participant's W-2 as taxable income.
6. The Contract Administrative Firm will conduct at least one set of non-discrimination testing per component reimbursement account per year, if applicable, based on information provided in writing by the Client and will provide the Client with written interpretation of such testing following each enrollment period. Additional non-discrimination testing can be provided upon written direction. Additional fees may apply if additional testing is required based on the Client's failure to provide adequate and accurate information as requested in writing by the Contract Administrative Firm.
7. The Contract Administrative Firm will provide a written year-to-date report of reimbursement account balances, reimbursements paid, and scheduled payroll contributions (if applicable) for all Participants on a monthly basis.
8. The Contract Administrative Firm will attend any audit of hearing by a government agency or bureau regarding compliance issues directly



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 5

pertaining to administrative services performed by the Contract Administrative Firm during the Term of this Agreement and will provide any and all requested documents in their possession.

9. The Contract Administrative Firm will respond to inquiries from the Client and their Participants including, but not limited to, available account balances, reimbursement request submission and appeals procedures. The Contract Administrative Firm will not provide legal advice. The Contract Administrative Firm will defer inquiries to the Client if the Participant has indicated intent to involve legal representation.

b. Client Responsibilities

- i. In accordance with the terms and conditions of this Agreement, the Client agrees to the following:

1. The Client Agrees that the Contract Administrative Firm is willing to perform the services described in this Agreement, provided that the Contract Administrative Firm shall not constitute or be deemed or construed to constitute the Plan Administrator or Plan Sponsor with respect to the Client's Spending Account Program or any component thereof, within the meaning of ERISA § 3(16), to the extent applicable. The Client agrees that this responsibility is, and remains, that of the Client or its designee.
2. The Client shall administer the Reimbursement Program or appoint a person or committee to administer the Program.
3. The Client agrees that, except as expressly set forth herein, the Contract Administrative Firm shall not be a Fiduciary, as such term is defined in ERISA § 3(21), of the Client's Spending Account Program or any component thereof. The Client agrees that this responsibility is, and remains, that of the Client. Further, the Client agrees that the Contract Administrative Firm, at no time, holds plan funds or assets and acts solely at the discretion of the employer.
4. The Client understands and acknowledges that the Contract Administrative Firm is responsible only for providing services specifically allocated to the Contract Administrative Firm in this Agreement, and only with regard to the component reimbursement accounts that together comprise the Client's Spending Account Program, as further specified by the attached Exhibit B and in accordance with the RECITALS to this Agreement. If the Client wishes to engage the Contract Administrative Firm for additional services such request must be presented in writing for the Contract Administrative Firm's review. If such services are available, the Contract Administrative Firm will



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 6

- present its fees and terms in writing and will require written agreement of such fees and terms by the Client before said services are performed.
5. The Client agrees to notify the Contract Administrative Firm if the Client has contracted a third party vendor for electronic enrollment and intends to have said third party vendor electronically transmit enrollment data.
 - a. The Client agrees that electronic data must conform to the Contract Administrative Firm's file specifications and that data fee establishment and testing fees may be incurred. Such fees must be presented in writing by the Contract Administrative Firm and agreed to by the Client before testing begins.
 - b. The Client agrees that the Contract Administrative Firm will process electronically transmitted files as received without question. If corrections are needed, such corrections must be provided by the Client in writing and will serve as authorization to perform system corrections and charge applicable administrative fees as set forth in Exhibit A.
 6. The Client agrees that it is responsible for the timely review and final approval, execution and implementation of sample Reimbursement Account documentation, if applicable, provided by the Contract Administrative Firm. If the sample Reimbursement Account documentation is not executed and implemented, the Client agrees that it is responsible upon adoption of alternative documentation to provide a copy of the same to the Contract Administrative Firm upon request. The Client agrees that the Contract Administrative Firm makes no warranties or representations regarding the adequacy of sample Reimbursement Account documentation under the Code of other applicable laws.
 7. The Client agrees to provide sample written summaries of the component reimbursement accounts to each Participant upon enrollment thereunder and to communicate any changes which may be made to the Client's Spending Account Program and/or the written summaries of same if required.
 8. The Client will establish and authorize the Contract Administrative Firm access via ACH to a Funding Account for the purpose of funding the following Spending Account activity as applicable:
 - a. All daily cumulative daily Benefits Card (Card) transactions via Automated Clearing House (ACH) transfer from the Funding Account directly to the Card provider
 - b. All daily cumulative Participant direct deposit transactions via ACH from the Funding Account directly to the Card provider.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 7

- c. All weekly manual (check) Participant reimbursements accumulated during the previous week and disbursed from an account owned and operated by the Contract Administrative Firm. The Contract Administrative Firm will process an ACH on a designated day of the week equal to the amount of funds disbursed by the Contract Administrative Firm via check during the previous week, unless other arrangements have been made allowing the Client to push such funds to the Contract Administrative Firm. If a fund push is approved, funds must be received by the Contract Administrative Firm on a designated day of the week. Should funds not be received by the designated day of the week, the Contract Administrative Firm will automatically pull funds from the Funding Account via ACH and additional processing fees will apply as listed in Exhibit A.
9. The Client will ensure that the Funding Account has adequate funds to support transactions described in Section 1.b.8.c. Should the Funding Account not be adequately funded, additional fees will be charged pursuant to Exhibit A. Further, the Contract Administrative Firm reserves the right to cease all reimbursement activity immediately until all funds, including administrative fees owed, are available and paid to the Contract Administrative Firm. Further, the Contract Administrative Firm reserves the right to require that all check reimbursements be made directly from a Client owned bank account using MICR specifications and an authorized Client signature.
10. The Client shall report all Participant terminations and all qualifying change in status events in a written format, including all requested information, to the Contract Administrative Firm prior to the first affected payroll date. Such notice must contain the effective date of the change, the first pay date affected, the new payroll contribution amount, and the new annual election amount (if applicable). Should this information not be provided in a complete or timely manner, the Client agrees to pay any resulting administrative fees which may be incurred in order to process retroactive adjustments to payroll contributions or reimbursement claims processed in error as set forth in Exhibit A.
11. The Client is responsible to review all reporting provided by the Contract Administrative Firm in a timely manner and must provide any corrections in writing. Should such corrections not be identified in a timely and complete manner, the Client agrees to pay any resulting administrative fees required to process such corrections as set forth in Exhibit A.
12. The Client agrees to provide to the Contract Administrative Firm, upon each open enrollment period, all required data necessary to perform non-discrimination testing if required. The Client agrees to report any changes to the Contract Administrative Firm which may affect the



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17

Page 8

qualification of the Plan for meeting non-discrimination requirements. In addition, the Client agrees to initiate any action required in the event that one or more component benefit programs are reported as discriminatory. If the Client requests additional non-discrimination testing services, the Client will be responsible for updating all data necessary to conduct said testing and agrees to pay resulting administrative fees as set forth in Exhibit A, if applicable.

13. The Client shall retain documentation relating to its Reimbursement Program operations that may be requested in an IRS or Department of Labor audit - including, but not limited to: non-discrimination testing information, executed copies of reimbursement account documentation, Salary Redirection Agreements (e.g. Enrollment Forms), Amendments, Resolutions adopting the Reimbursement Program, and Form 5500s (if applicable), for seven years after the close of each "Plan Year" with respect to the Program, as such term is defined under ERISA §3(39), if applicable.
14. The Client shall ensure that only common law employees participate in the Reimbursement Program [employees of companies described in Code §414 (b), (c) or (m) and listed in the Plan as participating affiliates may also participate] and to ensure that the terms of its documentation are properly enforced. Client solely is responsible for determining whether or not it is a component member of a controlled group, common control group, or affiliated service group, under Code § 414(b), (c), or (m) and for the consequences, under ERISA and the Code, of such status.
15. The Client agrees that, unless alternate arrangements have been made with the Contract Administrative Firm's approval, payment for services performed will be taken directly from the Funding Account as defined in Section 1.a.i.3 and 1.b.i.8 herein, in accordance with Exhibit A. Fees will be assessed on or about the first day of the month in which services are being provided. If the Client is still completing open enrollment during a billing month, fees associated with participation counts will be estimated. In these cases, adjustments will be made as necessary during the next month's billing cycle. Unless alternate arrangements have been made with the Contract Administrative Firm's approval, payment for fees will be drawn from said account via an ACH transaction no later than the 20th of the applicable billing month. A written statement of such fee assessments and ACH activity will be provided by the Contract Administrative Firm at least 2 business days prior to when the ACH is initiated. Administrative fees set forth in Exhibit A are subject to review by the Contract Administrative Firm upon expiration of the Rate Guarantee Period defined in Exhibit A. The Contract Administrative Firm must give written notice to the Client regarding any change in fees at least sixty (60) days prior to the expiration of the Rate Guarantee Period.
16. The Client Agrees that if the Card is contracted and Participant uses his/her Card for a transaction that falls outside of the Card parameters set forth by the IRS, the Contract Administrative Firm will send a written



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17

Page 9

notice to the Participant. If no response is received within 14 days, a second request for substantiation will be sent. If no response is received within 7 days of this second request, the Card may be deactivated and the expense will be deemed ineligible.

Once a transaction is deemed ineligible, resolution is required and can be made through one of the following methods:

- a. Submission of adequate receipts as substantiation to the Contract Administrative Firm within the corresponding plan year. Upon receipt, the transaction will be approved therefore reactivating the Card (if applicable);
 - b. Refunding the applicable reimbursement account on an after-tax basis equal to the amount of the transaction. This refund must be made in accordance with the Client's internal policies. The Contract Administrative Firm will reverse the ineligible transaction and release the associated funds for future use upon written notification from the Client.
 - c. A written report outlining unresolved and therefore ineligible transactions will be provided to the Client on a monthly basis. At the end of the plan year, all remaining ineligible transactions must be added to the Participant's W-2 as taxable income.
17. The Client agrees that, at any time during the Term of the Agreement as defined herein, if it should file in the United States for debt relief or reorganization of any type, all services from the date of the filing forward may terminate immediately. The Client further agrees that it is its responsibility to ensure that written notification of filing for debt relief or reorganization of any type is provided to the Contract Administrative Firm in a reasonable timeframe.
18. The Client agrees that in the event of an acquisition or merger that it is its responsibility to ensure that written notification is provided to the Contract Administrative Firm in a reasonable timeframe. The Client further agrees to provide all information as requested and in a timely manner to assist the Contract Administrative Firm in identifying aspects of current administration that may be impacted or require alteration as a result of an acquisition or merger, including but not limited to an amended Agreement, amended specimen reimbursement account documentation, and system adjustments. Client solely is responsible for determining whether or not, as a result of an acquisition, merger, or other business transaction it is a component member of a controlled group, common control group, or affiliated service group, under Code § 414(b), (c), or (m) and for the consequences, under ERISA and the Code,



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 10

of such status. Additional fees to support required changes may apply as set forth in Exhibit A.

19. The Client agrees to accurately complete a data collection/client verification form in a reasonable timeframe, as supplied by the Contract Administrative Firm, upon implementation or renewal of one or more component reimbursement accounts. The Client agrees that these forms will delineate the Contract Administrative Firm's services under this Agreement and will be specifically identified in Exhibit B. Further, the Client agrees that any changes to the information supplied on these forms may only be made in writing and are only effective when acknowledged by the Contract Administrative Firm in writing. Additional fees may be incurred for any retroactive changes made after the Client has submitted completed forms or for any changes which may be requested mid-year (after the open enrollment period).

2. Term and Termination

- a. **Effective Date.** This Agreement shall be effective as of the date of the last signature on this Agreement (the "Effective Date"), however component reimbursement accounts may be subject to a later effective date as set forth in the RECITALS to this Agreement.
- b. **Term.** The term of this Agreement begins on the Effective Date and shall last until terminated pursuant to the terms hereof (the "Term").
- c. **Termination Without Cause.** Either Party may terminate this Agreement without cause effective upon thirty (30) days written notice to the other Party.
- d. **Mutual Termination.** The Parties may terminate this Agreement by mutual written agreement.
- e. **Termination Upon Insolvency or Bankruptcy.** Either Party may terminate this Agreement effective immediately upon written notice to the other Party in the event that such other Party becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, or becomes subject to any proceeding under bankruptcy or insolvency law which does not result in a reorganization. In the event that a Party experiences an event described in this Section 2(e), such Party will make a good faith effort promptly to notify the other Party of the event so as to allow that other Party to terminate this Agreement pursuant to this Section.
- f. **Termination Due to Bad Acts.** Either Party may terminate this Agreement effective immediately upon written notice to the other Party in the event that such other Party, or any of its officers, owners, agents or employees, engages in conduct giving rise to a good faith belief that such Party, or any of its officers, owners, agents or employees, has engaged in misrepresentation, gross negligence, fraud or embezzlement. If a Party becomes aware of such conduct by any of its officers, owners, agents or employees, it will make a good faith effort promptly to notify the other Party of such conduct so as to allow that other Party to terminate this Agreement pursuant to this Section.
- g. **Termination Due to Non-Payment.** In the event of Client non-payment, this Agreement shall terminate on the date that is thirty (30) days after the Contract



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 11

Administrative Firm suspends services for nonpayment by the Client, provided that the Contract Administrative Firm provides written notice of such suspension to the Client and the Client fails to pay fees in arrears as set forth in Exhibit A, by the required due date. The Client is considered to have reached "nonpayment" status 30 days after written notice is provided outlining applicable administrative fees and payment for such fees has not been made. The Contract Administrative Firm will provide written notice if the Client is in "non-payment" status outlining a minimum fifteen (15) day cure period before suspending future services as outlined herein.

h. The Parties' Respective Rights and Obligations Upon Termination.

- i. In the event of termination of this Agreement, the Contract Administrative Firm will place a stop payment on all participant reimbursements that have not cleared within thirty (30) days of the termination date. All funds associated with the stop payment (minus processing fees as outlined in Exhibit A) will be returned to the Client within sixty (60) days of the termination date. Further, the Contract Administrative Firm will forward a written report outlining all reimbursements still owed to the Participant as a result of this activity so that payment can be processed by the Client or the Client's designee.
- ii. In the event of termination of this Agreement, and upon request by the Client, the Contract Administrative Firm will assist in a smooth transition of services and records to the Client or its designated service provider, provided that such documentation complies with the Contract Administrative Firm's current written report format or electronic file specifications and, solely with regard to Client's reimbursement accounts listed on Exhibit B that comprise "group health plans" for purposes of compliance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") as amended by the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009 ("HITECH"), subject to the provisions regarding retained "Protected Health Information" or "PHI" (as defined in the Parties' Business Associate Agreement), and including, as used herein, electronic PHI or "ePHI") in the Parties' Business Associate Agreement.
- iii. If the Contract Administrative Firm performs any post-termination services pursuant to this Agreement, the Client agrees to pay the Contract Administrative Firm fees or other charges on the same basis as if the Agreement had continued in effect for the period during which such services are performed.

3. Miscellaneous – Definitions

- a. **Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.
- b. **Assignability.** This Agreement and the rights, benefits, privileges, duties and responsibilities of the Parties hereto may not be assigned by any Party hereto without the prior written consent of the other Party hereto.
- c. **Audits.** The Contract Administrative Firm agrees that the Client and its representatives shall have the right, upon reasonable written notice, to conduct audits of the Contract Administrative Firm relating to the provision of services set forth in this Agreement at the Client's expense. Audits shall be performed during normal working hours. Fees



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 12

associated with an audit must be provided in writing by the Contract Administrative Firm to the Client and agreed to by both Parties in writing before said audit is conducted.

- d. **Availability of Counsel.** All Parties hereby acknowledge that they have read this Agreement in its entirety and have, to the extent to which they deem necessary, consulted with counsel before executing this Agreement.
- e. **Binding Nature of Agreement.** This Agreement is binding upon signature by both Parties and shall inure to the benefit of the heirs, executors, successors and assignors of the Parties hereto.
- f. **Complete Agreement.** With the exception of the Business Associate Agreement between the parties, this Agreement and all accompanying Exhibits constitute the complete Agreement of the Parties regarding its subject matter and replace and supersede any prior written or oral agreement between the Parties regarding its subject matter.
- g. **Confidentiality.**
 - i. The Parties mutually acknowledge and agree that in performance of this Agreement, each Party and its employees has and will continue to disclose to the other Party Confidential Information (as defined below) including but not limited to information relating to the Client's personnel and their employment status, and the Contract Administrative Firm's proprietary service model and materials, and that each is bound to maintain the confidentiality of such Confidential Information during the Term of this Agreement and at all times afterward, absent a legal duty to disclose or the express written authorization to do so obtained from the Party to whom the information pertains or belongs; provided however, that each Party may disclose Confidential Information of the other Party or its employees to its own representatives who need to know such information and are bound by obligations of confidentiality and non-use consistent with those set forth herein. Confidential Information shall not be used for any purpose other than performance of this Agreement or otherwise in furtherance of the purposes of this Agreement.
 - ii. For purposes of this Section 3(g), Confidential Information is any information identified by either Party to the other as confidential and/or proprietary (or words of similar import) or which reasonably should be considered confidential, including but not limited to information regarding the Parties' respective businesses or finances. Confidential Information does not include information which: (a) becomes generally available to the public other than as a result of a disclosure by the receiving party, its representatives, or its agents; (b) was available to the receiving party on a non-confidential basis prior to its disclosure hereunder by the other party or its employees or agents; (c) becomes available on a non-confidential basis from a third-party source provided that such third party source is not bound by a confidentiality agreement with the disclosing party; or (d) is independently developed by the receiving party without the use of, or reference to, the disclosing party's Confidential Information.
 - iii. With regard to "protected health information," as that term is defined in the Parties' Business Associate Agreement and under HIPAA, the Parties mutually agree to the additional privacy and security limitations set forth in the Business Associate Agreement. If there is a conflict between this Agreement and the Business Associate Agreement regarding information that can be classified as



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17

Page 13

Protected Health Information, the terms of the Business Associate Agreement will control to the extent necessary for full compliance under HIPAA.

- h. **Construction and Severability.** The captions of this Agreement and its paragraphs and subparagraphs are for the convenience of the Parties only and shall not be taken in account in the construction and interpretation of this Agreement. All personal pronouns used in this Agreement, whether used in the masculine, feminine or neuter gender, shall include all other gender, the singular may include the plural, and vice versa as the context may require. The terms of this Agreement are severable; should any portion of this Agreement be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remainder of this Agreement and this Agreement shall be construed and interpreted as though such invalid or unenforceable provision was not contained herein.
- i. **Force Majeure:** Neither the Contract Administrative Firm nor the Client will be deemed to be in default of this Agreement, nor held responsible for, any cessation, interruption or delay in the performance of its obligations to provide such services hereunder due to causes beyond its reasonable control, including, but not limited to, natural disaster, act of God, labor controversy, civil disturbance, disruption of the public markets, terrorism, war or armed conflict, or the inability to obtain sufficient materials or services required in the conduct of its business from the Contract Administrative Firm's vendors or other parties, including Intranet or Internet access, or any change in or the adoption of any law, judgment or decree (each, a "Force Majeure Event"). In the event that a Force Majeure Event prevents the Client or its designee from making a payment when due, the Contract Administrative Firm shall be excused from performance under this Agreement from the date on which such payment becomes delinquent until the date on which such payment is made.
- j. **Independent Contractor.** The Contract Administrative Firm's relationship with the Client is that of independent contractor and nothing in this Agreement shall be construed as creating the relationship of employer or employee between the Client and officers, employees, or agents of the Contract Administrative Firm or the relationship of a partnership or joint venture between the Parties.
- k. **Modifications.** This Agreement may not be modified or amended except by the Parties to this agreement by means of written modification or amendment of this Agreement or their legal successors in interest.
- l. **Notices.** All notices required hereunder shall be in writing and provided by electronic mail and will be considered received as of the date of the electronic transmission. Notices to the Client shall be sent to the daily contact on file with the Contract Administrative Firm. Notices to the Contract Administrative Firm shall be sent to the daily contact on file with the Client. Both Parties agree that they are responsible for ensuring that such Notices are forwarded to the appropriate internal personnel for handling. If additional information is needed to take action related to a Notice, a request must be made in writing outlining all specific requirements and instructions and provided by electronic mail.
- m. **Recordkeeping.**
 - i. The Contract Administrative Firm shall maintain records it creates or receives pursuant to this Agreement, including but not limited to notifications, correspondence and other records, for the lesser of (a) the Term of this Agreement or (b) seven (7) years following the date that the Contract



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 14

Administrative Firm created or received the record. The Contract Administrative Firm will deliver copies of such records to the Client or its designee within thirty (30) days of (a) termination of this Agreement, or (b) the Contract Administrative Firm's receipt of the Client's written request for the records.

- ii. The Contract Administrative Firm reserves the right to retain at its own expense, beyond the period defined in Section 4(m)(i), digital files containing records it created or received pursuant to this Agreement, subject however to the express provisions of Section 4(g), Confidentiality, and, to the extent such digital files contain PHI, the provisions of the Business Associate Agreement regarding maintenance of PHI when return or destruction of such PHI is infeasible.
- iii. The requirements of this subsection shall survive termination of this Agreement and shall remain in effect for so long as the required period of record maintenance lasts.
- n. **Standard of Care.** The Contract Administrative Firm will use reasonable care and due diligence in the performance of the duties contained in this Agreement, including the selection and retention of subcontractors and agents engaged by Contract Administrative Firm to assist in performance of its duties under this Agreement. It shall not be considered a breach of this Agreement if the Contract Administrative Firm refuses to perform services generally required under this Agreement if the manner in which the Client requires such services to be performed is inconsistent with the Contract Administrative Firm's standard of care, or requires material changes to the Contract Administrative Firm's existing operating procedures.
- o. **Subcontractors and Agents.** The Contract Administrative Firm will ensure that the Standard of Care as outlined in Section 3(n), and the privacy and security duties under HIPAA (as amended by HITECH) that are outlined in Section 3(g)(iii) are upheld by any subcontractor or agent engaged for the purpose of providing services as outlined in Section 1 and will further ensure that any such subcontractor or agent will comply with applicable terms of this Agreement, including without limitation, Section 3(g). Disclosure of subcontractor or agent relationships in existence as of the Effective Date or later will be made by the Contract Administrative Firm upon the written request of the Client.
- p. **Survival.** Notwithstanding any provision herein to the contrary, the Parties' obligations under Sections 3(g) and 5 shall survive termination of this Agreement.
- q. **Warranties.** No representations or warranties have been provided by any Party to this Agreement except as specifically set forth in this Agreement.
- r. **Venue in the Event of Legal Dispute.** Should either Party institute legal action to enforce its rights under this Agreement, the venue shall be in San Diego County, State of California, and the prevailing party in such action shall be entitled to recover reasonable attorney's fees and costs.

4. No Trust Created.

Notwithstanding any provision herein to the contrary, the Contract Administrative Firm and the Client agree and acknowledge that any funds submitted by the Client or any other individual or entity to the Contract Administrative Firm in accordance with this Agreement: (1) are and shall remain the general assets of the Client; (2) are not "plan assets" within the meaning of ERISA, without regard to whether ERISA applies to the reimbursement accounts at issue; (3) were never held in an account, fund or trust bearing the name of a Client component reimbursement



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 15

account, Reimbursement Program or any participants or beneficiaries thereof; and (4) shall always remain subject to the claims of the Client's creditors. The Client further understands that the Contract Administrative Firm is not responsible for satisfying any applicable trust requirements solely because funds are transmitted to the Client in accordance with this Agreement by either the Client, or individuals who currently are or formerly were employed by the Client.

5. Indemnification.

- a. The Client shall indemnify, defend and hold harmless the Contract Administrative Firm, its affiliates, directors, officers, owners, employees and subcontractors from any claim, expense, loss, damage, settlement, judgment, penalty or liability including reasonable attorney's fees and court costs (individually and collectively, "Claims") resulting in any way from or arising out of the Client's performance of or failure to perform its duties under this Agreement, including, without limitation, Claims resulting from or arising out of acts or omissions by the Client, its employees, owners, officers, directors, or subcontractors.
- b. The Contract Administrative Firm shall indemnify, defend and hold harmless the Client, its affiliates, directors, officers, owners, employees, and subcontractors or any of them from any claim, expense, loss, damage, settlement, judgment, penalty or liability, including reasonable attorneys' fees and court costs (individually and collectively, "Claims") resulting in any way from or arising out of the Contract Administrative Firm's performance of or failure to perform its duties under this Agreement, including, without limitation, Claims resulting from or arising out of acts or omissions by the Contract Administrative Firm, its employees, owners, officers, directors, or subcontractors.

6. Signature

The Parties to this Agreement consent and agree to all of its provisions and by their signatures cause this Agreement to become effective on the Effective Date.

Client:

Sign: _____

Print: Kristine Ridge

Title: City Manager

Date: _____

Attest:

Daisy Gomez, Clerk of Council

Recommended for approval:

Steven V. Pham
Executive Director of Human
Resources

Contract Administrative Firm:

DocuSigned by:
Sign: Laura McKinlay
A2D79A58F118409...

Print: Laura K. McKinlay

Title: President/CEO

Date: 9/14/2020

Approved as to form:

Sonia R. Carvalho, City Attorney

Laura A. Rossini
Laura A. Rossini
Acting Chief Assistant City
Attorney



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 16

Exhibit A: Spending Account Services

Fee Guarantee Period Begins on the Effective Date and ends

December 31, 2023

Annual Anniversary Date: January 1st ¹

Minimum Monthly Fee: \$100

FSA (Section 125 Services) ² & Commuter Benefit Administration³

FSA administration includes Limited and Full Purpose Health FSA and Dependent Care Assistance Plans. Commuter administration includes Qualified Transportation and Parking Plans. Commuter program design requirements apply¹. Bundled rate.

Monthly Participation Rate: \$4.00 per participant per month

Included Services List:

These services are part of all Spending Accounts unless expressly indicated below.

- ✓ **Implementation**
 - Plan Configuration Support
 - Initial EDI Testing⁴
- ✓ **Client Relations Manager (CRM)**
- ✓ **Benefit Card Administration⁵ (card stacked for multiple plans)**
- ✓ **Claim Review**
- ✓ **Client & Participant Portals**
- ✓ **Daily Reimbursement Remittance**
- ✓ **Direct Deposit Reimbursement**
- ✓ **Electronic Eligibility Updates**
- ✓ **Employer Reporting – scheduled and on demand**
- ✓ **Enrollment Processing and Eligibility Updates⁶**
- ✓ **FDIC Insured**

¹Once the Fee Guarantee Period expires, fees will renew as is on an annual basis unless new fee offerings are presented in writing 60 days prior to the Annual Anniversary Date.

²Participation fees are assessed by Plan Year and will remain billable until the Plan year has closed administration. Section 125 Services include standard and limited Health Flexible Spending Accounts as well as Dependent Care Reimbursement Account administration. A participant is billable as long as they are enrolled in at least one of the aforementioned account types. Igoe reserves the right to increase the monthly participation rate at any time due to increases in Federal Postage rates, changes to Federal legislation governing the provision of these services, or as a result of CPI adjustments (not to exceed 3% annually).

³The per participant fee is bundled across all commuter elections offered. Igoe reserves the right to increase the monthly participation rate at any time due to increases in Federal Postage rates, changes to Federal legislation governing the provision of these services, or as a result of CPI adjustments (not to exceed 3% annually).

⁴For files received prior to the administrative effective date

⁵Includes 2 benefit cards per account (both initial cards and cards renewed due to standard card expiration)

⁶Enrollment and Account Updates that require manual entry by an Igoe Associate are subject to a processing fee – please refer to the Billable Services List.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17

Page 17

- ✓ **Fund Rollover (FSA Carryover, HRA and Commuter)**
- ✓ **Investment Options (HSA only)**
- ✓ **Participant Call Center Support - Domestically Based**
- ✓ **Participant Communications & Alerts (Real Time)**
 - Communications are in electronic format
 - Account Statements are emailed monthly
 - Year-end tax statements (HSA only)
- ✓ **Participant Mobile App**
- ✓ **Plan Document and Summary Plan Descriptions (fees apply if such documentation is not required for Plan compliance)**

Included Annual Services List:

- ✓ **Non-discrimination Testing (NDT)** (provided such testing is required for compliance of spending accounts administered by Igoe)
- ✓ **Open Enrollment Processing⁷**

Billable Services List – Not Included

This list outlines services that are not included in the Monthly Participation Rate. Fees based on time and ability will be presented to the Client by means of a written proposal (statement of work) and must be agreed to before such services are provided. Postage expenses are calculated using the official Federal USPS postal rate as of the time of the mailing.

- ✓ **Benefit Cards**
 - **Cards in excess of the 2 card per participant limit: \$5.00 per**
 - **Lost/Stolen/Damaged Replacement Cards: \$5.00 per**
- ✓ **Benefit Fair and/or Open Enrollment Meeting Attendance**
 - **\$300 per day + travel**
This fee is waived for clients within 100 miles of Igoe's San Diego based corporate facility. Igoe's attendance is subject to associate availability.
- ✓ **Banking Fees**
 - **ACH Rejection-Client: \$50.00 per** each rejected client ACH
 - **Direct Deposit Rejection-Participant: \$15.00 per** each returned participant ACH
 - **Reimbursement Reissuance: \$10.00 per** each reissued reimbursement (ACH or manual check)
 - **Stop Payment: \$15.00 per** stop payment (fee only applies to manually issued

⁷Manual Enrollment Processing fees will apply if election data is provided in a manual format and/or after the data submission detail outlined in the Annual Open Enrollment Guide. Changes made to system configuration to accommodate amended benefit offerings are subject to System Re-configuration fees.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 18

checks)

✓ **EDI Development**

- **\$300 per vendor connection**

This fee includes consultation and file testing for files that are initiated and/or altered after initial plan administration has begun.

✓ **Manual Enrollment Processing**

- **\$5.00 per manually entered enrollment**

✓ **System Corrections/Re-Configuration**

- **\$30 per 1/4 hour (\$120 minimum)**

Amended Section 125 Plan Documents and SPDs are included as applicable.

✓ **Take-over Account Set-up and/or Balance Transfer**

- **\$10.00 per participant account created (\$200 minimum)**

This fee is waived for each take-over account that is submitted in Igoe's preferred format and successfully loaded into the Client's custom database.



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17

Page 19

Exhibit B: Client Spending Account Program Design

Medical Care Reimbursements Account:	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Dependent Care Assistance Account:	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Limited Purpose Reimbursement Account:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Health Reimbursement Account:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Health Savings Account:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Transit Reimbursement Account:	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Parking Reimbursement Account:	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

i Commuter Program Design Requirements:

Below is a list of administrative requirements that must be in place in order to maintain the Fee Guarantee outlined herein. Custom Plan Designs are available and upon written request. Fees for custom services will be made available at the time of the request.

- Connection to approved WiredCommute vendors
- Automatic update to current federal monthly limits
- Fund rollover with annual re-enrollment
- Manual claim remittance (participant will receive a check mailed home or can opt in to direct deposit)
- 180-day claim submission period (the termination run out will be invoked for employment termination)
- First of the month funding
- Eligibility changes must be submitted prior to the 20th of the month and will be effective the 1st of the following month



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 20



City of Santa Ana Spending Account Administrative Services Agreement

Client Initials: _____

PEPM17
Page 21

25A-23

IGOE ADMINISTRATIVE SERVICES

EXHIBIT 2

Business Associate Agreement

Prepared for City of Santa Ana

The terms of this contract reflect the business practices of Igoe Administrative Services and are not negotiable. Igoe Administrative Services promotes a fair and equal business practice and as a result extends the same services, allocation of responsibilities, and liability statements to all clients.



Document Generated on June 16, 2020
City of Santa Ana Business Associate Agreement
Client Initials: _____

Page 1

25A-24

Contents

Recitals	4
1. Definitions	4
a. Breach.	4
b. Breach Notification Rule....	4
c. Designated Record Set.	5
d. Electronic Protected Health Information.....	5
e. Electronic Transactions Rule.	5
f. Enforcement Rule.	5
g. Genetic Information.....	5
h. HIPAA Rules.....	5
i. HHS.....	5
j. Individual.....	5
k. Privacy Rule.....	5
l. Protected Health Information.....	5
m. Required by Law.....	5
n. Secretary.	5
o. Security Incident.	5
p. Security Rule.	5
q. Subcontractor..	6
r. Transaction.....	6
s. Unsecured Protected Health Information.	6
2. Permitted Uses and Disclosures of PHI by Business Associate.	6
3. Duties of Business Associate Relative to PHI.	7
4. Term and Termination.	10
i) Term.....	10
ii) Termination for Cause.	11
iii) Effect of Termination.....	11
5. Consideration.....	11
6. Remedies in Event of Breach.	12



Document Generated on June 16, 2020
City of Santa Ana Business Associate Agreement
Client Initials: _____

Page 2

7. Modification.....	12
8. Interpretation of this Contract to Other Contracts Between the Parties.....	12
9. Compliance with State Law.....	13
10. Miscellaneous.....	13
i) Ambiguity.....	13
ii) Regulatory References.....	13
iii) Notice to Covered Entity/Business Associate.....	13
11. Signature.....	14



Recitals

This Business Associate Agreement (the "Agreement") is made by **City of Santa Ana** in its capacity as Plan Administrator of **City of Santa Ana** Group Health Plan/Plans (herein referred to as "Covered Entity") and Igoe & Company Incorporated, dba Igoe Administrative Services (hereinafter known as "Business Associate" or "Igoe"). Covered Entity and Business Associate shall collectively be known herein as the "Parties".

WHEREAS, Covered Entity wishes to commence a business relationship with Business Associate that shall be memorialized in a separate administrative services agreement (the "Underlying Agreement") pursuant to which Business Associate may be considered a "business associate" of Covered Entity as defined in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") as amended by the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (the "HITECH Act"); and

WHEREAS, the nature of the prospective contractual relationship between Covered Entity and Business Associate may involve the exchange of Protected Health Information ("PHI") as that term is defined under HIPAA; and

WHEREAS, Covered Entity and Business Associate wish to enter into this Agreement for the purpose of ensuring compliance with the requirements of HIPAA as amended by HITECH, and its implementing regulations through and including the "omnibus" final HIPAA/HITECH regulations published in January 2013; and with applicable privacy provisions of California law;

NOW THEREFORE, in consideration of the mutual promises set forth herein and in the Underlying Agreement, the Parties, intending to be legally bound, hereby agree as follows:

1. Definitions

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Data Aggregation, Disclosure, Health Care Operations, Minimum Necessary, Notice of Privacy Practices, and Use. Other terms are as defined below:

- a. **Breach.** "Breach" shall have the same meaning as the term "breach" in 45 CFR § 164.402, taking into account the exclusions set forth at 45 CFR § 164.402(1).
- b. **Breach Notification Rule.** "Breach Notification Rule" shall mean the Standards and Implementation Specifications for Notification of Breaches of Unsecured Protected Health Information under 45 CFR Parts 160 and 164, subparts A and D.



Document Generated on June 16, 2020
City of Santa Ana Business Associate Agreement
Client Initials: _____

Page 4

- c. **Designated Record Set.** "Designated Record Set" shall have the same meaning as the term "designated record set" in 45 CFR §164.501.
- d. **Electronic Protected Health Information.** "Electronic Protected Health Information" or "Electronic PHI" shall have the same meaning as the term "electronic protected health information" in 45 CFR §160.103.
- e. **Electronic Transactions Rule.** "Electronic Transactions Rule" shall mean the final regulations issued by HHS concerning standard transactions and code sets under 45 CFR Parts 160 and 162.
- f. **Enforcement Rule.** "Enforcement Rule" shall mean the Enforcement Provisions set forth in 45 CFR Part 160
- g. **Genetic Information.** "Genetic Information" shall have the same meaning as the term "genetic information" in 45 CFR §160.103.
- h. **HIPAA Rules.** "HIPAA Rules" shall mean the Privacy, Security, Breach Notification and Enforcement Rules at 45 CFR Parts 160 and 164.
- i. **HHS.** "HHS" shall mean the U.S. Department of Health and Human Services.
- j. **Individual.** "Individual" shall have the same meaning as the term "individual" in 45 CFR §160.103 and shall include a person who qualifies as a personal representative in accordance with 45 CFR §164.502(g).
- k. **Privacy Rule.** "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E.
- l. **Protected Health Information.** "Protected Health Information" or "PHI" shall have the same meaning as the term "protected health information" in 45 CFR §160.103, limited to the information created, received, maintained or transmitted by Business Associate from or on behalf of Covered Entity pursuant to this Agreement.
- m. **Required by Law.** "Required by Law" shall have the same meaning as the term "required by law" in 45 CFR §164.103.
- n. **Secretary.** "Secretary" shall mean the Secretary of the U.S. Department of Health and Human Services or his or her designee.
- o. **Security Incident.** "Security Incident" shall have the same meaning as the term "security incident" in 45 CFR § 164.304, limited however by the provisions set forth in Section 3(c) below.
- p. **Security Rule.** "Security Rule" shall mean the Security Standards and Implementation Specifications at 45 CFR Parts 160 and 164, subparts A and C.



- q. **Subcontractor.** "Subcontractor" shall have the same meaning as the term "subcontractor" in 45 CFR § 160.103.
- r. **Transaction.** "Transaction" shall have the meaning given the term "transaction" in 45 CFR § 160.103.
- s. **Unsecured Protected Health Information.** "Unsecured Protected Health Information" or "Unsecured PHI" shall have the meaning given the term "unsecured protected health information" in 45 CFR § 164.402.

2. Permitted Uses and Disclosures of PHI by Business Associate.

- a. **General Use and Disclosure.** Except as otherwise limited in this Agreement, Business Associate may use or disclose Protected Health Information in order to perform functions, activities, or services for, or on behalf of, Covered Entity, as specified in the Underlying Agreement, provided that such use or disclosure of Protected Health Information would not violate the Privacy Rule, including the Minimum Necessary requirement, if done by Covered Entity.
- b. **Specific Uses and Disclosures by Business Associate.**
 - i. Except as otherwise limited in this Agreement, Business Associate may use or disclose PHI for the proper management and administration of Business Associate, or to carry out the legal responsibilities of Business Associate, provided that any disclosures of PHI are Required by Law, or Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person, and the person notifies Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.
 - ii. Business Associate may use Protected Health Information to perform Data Aggregation services on behalf of the Plan as permitted by 45 CFR § 164.504(e)(2)(i)(B).
 - iii. Business Associate may use Protected Health Information to create de-identified information consistent with the standards set forth at 45 CFR § 164.514.
- c. **Covered Entity's Other Business Associates.** In the course of fulfilling its duties hereunder, Business Associate may disclose PHI to, and receive PHI from, other business associates of Covered Entity to the same extent and degree as Covered Entity could disclose PHI to, or receive PHI from, such other of its business associates. Covered Entity is solely responsible for ensuring that it properly has entered into business associate agreements with its other business associates and Business Associate shall have no responsibility for confirming the



existence of a business associate agreement between Covered Entity, on the one hand, and, on the other hand, another business associate of Covered Entity. Where required by service agreements and/or business associate agreements prepared by other business associates, Covered Entity shall expressly authorize transmission of PHI to Business Associate. Covered Entity promptly shall notify Business Associate of any changes to its relationships with other business associates with which Business Associate may have dealings in fulfilling its duties hereunder.

3. Duties of Business Associate Relative to PHI.

- a. Business Associate shall not use or disclose PHI other than as permitted or required by this Agreement or as Required by Law, and otherwise comply with all applicable provisions of the Privacy Rule.
- b. Business Associate shall use appropriate safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by this Agreement, and otherwise comply with all applicable provisions of the Security Rule.
- c. Business Associate will report to Covered Entity any use or disclosure of Protected Health Information not provided for by this Agreement of which it becomes aware, including Security Incidents of which Business Associate becomes aware. Business Associate shall not, however be required to report to Covered Entity the ongoing existence and occurrence of "Attempted but Unsuccessful Security Incidents," defined as activity such as pings and other broadcast attacks on Business Associate's firewall, port scans, unsuccessful log-on attempts, denial of service and any combination of the above, so long as no such incident results in unauthorized access, use or disclosure of Electronic PHI as defined under the HIPAA Rules.
- d. Business Associate promptly shall notify Covered Entity of a Breach of Unsecured PHI upon Business Associate's discovery of same. Business Associate will treat any Breach as being discovered in accordance with 45 CFR § 164.410. Business Associate's notification to Covered Entity hereunder shall:
 - (1) Be made to Covered Entity without unreasonable delay and in no event later than 60 calendar days after discovery of the Breach, except where a law enforcement official determines that a notification would impede a criminal investigation or cause damage to national security;



- (2) Identify the individuals whose Unsecured PHI has been, or is reasonably believed to have been, the subject of a Breach; and
- (3) Include any other available information that the Covered Entity requires in order to complete a risk assessment under 45 CFR § 164.402 with respect to the Individuals affected by the Breach, or in order to notify such Individuals of the Breach, as well as the Secretary and the media, to the extent required under §13402(f) of the HITECH Act, 42 U.S.C. § 17932 and 45 CFR §§ 164.404, 164.406 and 164.408. Business Associate shall provide such information to Covered Entity promptly upon such information becoming available to Business Associate. Covered Entity solely shall be responsible for providing notification to any Individual, the Secretary, or the media with regard to a Breach.
- (4) Each party shall bear its own costs and expenses required to comply with notification duties resulting from a breach of Unsecured PHI as set forth in 45 CFR §§ 164.404, 164.406, and 164.408, with regard to Covered Entity, and as set forth in 45 CFR § 164.410, with regard to Business Associate.
- (5) Each party shall mitigate, to the extent practicable, any harmful effect known to them resulting from a use or disclosure of PHI in violation of this Agreement.
 - i. In accordance with 45 CFR §§ 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, Business Associate agrees to require that any of its Subcontractors that create, receive, maintain or transmit Protected Health Information from or on behalf of Business Associate agree in writing to the same restrictions, conditions, and requirements that apply to Business Associate with respect to such information, including the obligation promptly to notify Business Associate of any use or disclosure of PHI not provided for by the agreement between the Business Associate and the Subcontractor, and to report to Business Associate any Security Incident of which Subcontractor becomes aware, or Breach that Subcontractor discovers.
 - ii. In the event Business Associate becomes aware of a pattern or practice of a Subcontractor that violates the privacy and security safeguard obligations made to Business Associate, Business Associate will take reasonable steps to cure such violation and otherwise will respond to non-compliance by a Subcontractor in the same way that Covered Entity is required to respond to non-compliance by Business Associate.
 - iii. Effective as of September 23, 2013, or the Effective Date of this Agreement, if later, Business Associate will refrain from engaging in the sale of any Protected



Health Information other than with the written authorization of the Individual to whom the Protected Health Information pertains.

- iv. If Business Associate conducts in whole or part Electronic Transactions on behalf of Covered Entity for which HHS has established standards, Business Associate will comply, and will require any Subcontractor it involves with the conduct of such Transactions to comply, with each applicable requirement of the Electronic Transactions Rule. Business Associate shall also comply with the National Provider Identifier requirements, if and to the extent applicable.
- v. Business Associate will comply with requests for restrictions on use or disclosure to health plans for payment or health care operations purposes when the provider has been paid out of pocket in full consistent with 45 CFR § 164.522(a), provided that Covered Entity has first notified Business Associate of the application of such restrictions.
- vi. To the extent applicable, Business Associate shall provide access to Protected Health Information in a Designated Record Set at reasonable times, at the request of Covered Entity or, as directed by Covered Entity, to an Individual in order to meet the requirements under 45 CFR §164.524.
- vii. To the extent applicable, Business Associate shall make any amendment(s) to Protected Health Information in a Designated Record Set that Covered Entity directs or agrees to pursuant to 45 CFR §164.526 at the request of Covered Entity or an Individual.
- viii. Business Associate shall, upon request with reasonable notice, provide Covered Entity access to its premises for a review and demonstration of its internal practices and procedures for safeguarding PHI. Such access shall be granted no less frequently than annually, and also upon request and reasonable notice, in the event of a Breach or Security Incident as herein defined.
- ix. Business Associate agrees to document such disclosures of PHI and information related to such disclosures as would be required for a Covered Entity to respond to a request by an individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. §164.528. Should an individual make a request to Covered Entity for an accounting of disclosures of his or her PHI pursuant to 45 C.F.R. §164.528, upon prompt notice of same, Business Associate agrees to promptly provide Covered Entity with information in a format and manner sufficient to respond to the individual's request.
- x. Business Associate shall make its internal practices, books, records, and any other material requested by the Secretary relating to the use, disclosure, and



safeguarding of PHI received from Covered Entity available to the Secretary for the purpose of determining compliance with the HIPAA Rules. The aforementioned information shall be made available to the Secretary in the manner and place as designated by the Secretary or the Secretary's duly appointed delegate. Under this Agreement, Business Associate shall comply and cooperate with any request for documents or other information from the Secretary directed to Covered Entity that seeks documents or other information held by Business Associate.

- xi. Business Associate may use Protected Health Information to report violations of law to appropriate Federal and State authorities, consistent with 42 C.F.R. §164.502(j)(1).
- xii. Effective as of September 23, 2013, or the Effective Date of this Agreement, if later, if Covered Entity requests an electronic copy of Protected Health Information that is maintained electronically in a Designated Record Set in the Business Associate's custody or control, Business Associate will provide an electronic copy in the form and format specified by the Covered Entity if it is readily producible in such format; if it is not readily producible in such format, Business Associate will work with Covered Entity to determine an alternative form and format that enable Covered Entity to meet its electronic access obligations under 45 CFR § 164.524.
- xiii. Business Associate will not use or disclose PHI for purposes of Marketing, as defined in 45 CFR § 164.501, other than in accordance with the HIPAA Rules, including the requirement, where applicable, to obtain prior written authorization for such use or disclosure for Marketing purposes.
- xiv. Effective as of September 23, 2013, or the Effective Date of this Agreement, if later, Business Associate will refrain from using or disclosing Genetic Information for underwriting purposes in violation of the HIPAA Rules.

4. Term and Termination.

- i) **Term.** The Term of this Agreement shall be effective as of the date the Underlying Agreement is effective, and shall terminate when all of the Protected Health Information provided by Covered Entity to Business Associate, or created, maintained or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or, if it is infeasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this Section IV.



Document Generated on June 16, 2020
City of Santa Ana Business Associate Agreement
Client Initials: _____

Page 10

ii) **Termination for Cause.** Upon Covered Entity's knowledge of a material breach of this Agreement by Business Associate, Covered Entity shall:

- (1) Provide an opportunity for Business Associate to cure the breach or end the violation and, if Business Associate does not cure the breach or end the violation within the time specified by Covered Entity, which shall be no less than thirty (30 days), terminate this Agreement;
- (2) Immediately terminate this Agreement if Business Associate has breached a material term of this Agreement and cure is not possible.

iii) **Effect of Termination.**

- (1) Except as provided in paragraph 4(iii)(2) of this section, upon termination of this Agreement for any reason, Business Associate shall return or destroy all Protected Health Information received from Covered Entity, or created, maintained or received by Business Associate on behalf of Covered Entity. This provision shall apply to Protected Health Information that is in the possession of Subcontractors of Business Associate. Business Associate shall not retain any copies of the Protected Health Information.
- (2) In the event that Business Associate determines that returning or destroying the Protected Health Information is infeasible, Business Associate shall provide to Covered Entity written notification of the conditions that make return or destruction infeasible. After written notification that return or destruction of Protected Health Information is infeasible, Business Associate shall extend the protections of this Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protected Health Information.
- (3) Should Business Associate make a disclosure of PHI in violation of this Agreement, Covered Entity shall have the right to immediately terminate any contract, other than this Agreement, then in force between the Parties, including the Underlying Agreement.

5. Consideration.

The parties mutually recognize that the promises each has made to the other in this Agreement shall, henceforth, be detrimentally relied upon by each party in choosing to continue or commence a business relationship with the other party.



Document Generated on June 16, 2020
City of Santa Ana Business Associate Agreement
Client Initials: _____

Page 11

6. Remedies in Event of Breach.

Business Associate hereby recognizes that irreparable harm will result to Covered Entity, and to the business of Covered Entity, in the event of breach by Business Associate of any of the covenants and assurances contained in this Agreement. As such, in the event of breach of any of the covenants and assurances contained in Sections 2 or 3 above, Covered Entity shall be entitled to enjoin and restrain Business Associate from any continued violation of Sections 2 or 3. Furthermore, in the event of breach of Sections 2 or 3 by Business Associate, Covered Entity is entitled to reimbursement and indemnification from Business Associate for Covered Entity's reasonable attorneys' fees and expenses and costs that were reasonably incurred as a proximate result of Business Associate's breach however not including attorneys' fees, expenses or costs incurred in claims or actions brought by third parties affected by the breach. The remedies contained in this Section 6 shall be in addition to (and not supersede) any action for damages and/or any other remedy Covered Entity may have for breach of any part of this Agreement.

Covered Entity shall indemnify and limit the Business Associate's liability against any losses incurred as a result of communicating with the Covered Entity's designated contact, or from a use or disclosure of PHI by the **City of Santa Ana's** employees, agents, owners, directors, or by other business associates of Covered Entity.

7. Modification.

This Agreement may only be modified through a writing signed by the Parties and, thus, no oral modification hereof shall be permitted. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for Covered Entity to comply with the requirements of the HIPAA Rules.

8. Interpretation of this Contract to Other Contracts Between the Parties.

Should there be any conflict between the language of this contract and any other contract entered into between the Parties (either previous or subsequent to the date of this Agreement), that pertains to duties and obligations under the HIPAA Rules, the language and provisions of this Agreement shall control and prevail.



9. Compliance with State Law.

Except to the extent its obligation to do so is preempted by the provisions of HIPAA, including provisions of the HITECH Act, Business Associate shall notify Covered Entity of any breach of unencrypted data owned or licensed by Covered Entity, and maintained by Business Associate, in accordance with applicable California law. "Breach" for these specific purposes means acquisition of unencrypted data by an unauthorized person, or the reasonable belief of such acquisition, that compromises the security, confidentiality, or integrity of "personal information" pertaining to California residents, as those terms are defined in California Civil Code §§ 1798.82(g) and (h), respectively, subject however to the good faith exception to "Breach" set forth in Civil Code § 1798.82(g). If the HIPAA Rules and the California Civil Code provisions cited herein conflict regarding the degree of protection provided for Protected Health Information, Business Associate shall comply with the more restrictive protection requirement.

10. Miscellaneous.

- i) **Ambiguity.** Any ambiguity in this Agreement shall be resolved to permit the Parties to comply with the HIPAA Rules.
- ii) **Regulatory References.** A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.
- iii) **Notice to Covered Entity/Business Associate.** All Notices required hereunder shall be in writing and provided by electronic mail, and will be considered received as of the date of the electronic transmission. Notices to the Covered Entity shall be sent to the daily contact on file with the Business Associate. Notices to the Business Associate shall be sent to the daily contact on file with the Covered Entity. Both Parties agree that they are responsible for ensuring that such Notices are forwarded to the appropriate internal personnel for handling. If additional information is needed to take action related to a Notice, a request must be made in writing outlining all specific requirements and instructions and provided by electronic mail.
- iv) **Governing Law.** Interpretation and enforcement of this Agreement shall be governed by and construed in accordance with the laws of the state of California to the extent they are not preempted by the HIPAA Rules or other applicable federal law.
- v) **Severability.** The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect.
- vi) **No Third Party Beneficiary.** Nothing expressed or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties and the



respective successors or assignees of the parties, any rights, remedies, obligations, or liabilities whatsoever.

vii) **Construction and Interpretation.** The section headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement. This Agreement has been negotiated by the parties at arm's-length and each of them has had an opportunity to modify the language of the Agreement. Accordingly, the Agreement shall be treated as having been drafted equally by the parties, and the language shall be construed as a whole and according to its fair meaning. Any presumption or principle that the language is to be construed against any party shall not apply. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

viii) **Survival.** The respective rights and obligations of Business Associate under Sections 2(a) and (b) and 4(iii)(2) and (3) shall survive the termination of this Agreement.

11. Signature.

IN WITNESS WHEREOF and acknowledging acceptance and agreement of the foregoing, the Parties affix their signatures hereto.

Covered Entity:

Sign: _____

Print: Kristine Ridge

Title: City Manager

Date: _____

Business Associate:

DocuSigned by:
Sign: Laura McKinlay
A2D79A58F118409...

Print: Laura K. McKinlay

Title: President/CEO

Date: 9/14/2020

Attest:

Daisy Gomez, Clerk of Council

Approved as to form:

Sonia R. Carvalho
City Attorney

By Laura A. Rossini
Laura A. Rossini
Acting Chief Assistant City Attorney

Recommended for approval:

Steven V. Pham
Steven V. Pham
Executive Director of Human Resources

G:\18790\0001\DOCS\GU9280.DOCX



Document Generated on June 16, 2020
City of Santa Ana Business Associate Agreement
Client Initials: _____

Page 14