



January 28, 2016

Bernadette Wilson, Acting Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: Comments on Proposed Rule, Amendments to regulations under the Genetic Information Nondiscrimination Act of 2008, RIN 3046-AB02

Dear Ms. Wilson:

The American College of Medical Genetics and Genomics welcomes this opportunity to submit comments in response to the EEOC's proposed rule to amend regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) as they relate to employer wellness programs, referred to herein as the GINA NPRM.

About the American College of Medical Genetics and Genomics

The American College of Medical Genetic and Genomics (ACMG) is the only nationally recognized medical organization dedicated to improving health through the practice of medical genetics and genomics, representing over 1900 members, nearly 80% of which are board certified clinical and laboratory geneticists and genetic counselors. ACMG's mission, as redefined in our 2015 Strategic Plan, is to *"develop and sustain genetic and genomic initiatives in clinical and laboratory practice, education and advocacy."* Three guiding pillars underpin ACMG activities: 1) Clinical and Laboratory Practice: Establish the paradigm of genomic medicine by issuing statements and evidence-based or expert clinical and laboratory practice guidelines and through descriptions of best practices for the delivery of genomic medicine. 2) Education: Provide education and tools for medical geneticists, other health professionals and the public and grow the genetics workforce. 3) Advocacy: Work with policymakers and payers to support the responsible application of genomics in medical practice [and society].

As advocates for both the providers of clinical and laboratory genetic and genomic health care — including genetic tests and services— and for the individuals and families served by our members, ACMG has publically endorsed the prevention of unfair discrimination based on genetic disease risk for nearly two decades (see Watson MS and Greene CL, Points to Consider in Preventing Unfair Discrimination Based on Genetic Disease Risk: A Position Statement of the American College of Medical

Genetics, *Genet Med* 3(6):443, 2001 and re-affirmed 2005). With regard to genetic discrimination in the workplace, ACMG believes that:

- Protection against discrimination in employment must cover the many participants in the process including employers, employment agencies, labor organizations, and training programs, and at all steps and facets of the employment process, including corporate wellness programs.
- Protected genetic information must include that based on evaluation, testing, and family histories of individuals and their family members.
- All employees must feel safe in the workplace and be in control of who has access to their protected genetic information, as well as when and how that access is granted. This should include the ability to “opt-out” of all employee health/wellness programs that involve learning about genetic status unless there is clear evidence that genetic factors contribute to an individual’s vulnerability to unavoidable environmental workplace exposures, and testing is available to determine whether an individual is at increased risk. In these cases, employees and potential employees should be made aware of the availability of such testing and should be fully informed of the implications of testing.

General Comment

It is for these reasons that we write today in strong opposition to the GINA NPRM. We are deeply concerned that this rule, if finalized, and in combination with the proposed rule to amend workplace wellness standards under the Americans with Disabilities Act (RIN 3046-AB01), referred to herein as the ADA NPRM, will coerce many millions of individuals to relinquish control over their personal health information and make it legal for workplace wellness programs to harvest personal health and genetic information on an industrial scale, use and share information for various commercial and other purposes, and increase the likelihood that individual’s information could be used in discriminatory or other harmful ways.

Beyond the broad and pervasive risks this new rule presents for all Americans, we are also deeply concerned that, if finalized, the proposed rule will likely undermine recruitment in the Precision Medicine Initiative (PMI). As announced by President Obama, the groundbreaking PMI intends to recruit one million participants and among other health data, collect genomic information to develop personalized therapies to prevent and treat disease. This visionary initiative promises to revolutionize medicine and improve the nation’s health. Its success rests on the ability to assure participants their personal health and genetic information will be kept strictly confidential and used only for their benefit and the stated research purposes. However, the GINA NPRM would create an opportunity for employers to coerce people into giving up access to their personal health information, including information that might be discovered through PMI research. With the privacy and security of personal health information threatened, people could be disinclined to participate in PMI studies and this critically important research effort would be undermined.

Three key provisions in the NPRM weaken GINA protections

Though the preamble acknowledges the unique protections for genetic information under GINA and the compelling reasons these were enacted, the GINA NPRM proposes three key changes that would greatly weaken GINA's protections:

1. The NPRM redefines "voluntary" wellness program to mean "mandatory" for most people – Under current regulations, employers (covered entities) are prohibited from requesting individuals to take a genetic test or disclose genetic information. One of the exceptions is if such requests are made through a voluntary workplace wellness program, meaning the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it.

The GINA NPRM proposes to redefine the definition of "voluntary" in a way that would permit employers to severely penalize families unless they provide access to their personal health information. The maximum financial inducement in the GINA NPRM could be as large as 30% of the cost of the group health plan (employer and employee share) and could be based on the cost of family coverage if an employee's spouse participates in the group health plan and if the employer wants the spouse to also disclose personal health information through the wellness program. Given the average cost of insurance coverage, this inducement very quickly becomes a significant financial penalty and one that most families cannot afford to avoid.

According to the KFF/HRET 2015 Survey of Employer Health Benefits¹, the average cost of family coverage under a group health plan this year is \$17,545, meaning the maximum annual penalty, on average, could reach \$5,264 per family. For some the penalty could be even greater. For example, in 20% of firms, including some with predominantly older workers, the cost of family coverage is \$20,000 or higher. Furthermore, because Affordable Care Act (ACA) final health insurance market regulations provide for per-member rating within group health plans to take into account age and tobacco use, and permit employers flexibility to allocate group health plan contributions based on per-member rating, the wellness penalty cost could be three times higher for older workers compared to younger workers.² Under the GINA NPRM, this penalty could be applied to the family's cost of participating in the health plan or it could be applied through other in-kind means, such as reductions in salary, leave or other benefits.

Based on the national average group health plan cost, a penalty of \$5,264 would constitute nearly 10 percent of the median U.S. household income in 2014 (\$53,657). Adding this amount to the cost of

¹ <http://kff.org/health-costs/report/2015-employer-health-benefits-survey/>

² For example, in a 3-person firm with workers age 20, 40, and 60, under per-member rating and 3:1 age rating limits, the group plan premium attributable to the 20-year-old might be \$2,000, with \$4,000 attributable to the 40-year-old and \$6,000 attributable to the 60-year-old. Under the Administration's final health insurance market regulations (see 78 *Federal Register* at 13410), a firm has flexibility to base contributions toward each worker's coverage based on the per-member premium; for example, the firm could contribute 80% of the per-member rate for each worker, leaving the oldest worker to pay up to 3 times as much as the youngest worker. If wellness penalties are applied to this rating structure, older workers enrolled in family coverage could face extremely high costs for refusing to disclose their health information.

group health coverage would guarantee that coverage would be unaffordable for most families. (The standard for affordable coverage under the ACA is defined as costing no more than 8.05% of income in 2015.) This is clearly no longer an inducement, but a coercive penalty. By proposing it, EEOC perverts the meaning of the word “voluntary” under GINA and damages the law’s fundamental protection against compelling individuals to disclose their genetic information.

The GINA NPRM attempts to counteract the problem it creates by retaining select protections for genetic information (notice rules, consent requirements, prohibition on conditioning inducements on the disclosure of genetic information) and by adding a new requirement (that prohibits conditioning participation on agreement to the sale of one’s genetic information or on the waiver of privacy protections for genetic information.) However, these protections will be rendered ineffective by two other concerning changes proposed in the GINA NPRM:

2. The NPRM adopts a standard for “reasonably designed” wellness program that is meaningless - The GINA NPRM adopts the definition of a “reasonably designed” workplace wellness program that was originally proposed in the Bush Administration³ and subsequently embraced by the Obama Administration⁴ in regulations implementing the Affordable Care Act (ACA) workplace wellness standards. This standard is intentionally vague and flexible and requires no scientific evidence of efficacy, only the sponsor’s claim that it has a reasonable chance of promoting health. The ACA rule notes that the reasonably designed standard is intended to be easy to satisfy and to allow experimentation by employers.⁵ Under this definition, for example, a workplace wellness program could claim to be reasonably designed if it gathers up all available personal health information on participants – not only through health risk assessments and biometric screening, but also from participants’ medical records, health insurance claims data, and other sources – and then uses and shares information with other commercial partners who also want access to the information for marketing and other purposes.⁶

³ <http://www.gpo.gov/fdsys/pkg/FR-2006-12-13/pdf/06-9557.pdf>

⁴ <http://www.gpo.gov/fdsys/pkg/FR-2013-06-03/pdf/2013-12916.pdf>

⁵ 78 *Federal Register* at 33162.

⁶ So-called “reasonably designed” workplace wellness programs already are using genetic testing. For example, one wellness vendor offers a program that encourages individuals to undergo genetic testing for metabolic syndrome risk, even though medical experts question the validity of this test (see: <http://www.dallasnews.com/business/health-care/20150428-genetic-testing-moves-into-world-of-employee-health.ece>). Under this program, participants complete an HRA and biometric screening (which they would be financially compelled to do under the NPRM) and are offered a genetic test to assess their risk of developing metabolic syndrome. The wellness vendor also markets its products – so called genetically engineered vitamins and nutritional supplements – to individuals it determines to be at risk for metabolic syndrome. Terms of Use and Privacy links on the vendor’s website note that this is a Canadian corporation, not subject to the laws of the U.S., though it also describes HIPAA protections in detail. These documents also state that personal information collected through the wellness program can be used and disclosed to market the vendors own products and services to participants, and to send participants offers that promote the products of other businesses. Participants agree to all of these terms by simply using the wellness program website. “If you do not agree to these terms, do not use this Site.” See [Attachment B](#).

In fact, that is how many workplace wellness programs are designed today. Their methods of harvesting personal health information from employees and their family members are so extensive and aggressive that genetic information will inevitably be swept in with other health data. (See [Attachment A](#) for examples of wellness programs that obtain personal health data not only from health risk assessments and biometric screening, but also by accessing participant’s medical records data, health plan claims data, and wearable device data.) Routinely, wellness program vendors obtain participants’ passive consent to these practices by including in their Terms of Use (lengthy, legal documents found at a link obscurely located on the wellness program web site) a statement that use of the website constitutes agreements to all Terms. Individuals cannot participate in the wellness program other than through the website.

The GINA NPRM prohibits wellness programs from conditioning participation on agreeing to the “sale” of genetic information. However, wellness vendor Terms of Use never say they will “sell” personal information, only “share” it with their business partners, which enables them to circumvent this restriction.

The GINA NPRM also prohibits wellness programs from conditioning participation on agreeing to waive GINA confidentiality protections. However, privacy protections – under GINA and under HIPAA – would not prohibit “sharing” information with business partners of the covered entity as long as sharing is for purposes of administering the program. Under the vague “reasonably designed” standard, business partners of the wellness program may claim that accessing personal health data and genetic information is necessary to provide wellness services (such as marketing running shoes or vitamins), or even to collect and analyze in an effort to find other ways to provide “reasonably designed wellness” services.

In short, the “reasonably designed” standard under the GINA NPRM permits wholesale health data mining by employer wellness programs and their business partners, by negating notice, informed consent, and privacy protections that might otherwise apply. Wellness vendors are eager to find ways to access our health data and profit from it – as one industry official recently noted⁷, “data is the new money” – and the EEOC’s permissive wellness rules will only bless this practice.

Today more than 45 million workers⁸ are in large firms offering workplace wellness programs. The GINA NPRM puts at risk the privacy of their health information and that of their family members. Once employers are allowed to coerce participation, people may find their most private information becomes available to corporations to explore and exploit for commercial purposes. Resulting advertising appeals and other re-disclosures increase the risk that private information will become public, including to co-workers, employers, and insurers.

3. The NPRM weakens protections for genetic information that is family medical history – The third fundamental weakening of GINA protections is accomplished by the NPRM effectively changing the definition of genetic information under federal law. GINA defines genetic information to include information about an individual’s genetic tests and the genetic tests of an individual’s family members,

⁷ <http://www.modernhealthcare.com/article/20151112/NEWS/151119993>

⁸ <http://kff.org/private-insurance/issue-brief/workplace-wellness-programs-characteristics-and-requirements/>

as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history). However, the NPRM would permit workplace wellness programs to compel both workers and their spouses to disclose their own personal health information, even though the spouse's health information constitutes genetic information of the worker and vice versa, and information on both parents constitutes genetic information of their children, which the NPRM insists should not be collected under any circumstances.

This action effectively removes family history from the definition of protected genetic information. Family history is often the least expensive and most accessible pathway to obtaining genetic information. Underserved communities that have little or no access to advanced and innovative technology are able to construct family health histories with little effort and expense. This allows them to manage their own health better. GINA protections for family medical history are fundamental. However, under the GINA NPRM, information disclosed by an employee or spouse about their own health conditions, which also constitutes genetic information about their family members, would not be afforded the special protections (notice, exemption from inducements, etc.) that the NPRM says it will preserve for other genetic information. The EEOC cannot and must not propose to undermine individual's basic GINA protections in this way.

The proposed rule is unnecessary and unlawful

The stated rationale for the GINA NPRM is the need to harmonize GINA standards related to collection of genetic information through voluntary workplace wellness programs with those under the ADA NPRM (related to collection of all other health care information by wellness programs), which in turn, was proposed to harmonize with ACA workplace wellness provisions, which permit the imposition of large financial penalties on individuals who cannot meet certain health-outcomes based targets.

However, the practical need for this NPRM has not been demonstrated. Workplace wellness programs commonly focus on collecting health information – an activity regulated by GINA and ADA – but rarely tie financial rewards to health outcomes – an activity regulated by ACA wellness standards. Just 5%⁹ of large employer workplace wellness programs today use the health-outcomes-based incentives authorized under the ACA. By contrast, most large employer workplace wellness programs use health risk assessments and/or biometric screening to gather personal health information from employees and their family members. A national study¹⁰ of workplace wellness programs by the RAND Corporation found that one-in-five workplace wellness programs are *primarily* screening focused and provide few if any other wellness services. Therefore, the GINA and ADA rules governing the collection of health information by wellness programs, and the ACA rules governing what health-contingent wellness programs can do with that information, apply to distinct types of wellness programs that rarely overlap. The protections governing information collection are important in their own right, and critically important to the employment, nondiscrimination, and privacy rights of individuals. How they are interpreted and enforced should not be influenced by a minority of workplace wellness programs operating under ACA rules.

⁹ <http://kff.org/private-insurance/issue-brief/workplace-wellness-programs-characteristics-and-requirements/>

¹⁰ <https://www.dol.gov/ebsa/pdf/WellnessStudyFinal.pdf>

In addition, as many of us noted in comments on the ADA NPRM this summer, GINA and ADA rules governing voluntary wellness programs are not in conflict with ACA wellness rules. As Congress acted to permit workplace wellness program to use health-outcomes-based incentives under the ACA, it did not amend GINA or the ADA to change the definition of a *voluntary* wellness program under either law. Nor did Congress preface the ACA wellness provisions with the proviso, “notwithstanding any other provision of law...” – as it did in 20 other instances within the ACA – to indicate that ACA wellness standards were intended to supersede GINA and ADA standards.

Congress’ decision to enact the ACA without such language demonstrates its intent that GINA and the ADA have parallel applicability to wellness programs. The Obama Administration recognized this legal fact in its 2013 regulation to implement ACA wellness provisions. That regulation explicitly and correctly stated that ACA wellness provisions had “no effect on other laws,” and that compliance with ACA wellness provisions “is not determinative of compliance with any other provision of ... any other ...Federal law including the ADA ...and the Genetic Information Nondiscrimination Act of 2008...”¹¹ For the EEOC to now propose changes to GINA in ways that Congress did not authorize is beyond the Agency’s legal authority.

By so radically changing the meaning of “voluntary” workplace wellness program under GINA and the ADA, EEOC undermines protections under both laws that protect workers and their family members from involuntary release of their personal health and genetic information. That is also beyond what Congress has legislated and so beyond the legal authority of EEOC to propose.

Recommended changes to the NPRM

1. Define “voluntary” to mean voluntary – The preamble to the NPRM notes that some employers have expressed confusion and uncertainty as to when health-contingent wellness incentives permitted under the ACA may be in conflict with the ADA and GINA.

We urge that a better and legally defensible response by the EEOC would be to strike the NPRM provision at §1635.8(b)(2)(ii) permitting inducements up to 30% of the group health plan cost; restore language in the final regulation at §1635.8(b)(2)(i)(A) defining voluntary to mean that individuals are neither required to provide genetic information nor penalized if they choose not to provide it; strike language in the final regulation at §1635.8(b)(2)(ii) suggesting that employers may offer financial inducements to complete health risk assessments; and provide additional clarification that voluntary wellness programs must be entirely voluntary with all financial and in-kind incentives prohibited. We also urge the Commission to adopt parallel changes to the ADA regulation.

2. Adopt stronger standards for “reasonably designed” wellness programs that request genetic information and other personal health information – Any workplace wellness program that requests genetic information and/or other personal health information should be required to meet standards for “reasonably designed” commensurate to the serious implications of requesting such sensitive

¹¹ 78 Federal Register at 33163.

information. Unless a meaningful standard for “reasonably designed” is adopted, privacy and nondiscrimination protections for genetic information will be undermined.

We urge that GINA and ADA standards for a reasonably designed wellness program include a requirement that programs show scientific evidence that their program will promote health and prevent disease. Further reasonably designed programs should be restricted to collect no more than the “minimum necessary” health information that is directly linked to the wellness program services and activities. Programs should also be required to demonstrate that they meet this standard by describing the specific health and genetic information that will be requested; the specific services or interventions (including those provided by business partners of the employer or wellness program vendor), evidence that specific wellness services and interventions are likely to promote health and prevent disease, and evidence that specific wellness services and interventions require collection of the specific genetic and health information requested.

The GINA NPRM adopts other elements of the reasonably designed definition from the ACA rule and from the ADA wellness NPRM. These include requirements that workplace wellness programs not be overly burdensome, a subterfuge for discrimination, highly suspect in the methods used to promote wellness, unreasonably intrusive, or intended merely to shift costs to individuals. However, none of these standards are enforceable without data.

We urge that employers who collect genetic and health information through workplace wellness programs must be required, at a minimum, to report data to federal regulators on the type and amount of incentives used, the incidence of incentives, and the effect of incentives on costs borne by employees and their families vs. the employer. Such programs also should be required to submit data measuring their impact on promoting health and preventing disease.

In addition, wellness programs (and their vendors) should report specific information on the nature of their wellness programs including the services and interventions involved. Wellness programs should disclose the names of all of business partners that can access participants’ genetic and/or health information and describe “services” they provide and payment received for those services. Wellness programs that generate significant revenue from sharing participants’ genetic and other personal health information should not be considered “reasonably designed” to promote health or prevent disease.

3. GINA protections must apply to all genetic information, including family medical history – The GINA NPRM seems not to recognize that family medical history is genetic information. By permitting wellness programs to compel disclosure of health information about family members of individuals – spouses and parents – it permits programs to compel disclosure of genetic information.

We urge that no exception should be allowed for plans to offer inducements to employees’ spouses or other family members to disclose information about the spouse’s (or other family member’s) own current or past health status.

4. Notice requirements must be strengthened and authorization should never be passively obtained –

Current GINA regulations require voluntary wellness programs to obtain prior, knowing, voluntary and written authorization to collect genetic information, which may include authorization in electronic format. This requirement is only met if the authorization form is (1) written so the individual is reasonably likely to understand it, (2) describes the type of genetic information that will be obtained and the general purposes for which it will be used, and (3) describes restrictions on disclosure of genetic information.¹² Importantly, notice and authorization requirements are not meaningful in programs that are not voluntary. Individuals who cannot afford to pay the penalty for not participating will also feel compelled to provide authorization.

Typically wellness vendors today provide notice that is not readily understood or sufficiently descriptive, and most obtain passive authorization from participants. Terms of use and other privacy practices are described in arcane and lengthy legal documents that broadly and permissively authorize the collection, use, and re-disclosure of participants' health information, including genetic information. These "notices" and "authorizations" typically are hidden behind obscure links that most people will not see or read. All include a statement that use of the website constitutes agreement to all terms, often equating this to an electronic signature.

We urge the EEOC to examine notice, authorization, and information collection practices by wellness vendors and revise notice standards under GINA and the ADA. With respect to notice standards, EEOC should draft a template notice with instructions for workplace wellness programs to specifically describe in clear, understandable terms, genetic information and other personal health information that the program will collect and how, specifically, each element of information will be used by the program (including by each business partner.) The template notice should also specify that the covered entity sponsoring the workplace wellness program will be strictly liable for any breach or misuse of program information and should include instructions on how to file a complaint with the EEOC.

We also recommend the EEOC should draft a template authorization form. EEOC should instruct covered entities that explicit and knowing authorization by a participant is required before any health information can be disclosed to a wellness program; passive authorization should not be permitted.

Model notice and authorization forms should be required for every workplace wellness program that requests genetic and other personal health information, including programs that offer even de minimis incentives to participate.

5. Revise GINA and ADA NPRM to ensure that covered entities are the same – The GINA wellness NPRM permits workplace wellness programs to offer inducements to an employee whose spouse (1) is covered by group health plan; (2) receives wellness services; and (3) provides information about his or her current or past health status as part of a HRA. By contrast, the ADA wellness NPRM applies different standards to wellness programs depending on whether they are provided as part of a group health plan

¹² §1635.8(b)(2)(i)(B)

or separately from the group health plan. The ADA rule does not define what it means for a wellness program to be offered as part of or separate from a group health plan. However, almost half of large employers¹³ report their wellness programs are offered separate from the group health plan.

We urge that ADA and GINA standards must be consistently applied in order to safeguard genetic information and other personal health information requested by workplace wellness programs. All programs, whether health contingent or participatory, in or outside of health plans, should be truly voluntary, reasonably designed, and subject to meaningful notice and privacy protections.

6. Prohibit collection of genetic information about children of all ages – The GINA NPRM proposes to prohibit inducements in exchange for current or past health status information about an employee’s children (biological and non-biological.)

We urge clarification that this prohibition extends to children of any age and not just minor or dependent children.

7. Prohibit conditioning participation in wellness program on agreement permitting the sale of genetic information, or otherwise waiving confidentiality protections – This provision at §1635.8(b)(2)(iv) in the NPRM is important in concept, but as noted earlier, this protection will be ineffective unless wellness programs are truly voluntary and truly reasonably designed. In addition, as noted earlier, wellness program authorizations today do not include the word “sale.” Instead information is “shared” with wellness vendor business partners.

We urge that more rigorous standards must ensure that any entity or business partner with whom genetic information and other personal health information is “shared” must be operating within an otherwise reasonably designed wellness program, meeting standards we described earlier, must be engaged in a specific wellness-related activity, and should receive only the minimum amount of information necessary to carry out the specific activity.

8. Prohibit conditioning inducements on agreement to provide genetic information – This provision at §1635.8(b)(2)(iii) in the NPRM is also important in concept, but this protection will be ineffective unless wellness programs are truly voluntary and truly reasonably designed.

We urge that wellness programs should not make any inquiries about genetic information unless the inquiry is directly linked to a wellness intervention that is likely, based on scientific evidence, to promote health or prevent disease.

9. Privacy protections for genetic information and other health information obtained by wellness programs must be strengthened – Additional protections are needed to safeguard the privacy of genetic and personal health information obtained by workplace wellness programs in light of many programs’ data-mining orientation, and in light of advances in technology for linking data and for re-identifying de-identified data. We are also concerned that, under the current final regulation, wellness programs are

¹³ <http://kff.org/private-insurance/issue-brief/workplace-wellness-programs-characteristics-and-requirements/>

permitted to share data with employers in “aggregate terms” that do not, or are not reasonably likely to disclose the identity of an employee. Advances in technology make it much more likely that aggregate or de-identified genetic information can be re-identified.¹⁴

We urge that covered entities, including their business partners, should be prohibited from re-identifying any aggregate data or de-identified data they may receive. We also urge that other protections provided under the privacy provisions of HIPAA should be included under GINA confidentiality protections – specifically, individuals should have a right to obtain copies of all personal information collected as part of the wellness program, the ability to challenge completeness and accuracy of such information, a right to obtain a listing of all parties to whom such information was disclosed and a description of any compensation or consideration received for that disclosure. Individuals also should have the ability to request confidential communications. Individuals also should have the right to request that all their wellness data be deleted by the employer, the wellness program administrator, and its business partners, if they decide to stop participating in the program. Finally, the covered entity must be strictly liable for any breaches to wellness program confidentiality that may occur (or harm to individuals resulting from sharing of personal health information by or with wellness program business partners), regardless of whether the covered entity or one of its business partners was at fault. Covered entities should not be allowed to disclaim liability for harms that result from such sharing. These protections should be included in GINA regulations, not just referenced in HIPAA. HIPAA privacy rules will not apply in many workplace wellness programs that are outside of the group health plan. In addition, individuals have a private right of action under GINA, but not under HIPAA.

Other public comment requested by the EEOC

Request comment on whether individuals offered inducements to disclose their information should be allowed to instead provide physician certification - We strongly urge that NO inducements to disclose genetic information or other personal health information should be permitted. In the narrow context of the NPRM as proposed, we would offer comment that an alternative to disclosing information should be provided. Further, the certifying physician should be chosen by the individual, not the employer. The wellness program should reimburse any fee or cost sharing incurred by the individual in obtaining such certification. The certification should not disclose any information about the individual’s health status or other genetic information. The certification should state only that the individual is under the care of a physician and that any medical risks are being managed, vs. under “active treatment,” as stated in the NPRM.

Request comment on whether proposed authorization requirements apply only to wellness programs that offer more than de minimis rewards or penalties – We strongly urge that authorization and notice requirements should apply to all workplace wellness programs that make inquiries about or obtain

¹⁴ For example, it has been demonstrated that research participants can be identified from “anonymous” DNA. See: <http://www.nature.com/news/privacy-protections-the-genome-hacker-1.12940>.

individual's genetic or other personal health information. Wellness programs use many techniques, including gamification and social influencing, that aim to increase the number of participating employees without use of financial incentives. These techniques can manipulate employees into participating and providing data.

Request comment on procedural safeguards to ensure that workplace wellness programs are designed to promote health or prevent disease and do not operate to shift costs to employees – As noted earlier, we urge that it is critically important for EEOC to adopt a meaningful definition of “reasonably designed” that would apply to any wellness programs that obtains genetic or other personal health information. Such programs should be based on scientific evidence, not just a reasonable guess, which they will work to promote health and prevent disease. Prohibiting use of incentives will ensure that costs are not shifted. In the event incentives are permitted, we urge that covered entities be required to track and report data on the amount and type of incentive, its incidence, and the effect of incentives on the allocation of costs between employers and employees.

Request comment on whether to adopt more specific guidance on the electronic storage of wellness program records – Adopting meaningful standards for reasonably designed wellness programs is an important first step to limit the amount of health information collected by wellness programs in the first place. In addition, we note that the Precision Medicine Initiative is developing a data security framework to identify and protect against threats to security. Any workplace wellness program that requests or gains access to genetic information should be required to adopt similar standards.

Request comment on best practices to ensure that information about spouse' current health status is protected from disclosure – As noted earlier, stronger standards for reasonably designed wellness programs and for privacy protections for information contained in such programs are imperative. Covered entities that sponsor workplace wellness programs that collect or obtain personal health information must ultimately be held legally responsible for any inappropriate disclosure of health information.

Request comment on whether wellness programs should be restricted to collect only the minimum necessary genetic information to directly support the specific wellness activities - As stated earlier, this requirement is essential and must be adopted.

Request comment on whether wellness programs should be prohibited from accessing genetic information from other sources, such as patient claims data and medical records data – As stated earlier, this requirement is essential and must be adopted.

Request comment on whether employer offer (or are likely to offer in the future) wellness programs outside of a group health plan, or use inducements to encourage employees' spouses to provide health or genetic information, and the extent to which GINA regulations should allow inducements provided as part of such programs – Data from the KFF/HRET employer health benefit survey¹⁵ indicate that nearly

¹⁵ <http://files.kff.org/attachment/ehbs-2014-section-twelve-wellness-programs-and-health-risk-assessments-section-twelve-wellness-programs-and-health-risk-assessments>

half of large employer wellness programs offer wellness benefits outside of the group health plan. There is no definition under federal law or regulation of what it means to offer wellness programs outside of a group health plan. We urge that all wellness programs be treated the same under the law. The purpose of GINA and ADA is to protect against coerced disclosure of genetic and other health information by wellness programs, so how the wellness program is not material to that purpose.

Data from the KFF/HRET employer health benefit survey from 2013¹⁶ also indicate that 65% of large firm workplace wellness programs are open to participation by spouses. The survey did not collect data specifically on use of incentives to encourage participation by spouses. It is likely to expect, however, that wellness programs oriented to data mining will seek ways to increase access to genetic information and other health data by spouses and other family members of employees.

In conclusion, ACMG strongly reiterates that any employer request for genetic information or other personal health information should be subject to the strongest possible standards. Such requests should only be permitted through wellness plans that are truly voluntary and truly reasonably designed, and even then, strong notice, authorization, and privacy requirements should apply, as should reporting requirements on employers to promote accountability and enforcement.

Sincerely,



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¹⁶ <http://kff.org/report-section/ehbs-2013-section-12/>

Attachment A – Examples of Wellness Programs that Collect Personal Health Information from Other Sources, Including Medical Records and Insurance Claims

This attachment includes examples of Terms of Use and Privacy policies of several major vendors of workplace wellness programs. The Terms and Privacy policies of the first vendor are included in their entirety to show the length and complexity; some relevant passages are highlighted. For space considerations, excerpts from Terms of Use and Privacy policies of other vendors are shown, although links to full documents are provided.

HealthMine

The HealthMine¹⁷ wellness vendor promises prospective clients that it collects “terabytes of individual health data - claims, lab, pharmacy, health and biometric assessment, and wearable/activity tracker stats”.

Terms of Use and Privacy links state that using the site constitutes agreement to all HealthMine terms and its privacy policy. This includes authorization to collect medical records and claims data, to use personal information for marketing purposes, and to share personal health information with HealthMine Partners.

HealthMine Privacy and Terms

Privacy Policy¹⁸

This Privacy Policy is incorporated by reference into the HealthMine Terms of Use. The terms “**HealthMine**,” “**we**,” and “**us**” include HealthMine, Inc. and our affiliates and subsidiaries. This Privacy Policy explains how HealthMine may: collect, use, and disclose information we obtain through the “Service.”

As part of providing the Service, HealthMine transmits, processes, and maintains data for health plans and health plan sponsors that use this Service. Such information will be held subject to the requirements specified by them and in accordance with our contracts with them and applicable law. This Privacy Policy does not reflect the privacy practices of the health plans and health plan sponsors, and we are not responsible for their privacy policies or practices. HealthMine does not review, comment upon, or monitor health plans’ or health plan sponsors’ privacy policies or their compliance with their respective privacy policies, nor do we review health plans’ or health plan sponsors’ instructions with respect to our processing of information to determine whether such instructions are in compliance or conflict with the terms of their published privacy policies.

“Personal Information” can be used to readily identify, contact, or locate you.

“**Personal Information**” means information that alone or when in combination with other information may be used to readily identify, contact, or locate you, such as: name, address, email address, or phone number. Personal Information also includes associated health-related information. We do not consider Personal Information to include information that has been anonymized so that it does not allow a third party to easily identify a specific individual.

THE SERVICE COLLECTS YOUR INFORMATION

We collect Personal Information:

- when you register to use the Service;
- from employers and health plans;
- when you use the Service;

¹⁷ <http://www.healthmine.com/the-technology/>

¹⁸ <http://www.healthmine.com/privacy-policy/>

- from your device, such as location information; and
- when you communicate with us.

We also collect information, such as anonymous usage statistics, by using cookies, server logs, and other similar technology as you use the Service.

Registration and Account Information. You must have an account to use the Service. To create an account, you may need to provide Personal Information, such as your name, date of birth, group number, member number, email address, and a password. You may also provide other optional information, such as your address so we can send you rewards.

Your Use of the Service. We collect information you provide through the Service. For example, when you submit information in a health risk assessment or community forums or otherwise interact with other users, the Service will collect the information you provide in such submissions, including any Personal Information.

From Employers and Health Plans. Health plans and health plan sponsors may provide information, including Personal Information, to the Service about their members and personnel. When providing the Service, we maintain Personal Information collected or provided by health plans and health plan sponsors using the Service according to their instructions. It is the health plans' and health plan sponsors' responsibility to ensure that the information they submit to the Service is collected and used in compliance with applicable law, including, for example, by providing the appropriate level of notice to individuals.

Making Payments. When you make payments through the Service, you may need to provide financial account information, such as your credit card number, to our third-party service providers. We do not collect or store such information, though we may receive summary information about a transaction that does not include credit card or bank account numbers.

Customer Support. We may collect Personal Information through your communications with our customer-support team.

Location Information from Your Mobile Device. We may collect and store your precise location information if your device settings are enabled to send it to us. Collection of this information may improve the provision of the Service.

Cookies, Automatic Data Collection, and Related Technologies. The Service collects and stores information that is generated automatically as you use it, including your preferences and anonymous usage statistics. When we associate such information with Personal Information, we will treat the combination as Personal Information. When you use the Service, we and our third-party partners, such as analytics providers, use "cookies" and other similar technologies to collect information about how the Service is used. Our partners also may collect information about your online activities over time and on other websites or apps. When they provide such services, they are governed by their own privacy policies. You may be able to change browser settings to block and delete cookies when you access the Service through a web browser. However, if you do that, the Service may not work properly.

By using the Service, you are authorizing us to gather, parse, and retain data related to the provision of the Service.

HOW HEALTHMINE USES YOUR INFORMATION

We use Personal Information to:

- facilitate and improve our services; and
- communicate with you.

We may use aggregate information for any purpose, including for marketing purposes.

Internal and Service-Related Usage. We use information, including Personal Information, for internal and service-related purposes and may provide it to third parties to allow us to facilitate the Service. We may use and retain any data we collect to provide and improve any of our services.

Communications. We may send email to the email address you provide to us or push notifications to your mobile device if they are enabled on your device to verify your account and for informational and operational purposes, such as account management, customer service, or system maintenance.

Marketing. We may use information, including Personal Information, to provide online advertising on the Service and to send push notifications with information we think may be useful or relevant to you.

Aggregate Data. We may anonymize or aggregate data collected through the Service and use it for any purpose.

HEALTHMINE MAY DISCLOSE YOUR INFORMATION

We may share your Personal Information:

- with our third-party vendors and service providers;
- to comply with legal obligations;
- to protect and defend our rights and property; and
- with your permission.

We do not rent, sell, or share Personal Information about you with other people or nonaffiliated companies for their direct marketing purposes, unless we have your permission.

We Use Vendors and Service Providers. We may share any information we receive with vendors and service providers retained in connection with the provision of the Service. For example, we partner with organizations that can provide educational information about health conditions, and we may provide information, including Personal Information to them, so they can provide you with relevant information. When we provide protected health information to such vendors, we require that they sign a business associate agreement limiting their use and disclosure of such information. We also may need to provide information, including Personal Information, to facilitate reward fulfillment.

Displaying to Other Users. The content you provide to the Service may be displayed on the Service. For example, other users of the Service may be able to see some information about you when you post to public areas of the Service by using the community and sharing features. We are not responsible for the privacy practices of the other users who will view and use the posted information.

Displaying or Disclosing to Employers and Health Plans. The information you provide to the Service may be displayed on the Service or otherwise disclosed to the health plans and health plan sponsors connected to your account. Your health plans and health plan sponsors (including their staff) may have access to your account information, including your Personal Information. We are not responsible for the privacy practices of the others who will view and use the information through the Service.

Marketing. We do not rent, sell, or share Personal Information about you with other people or nonaffiliated companies for their direct marketing purposes, unless we have your permission. We may allow access to other data collected by the Service to enable the delivery of online advertising on the Service, or otherwise facilitate transmittal of information we think may be useful or relevant to you.

Legal and Similar Disclosures. We may access, preserve, and disclose collected information, if we believe doing so is required or appropriate to: comply with law enforcement requests and legal process, such as a court order or subpoena; respond to your requests; or protect your, our, or others' rights, property, or safety.

Merger, Sale, or Other Asset Transfers. If we are involved in a merger, acquisition, financing due diligence, reorganization, bankruptcy, receivership, sale of company assets, or transition of service to another provider, your information may be sold or transferred as part of such a transaction as permitted by law and/or contract. We cannot control how such entities may use or disclose such information.

With Your Permission. We may also disclose your Personal Information with your permission.

INFORMATION SECURITY

We take steps to ensure that your information is treated securely and in accordance with this Privacy Policy. Unfortunately, the Internet cannot be guaranteed to be 100% secure, and we cannot ensure or warrant the security of any information you provide to us. We do not accept liability for unintentional disclosure. We may provide our services to employers and health plans subject to HIPAA, and when we process “protected health information” as defined by HIPAA on behalf of them, we are acting as a “business associate” to them as regulated by HIPAA. Therefore, we must adopt and maintain appropriate physical, technical, administrative, and organizational procedures to safeguard and secure the protected health information we process. We also may not access, use, or disclose the protected health information except as permitted by health plans and health plan sponsors, you, and/or applicable law. We strive to protect the privacy of the Personal Information the Service processes, and to avoid inadvertent disclosure.

By using the Service or providing Personal Information to us, you agree that we may communicate with you electronically regarding security, privacy, and administrative issues relating to your use of the Service. If we learn of a security system’s breach, we may attempt to notify you electronically by posting a notice on the Service or sending an email to you. You may have a legal right to receive this notice in writing. To receive free written notice of a security breach (or to withdraw your consent from receiving electronic notice), please notify us at ITSupportTeam@healthmine.com.

CHILDREN’S PRIVACY

We do not knowingly collect information from children under 13. We will take steps to delete it if we learn we have collected it.

We do not knowingly collect, maintain, or use personal information from children under 13 years of age, and no part of the Service is directed to children under the age of 13. If you learn that your child has provided us with personal information without your consent, you may alert us at ITSupportTeam@healthmine.com. If we learn that we have collected any personal information from children under 13, we will promptly take steps to delete such information and terminate the child’s account.

INTERNATIONAL USERS

By using the Service, you will transfer data to the United States.

If you are visiting from the European Union or other regions with laws governing data collection and use, please note that you are agreeing to the transfer of your information to the United States and processing globally. By providing your information you consent to any transfer and processing in accordance with this Privacy Policy.

UPDATE YOUR INFORMATION OR POSE A QUESTION OR SUGGESTION

If you would like to update or correct any information that you have provided to us through your use of the Service or otherwise, or if you have suggestions for improving this Privacy Policy, please send an email to ITSupportTeam@healthmine.com.

CHANGES TO OUR PRIVACY POLICY AND PRACTICES

We may revise this Privacy Policy, so review it periodically.

Posting of Revised Privacy Policy. We will post any adjustments to the Privacy Policy on this web page, and the revised version will be effective when it is posted. If you are concerned about how your information is used, bookmark this page and read this Privacy Policy periodically.

New Uses of Personal Information. From time to time, we may desire to use Personal Information for uses not previously disclosed in our Privacy Policy. If our practices change regarding previously collected Personal Information in a way that would be materially less restrictive than stated in the version of this Privacy Policy in effect at the time we collected the information, we will make reasonable efforts to provide notice and obtain consent to any such uses as may be required by law.

Contact Information

HealthMine, Inc.
2929 Campus Drive
Suite 405
San Mateo, CA 94403

ITSupportTeam@healthmine.com

Effective Date: **August 3, 2015**

Last Updated Date: **August 3, 2015**

Terms of Use¹⁹

Welcome, and thank you for your interest in HealthMine, Inc. ("**HealthMine**", "**we**," or "**us**") and our Web site at www.healthmine.com (the "**Site**"), as well as all related web sites, networks, embeddable widgets, downloadable software, mobile applications (including tablet applications), and other services provided by us and on which a link to these Terms of Use is displayed (collectively, together with the Site, the "**Service**"). These Terms of Use are a legally binding contract between you and HealthMine regarding your use of the Service.

PLEASE READ THE FOLLOWING TERMS OF USE CAREFULLY. **BY CLICKING "I ACCEPT" OR OTHERWISE USING THE SERVICE, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTOOD, AND AGREE TO BE BOUND BY THE FOLLOWING TERMS AND CONDITIONS, INCLUDING THE HEALTHMINE PRIVACY POLICY (COLLECTIVELY, THESE "TERMS").** If you are not eligible, or do not agree to these Terms, then please do not use the Service.

These Terms of Use provide that all disputes between you and HealthMine will be resolved by BINDING ARBITRATION. YOU AGREE TO GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS UNDER THIS CONTRACT (except for matters that may be taken to small claims court). Your rights will be determined by a NEUTRAL ARBITRATOR and NOT A JUDGE OR JURY and your claims cannot be brought as a class action. Please review Section 22 below for the details regarding your agreement to arbitrate any disputes with HealthMine.

1. **HealthMine Service Overview.** HealthMine provides a Personal Clinical Engagement ("PCE") technology platform **that seamlessly integrates with any health insurance carrier or employer-sponsored plan and automatically brings together comprehensive clinical data and lifestyle and disease management tools into a personalized health portal that is accessible on any modern mobile device or Internet web browser.** HealthMine's PCE platform (i) automatically updates medical claims, pharmacy claims, biometric and lab

¹⁹ <http://www.healthmine.com/terms-use/>

results, activity tracker data, smart scale data and more, (ii) delivers access to deductible status, out-of-pocket tabs, authorization requirements and more, (iii) provides personalized health goals and recommendations synchronized with rewards and other incentives, and (iv) delivers real-time updates of progress to measure, monitor and improve health.

2. **For Educational and Informational Purposes Only.** The Service provides information, not medical, legal, or psychological advice, diagnoses, or treatment. The Service may provide helpful health-related information, but it is not intended to substitute for professional advice, diagnoses, or treatment, or your judgment. You acknowledge that all of the information and content on the Service is provided “as is” for educational and informational purposes only. You assume full risk and responsibility for the use of or reliance on information you obtain from or through the Service.
3. **No Patient or Client Relationship.** Your use of the Service does not create a patient or client relationship with HealthMine. You should consult with qualified health professionals who are familiar with your individual medical needs concerning your specific medical issues.

Never disregard professional advice or delay in seeking it because of information you read on the Service.

4. **Medical Emergency.** IF YOU THINK YOU MAY HAVE A MEDICAL EMERGENCY, CALL YOUR DOCTOR OR 911 IMMEDIATELY. We do not recommend or endorse any provider of health care or health-related products, tests, opinions, procedures, items, or services.
5. **Eligibility.** You must be at least eighteen (18) years of age to use the Service. By agreeing to these Terms, you represent and warrant to us: (i) that you are at least eighteen (18) years of age; (ii) that you have not previously been suspended or removed from the Service; and (iii) that your registration and your use of the Service is in compliance with any and all applicable laws and regulations. If you are using the Service on behalf of an entity, organization, or company, you represent and warrant that you have the authority to bind such organization to these Terms and you agree to be bound by these Terms on behalf of such organization.
6. **Accounts and Registration.** To access most features of the Service, you must register for an account. When you register for an account, you may be required to provide us with some information about yourself (such as your e-mail address or other contact information). You agree that the information you provide to us is accurate and that you will keep it accurate and up-to-date at all times. When you register, you will be asked to provide a password. You are solely responsible for maintaining the confidentiality of your account and password. You agree to accept responsibility for all activities that occur under your account. If you have reason to believe that your account is no longer secure, then you must immediately notify us at ITSupportTeam@healthmine.com.
7. **Payment.** Access to the Service, or to certain features of the Service, may require you to pay fees. Before you are required to pay any fees, you will have an opportunity to review and accept the applicable fees that you will be charged. All fees are in U.S. Dollars and are non-refundable. HealthMine may change the fees for the Service or any feature of the Service, including by adding additional fees or charges, on a going-forward basis at any time. HealthMine will charge the payment method you specify at the time of purchase. You authorize HealthMine to charge all sums described herein to such payment method. If you pay any applicable fees with a credit card, HealthMine may seek pre-authorization of your credit card account prior to your purchase to verify that the credit card is valid and has the necessary funds or credit available to cover your purchase.
8. **User Content**
 - **User Content Generally.** Certain features of the Service may permit users to post content, including messages, reviews, photos, video, images, folders, health-related, wearable, and other data, text, and other types of works (collectively, “**User Content**”) and to publish User Content on the Service. *You*

retain copyright and any other proprietary rights that you may hold in the User Content that you post to the Service.

- **Limited License Grant to HealthMine.** By posting or publishing User Content, you grant HealthMine a worldwide, non-exclusive, royalty-free right and license (with the right to sublicense) to host, store, transfer, display, perform, reproduce, modify, and distribute your User Content, in whole or in part, in any media formats and through any media channels (now known or hereafter developed). Any such use of your User Content by HealthMine may be without any compensation paid to you.
- **Limited License Grant to Other Users.** By posting and sharing User Content with another user of the Service, you hereby grant that user a non-exclusive license to access and use such User Content as permitted by these Terms and the functionality of the Service.
- **User Content Representations and Warranties.** You are solely responsible for your User Content and the consequences of posting or publishing User Content. By posting and publishing User Content, you affirm, represent, and warrant that:
 - you are the creator and owner of, or have the necessary licenses, rights, consents, and permissions to use and to authorize HealthMine and users of the Service to use and distribute your User Content as necessary to exercise the licenses granted by you in this Section 8 and in the manner contemplated by HealthMine and these Terms; and
 - your User Content, and the use thereof as contemplated herein, does not and will not: (i) infringe, violate, or misappropriate any third-party right, including any copyright, trademark, patent, trade secret, moral right, privacy right, right of publicity, or any other intellectual property or proprietary right; or (ii) slander, defame, or libel any third-party.
 - **User Content Disclaimer.** We are under no obligation to edit or control User Content that you or other users post or publish, and will not be in any way responsible or liable for User Content. HealthMine may, however, at any time and without prior notice, screen, remove, edit, or block any User Content that in our sole judgment violates these Terms or is otherwise objectionable. You understand that when using the Service you will be exposed to User Content from a variety of sources and acknowledge that User Content may be inaccurate, offensive, indecent or objectionable. You agree to waive, and hereby do waive, any legal or equitable rights or remedies you have or may have against HealthMine with respect to User Content. We expressly disclaim any and all liability in connection with User Content. If notified by a user or content owner that User Content allegedly does not conform to these Terms, we may investigate the allegation and determine in our sole discretion whether to remove the User Content, which we reserve the right to do at any time and without notice. For clarity, HealthMine does not permit copyright-infringing activities on the Service.

9. **Digital Millennium Copyright Act**

- **DMCA Notification.** We comply with the provisions of the Digital Millennium Copyright Act applicable to Internet service providers (17 U.S.C. §512, as amended). If you have any complaints with respect to material posted on the Service, you may contact our Designated Agent at the following address:
HealthMine, Inc.

2929 Campus Drive, Suite 405

San Mateo, CA 94403

E-mail: copyright@HealthMine.com

Any notice alleging that materials hosted by or distributed through the Service infringe intellectual property rights must include the following information:

1. an electronic or physical signature of the person authorized to act on behalf of the owner of the copyright or other right being infringed;
2. a description of the copyrighted work or other intellectual property that you claim has been infringed;

3. a description of the material that you claim is infringing and where it is located on the Service;
4. your address, telephone number, and email address;
5. a statement by you that you have a good faith belief that the use of the materials on the Service of which you are complaining is not authorized by the copyright owner, its agent, or the law; and
6. a statement by you that the above information in your notice is accurate and that, under penalty of perjury, you are the copyright or intellectual property owner or authorized to act on the copyright or intellectual property owner's behalf.
 - **Repeat Infringers.** HealthMine will promptly terminate without notice the accounts of users that are determined by HealthMine to be "repeat infringers." A repeat infringer is a user who has been notified of infringing activity more than twice and/or has had User Content removed from the Service more than twice.
7. **Prohibited Conduct.** BY USING THE SERVICE YOU AGREE NOT TO:
 - use the Service for any illegal purpose, or in violation of any local, state, national, or international law;
 - violate, or encourage others to violate, the rights of third parties, including by infringing or misappropriating third party intellectual property rights;
 - post, upload, or distribute any User Content or other content that is unlawful, defamatory, libelous, inaccurate, or that a reasonable person could deem to be objectionable, profane, indecent, pornographic, harassing, threatening, embarrassing, hateful, or otherwise inappropriate;
 - interfere with security-related features of the Service, including without limitation by (i) disabling or circumventing features that prevent or limit use or copying of any content, or (ii) reverse engineering or otherwise attempting to discover the source code of the Service or any part thereof except to the extent that such activity is expressly permitted by applicable law;
 - interfere with the operation of the Service or any user's enjoyment of the Service, including without limitation by (i) uploading or otherwise disseminating viruses, adware, spyware, worms, or other malicious code, (ii) making unsolicited offers or advertisements to other users of the Service, (iii) attempting to collect, personal information about users or third parties without their consent; or (iv) interfering with or disrupting any networks, equipment, or servers connected to or used to provide the Service, or violating the regulations, policies, or procedures of such networks, equipment, or servers;
 - perform any fraudulent activity including impersonating any person or entity, claiming false affiliations, accessing the Service accounts of others without permission, or falsifying your age or date of birth;
 - sell or otherwise transfer the access granted herein or any Materials (as defined in Section 16 below) or any right or ability to view, access, or use any Materials; or
 - attempt to do any of the foregoing in this Section 10, or assist or permit any persons in engaging or attempting to engage in any of the activities described in this Section 10.
8. **Third-Party Services and Linked Websites.** HealthMine may provide tools through the Service that enable you to export information, including User Content, to third party services, including through features that allow you to link your account on HealthMine with an account on the third party service. By using these tools, you agree that we may transfer such information to the applicable third-party service. Such third party services are not under our control, and we are not responsible for their use of your exported information. The Service may also contain links to third-party websites. Such linked websites are not under our control, and we are not responsible for their content.

9. **Rewards.** The Service may incentivize you to engage in certain wellness activities by providing you with opportunities to win rewards (“**Rewards**”) through promotions offered through the Service (“**Promotions**”). No purchase is necessary to participate in any Promotions. Promotions are void where prohibited, restricted by law, or where registration or bonding requirements exist. Rewards are non-transferable. Rewards may be subject to third-party terms and conditions. No substitutions are permitted, except that HealthMine or the Promotion’s sponsor, as applicable, reserves the right to substitute a Reward of equal or greater monetary value for any Reward displayed on the Promotion’s info page. The winner of a Promotion will be responsible and liable for any federal, state, and local taxes on the value of their Reward as well as any other costs not specifically indicated to be paid by HealthMine or Promotion sponsor on the Promotion’s info page. Any person attempting to defraud or in any way tamper with any Promotion will be ineligible for Rewards and may be prosecuted under the law. HealthMine reserves the right to modify this Section 12 in any way or at any time. HealthMine reserves the right, in its sole discretion, to shorten, extend, modify, cancel or suspend any Promotion in its sole discretion at any time and without notice.
10. **Termination of Use; Discontinuation and Modification of the Service.** If you violate any provision of these Terms, your permission to use the Service will terminate automatically. Additionally, HealthMine, in its sole discretion may terminate your user account on the Service or suspend or terminate your access to the Service at any time, with or without notice. We also reserve the right to modify or discontinue the Service at any time (including, without limitation, by limiting or discontinuing certain features of the Service) without notice to you. We will have no liability whatsoever on account of any change to the Service or any suspension or termination of your access to or use of the Service. You may terminate your account at any time by contacting customer service at ITSupportTeam@healthmine.com. If you terminate your account, you will remain obligated to pay all outstanding fees, if any, relating to your use of the Service incurred prior to termination.
11. **Privacy Policy; Additional Terms**
- **Privacy Policy.** Please read the HealthMine Privacy Policy carefully for information relating to our collection, use, storage and disclosure of your personal information. The HealthMine Privacy Policy is hereby incorporated by reference into, and made a part of, these Terms.
 - **Additional Terms.** Your use of the Service is subject to any and all additional terms, policies, rules, or guidelines applicable to the Service or certain features of the Service that we may post on or link to on the Service (the “**Additional Terms**”), such as end-user license agreements for any downloadable applications that we may offer, or rules applicable to particular features or content on the Service, subject to Section 15 All such Additional Terms are hereby incorporated by reference into, and made a part of, these Terms.
12. **Changes to the Terms.** We reserve the right, at our discretion, to change these Terms on a going-forward basis at any time. Please check these Terms periodically for changes. In the event that a change to these Terms materially modifies your rights or obligations, we will make reasonable efforts to notify you of such change. We may provide notice through a pop-up or banner within the Service, by sending an email to any address you may have used to register for an account, or through other mechanisms. Additionally, if the changed Terms materially modify your rights or obligations, we may require you to provide consent by accepting the changed Terms. If we require your acceptance of the changed Terms, changes are effective only after your acceptance. If you do not accept the changed Terms, we may terminate your access to and use of the Service. All other changes are effective upon publication of the changed Terms. Disputes arising under these Terms will be resolved in accordance with the Terms in effect that the time the dispute arose.
13. **Ownership; Proprietary Rights.** The Service is owned and operated by HealthMine. The visual interfaces, graphics, design, compilation, information, data, computer code (including source code or object code), products, software, services, and all other elements of the Service (the “**Materials**”) provided by HealthMine are protected by all relevant intellectual property and proprietary rights and

applicable laws. All Materials contained in the Service are the property of HealthMine or our third-party licensors. Except as expressly authorized by HealthMine, you may not make use of the Materials. HealthMine reserves all rights to the Materials not granted expressly in these Terms.

14. You agree that you will be responsible for your use of the Service, and you agree to defend, indemnify, and hold harmless HealthMine and its officers, directors, employees, consultants, affiliates, subsidiaries and agents (collectively, the “**HealthMine Entities**”) from and against any and all claims, liabilities, damages, losses, and expenses, including reasonable attorneys’ fees and costs, arising out of or in any way connected with (i) your access to, use of, or alleged use of the Service; (ii) your violation of these Terms or any representation, warranty, or agreements referenced herein, or any applicable law or regulation; (iii) your violation of any third-party right, including without limitation any intellectual property right, publicity, confidentiality, property or privacy right; or (iv) any disputes or issues between you and any third party. We reserve the right, at our own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by you (and without limiting your indemnification obligations with respect to such matter), and in such case, you agree to cooperate with our defense of such claim.

15. **Disclaimers; No Warranties**

THE SERVICE AND ALL MATERIALS AND CONTENT AVAILABLE THROUGH THE SERVICE (INCLUDING REWARDS) ARE PROVIDED “AS IS” AND ON AN “AS AVAILABLE” BASIS, WITHOUT WARRANTY OR CONDITION OF ANY KIND, EITHER EXPRESS OR IMPLIED. THE HEALTHMINE ENTITIES SPECIFICALLY (BUT WITHOUT LIMITATION) DISCLAIM ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, RELATING TO THE SERVICE AND ALL MATERIALS AND CONTENT AVAILABLE THROUGH THE SERVICE, INCLUDING BUT NOT LIMITED TO (i) ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, QUIET ENJOYMENT, OR NON-INFRINGEMENT; AND (ii) ANY WARRANTIES ARISING OUT OF COURSE OF DEALING, USAGE, OR TRADE. THE HEALTHMINE ENTITIES DO NOT WARRANT THAT THE SERVICE OR ANY PART THEREOF, OR ANY MATERIALS OR CONTENT OFFERED THROUGH THE SERVICE, WILL BE UNINTERRUPTED, SECURE, OR FREE OF ERRORS, VIRUSES, OR OTHER HARMFUL COMPONENTS, AND DO NOT WARRANT THAT ANY OF THE FOREGOING WILL BE CORRECTED.

NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM THE SERVICE OR ANY MATERIALS OR CONTENT AVAILABLE ON OR THROUGH THE SERVICE WILL CREATE ANY WARRANTY REGARDING ANY OF THE HEALTHMINE ENTITIES OR THE SERVICE THAT IS NOT EXPRESSLY STATED IN THESE TERMS. YOU ASSUME ALL RISK FOR ALL DAMAGES THAT MAY RESULT FROM YOUR USE OF OR ACCESS TO THE SERVICE, YOUR DEALINGS WITH OTHER SERVICE USERS, AND ANY MATERIALS OR CONTENT AVAILABLE THROUGH THE SERVICE. YOU UNDERSTAND AND AGREE THAT YOU USE THE SERVICE AND USE, ACCESS, DOWNLOAD, OR OTHERWISE OBTAIN MATERIALS OR CONTENT THROUGH THE SERVICE AND ANY ASSOCIATED SITES OR SERVICES AT YOUR OWN DISCRETION AND RISK, AND YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR PROPERTY (INCLUDING YOUR COMPUTER SYSTEM USED IN CONNECTION WITH THE SERVICE) OR LOSS OF DATA THAT RESULTS FROM THE USE OF THE SERVICE OR THE DOWNLOAD OR USE OF SUCH MATERIALS OR CONTENT. SOME JURISDICTIONS MAY PROHIBIT A DISCLAIMER OF WARRANTIES AND YOU MAY HAVE OTHER RIGHTS THAT VARY FROM JURISDICTION TO JURISDICTION.

9. **Limitation of Liability**

IN NO EVENT WILL THE HEALTHMINE ENTITIES BE LIABLE TO YOU FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, DATA, OR OTHER INTANGIBLE LOSSES) ARISING OUT OF OR RELATING TO YOUR ACCESS TO OR USE OF, OR YOUR INABILITY TO ACCESS OR USE, THE SERVICE OR ANY MATERIALS OR CONTENT ON THE SERVICE, WHETHER BASED ON WARRANTY, CONTRACT, TORT (INCLUDING NEGLIGENCE), STATUTE OR ANY OTHER LEGAL THEORY, WHETHER OR NOT THE HEALTHMINE ENTITIES HAVE BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGE.

YOU AGREE THAT THE AGGREGATE LIABILITY OF THE HEALTHMINE ENTITIES TO YOU FOR ANY AND ALL CLAIMS ARISING OUT OF RELATING TO THE USE OF OR ANY INABILITY TO USE THE SERVICE (INCLUDING ANY MATERIALS OR CONTENT AVAILABLE THROUGH THE SERVICE) OR OTHERWISE UNDER THESE TERMS, WHETHER IN CONTRACT, TORT, OR OTHERWISE, IS LIMITED TO THE GREATER OF (i) THE AMOUNTS YOU HAVE PAID TO HEALTHMINE FOR ACCESS TO AND USE OF THE SERVICE IN THE 12 MONTHS PRIOR TO THE CLAIM OR (ii) \$100.

SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES. ACCORDINGLY, THE ABOVE LIMITATION MAY NOT APPLY TO YOU.

EACH PROVISION OF THESE TERMS THAT PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, OR EXCLUSION OF DAMAGES IS TO ALLOCATE THE RISKS UNDER THESE TERMS BETWEEN THE PARTIES. THIS ALLOCATION IS AN ESSENTIAL ELEMENT OF THE BASIS OF THE BARGAIN BETWEEN THE PARTIES. EACH OF THESE PROVISIONS IS SEVERABLE AND INDEPENDENT OF ALL OTHER PROVISIONS OF THESE TERMS. THE LIMITATIONS IN THIS SECTION 19 WILL APPLY EVEN IF ANY LIMITED REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

1. **Governing Law.** These Terms shall be governed by the laws of the State of Texas without regard to conflict of law principles. To the extent that any lawsuit or court proceeding is permitted hereunder, you and HealthMine agree to submit to the personal and exclusive jurisdiction of the state courts and federal courts located within Dallas County, Texas for the purpose of litigating all such disputes. We operate the Service from our offices in California, and we make no representation that Materials included in the Service are appropriate or available for use in other locations.
2. These Terms, together with the Privacy Policy and any other agreements expressly incorporated by reference herein, constitute the entire and exclusive understanding and agreement between you and HealthMine regarding your use of and access to the Service, and except as expressly permitted above may be amended only by a written agreement signed by authorized representatives of all parties to these Terms. You may not assign or transfer these Terms or your rights hereunder, in whole or in part, by operation of law or otherwise, without our prior written consent. We may assign these Terms at any time without notice. The failure to require performance of any provision will not affect our right to require performance at any time thereafter, nor shall a waiver of any breach or default of these Terms or any provision of these Terms constitute a waiver of any subsequent breach or default or a waiver of the provision itself. Use of section headers in these Terms is for convenience only and shall not have any impact on the interpretation of particular provisions. In the event that any part of these Terms is held to be invalid or unenforceable, the unenforceable part shall be given effect to the greatest extent possible and the remaining parts will remain in full force and effect. Upon termination of these Terms, any provision that by its nature or express terms should survive will survive such termination or expiration, including, but not limited to, Sections 2, 7, and 9 through 23.
3. **Dispute Resolution and Arbitration**
 - **Generally.** In the interest of resolving disputes between you and HealthMine in the most expedient and cost effective manner, you and HealthMine agree that any and all disputes arising in connection with these Terms shall be resolved by binding arbitration. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, may allow for more limited discovery than in court, and can be subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. Our agreement to arbitrate disputes includes, but is not limited to all claims arising out of or relating to any aspect of these Terms, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory, and regardless of whether the claims arise during or after the termination of these Terms. YOU UNDERSTAND AND AGREE THAT, BY ENTERING INTO THESE TERMS, YOU AND HEALTHMINE ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION.
 - **Exceptions.** Notwithstanding subsection 1, we both agree that nothing herein will be deemed to waive, preclude, or otherwise limit either of our right to (i) bring an individual action in small claims

- court, (ii) pursue enforcement actions through applicable federal, state, or local agencies where such actions are available, (iii) seek injunctive relief or other provisional relief in aid of arbitration from a court of law, or (iv) to file suit in a court of law to address intellectual property infringement claims.
- **Arbitrator.** Any arbitration between you and HealthMine will be governed by the Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes (collectively, “AAA Rules”) of the American Arbitration Association (“AAA”), as modified by these Terms, and will be administered by the AAA. The AAA Rules and filing forms are available online at www.adr.org, by calling the AAA at 1-800-778-7879, or by contacting HealthMine.
 - **Notice; Process.** A party who intends to seek arbitration must first send a written notice of the dispute to the other, by certified mail or Federal Express (signature required), or in the event that we do not have a physical address on file for you, by electronic mail (“Notice”). HealthMine’s address for Notice is: HealthMine, Inc., 2929 Campus Drive, Suite 405, San Mateo, CA 94403. The Notice must (i) describe the nature and basis of the claim or dispute; and (ii) set forth the specific relief sought (“Demand”). We agree to use good faith efforts to resolve the claim directly, but if we do not reach an agreement to do so within 30 days after the Notice is received, you or HealthMine may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by you or HealthMine shall not be disclosed to the arbitrator until after the arbitrator makes a final decision and award, if any. In the event our dispute is finally resolved through arbitration in your favor, HealthMine shall pay you (i) the amount awarded by the arbitrator, if any, (ii) the last written settlement amount offered by HealthMine in settlement of the dispute prior to the arbitrator’s award; or (iii) \$1,000.00, whichever is greater.
 - **Fees.** In the event that you commence arbitration in accordance with these Terms, HealthMine will reimburse you for your payment of the filing fee, unless your claim is for greater than \$10,000, in which case the payment of any fees shall be decided by the AAA Rules. Any arbitration hearings will take place at a location to be agreed upon in Dallas County, Texas, provided that if the claim is for \$10,000 or less, you may choose whether the arbitration will be conducted (i) solely on the basis of documents submitted to the arbitrator; (ii) through a non-appearance based telephonic hearing; or (iii) by an in-person hearing as established by the AAA Rules in the county (or parish) of your billing address. If the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all fees will be governed by the AAA Rules. In such case, you agree to reimburse HealthMine for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the decision and award, if any, are based. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees or expenses at any time during the proceeding and upon request from either party made within 14 days of the arbitrator’s ruling on the merits.
 - **No Class Actions.** YOU AND HEALTHMINE AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and HealthMine agree otherwise, the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.
 - **Modifications.** In the event that HealthMine makes any future change to this arbitration provision (other than a change to HealthMine’s address for Notice), you may reject any such change by sending us written notice within 30 days of the change to HealthMine’s address for Notice, in which case your account with HealthMine shall be immediately terminated and this arbitration provision, as in effect immediately prior to the amendments you reject shall survive.
 - **Enforceability.** If Subsection 6 is found to be unenforceable or if the entirety of this Section 22 is found to be unenforceable, then the entirety of this Section 22 shall be null and void and, in such case, the parties agree that the exclusive jurisdiction and venue described in Section 20 shall govern any action arising out of or related to these Terms.

4. **Consent to Electronic Communications.** By using the Service, you consent to receiving certain electronic communications from us as further described in our Privacy Policy. Please read our Privacy Policy to learn more about your choices regarding our electronic communications practices. You agree that any notices, agreements, disclosures, or other communications that we send to you electronically will satisfy any legal communication requirements, including that such communications be in writing.

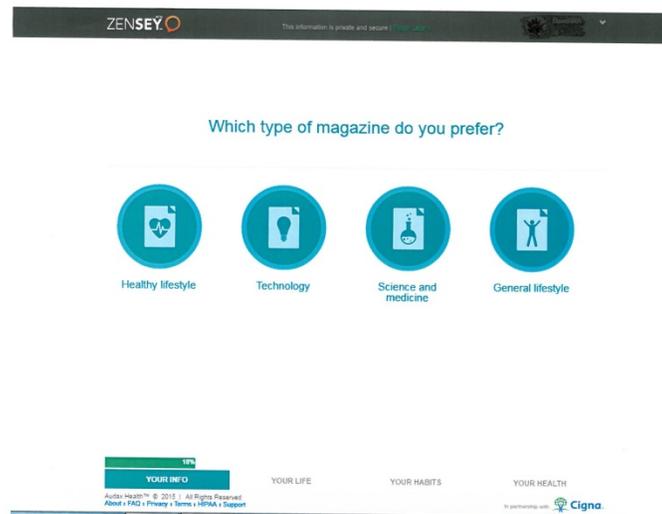
5. **Contact Information.** The services hereunder are offered by HealthMine, Inc., located at 2929 Campus Drive, Suite 405, San Mateo, CA 94403. You may contact us by sending correspondence to the foregoing address or by emailing us at ITSupportTeam@healthmine.com. If you are a California resident, you may have these Terms mailed to you electronically by sending a letter to the foregoing address with your electronic mail address and a request for these Terms.

Zensey/Audax

Zensey/Audax is a subsidiary of Optum , a health IT division of United HealthCare.

The Zensey Terms of Use and Privacy links indicate that the vendor can access other information about participants, including information that may be stored in Microsoft HealthVault, and that it can share personal information with its partners, subsidiaries, and third party vendors. Terms of Use also specify that individuals agree to all terms and authorize disclosures through the act of using the website.

Also of note, a question in the Zensey wellness Health Risk Assessment asks about individuals' magazine preferences:



Terms of Service²⁰

...

This is a legally binding agreement between you and <Audax Health Solutions, Inc.> ("we", "us" or "our"). We also refer to ourselves in these Terms of Service as "Zensey" (one of our premier brand names). Any references to "you" or "your" in these Terms of Service will mean the person (whether an individual or entity) using this Site. BY USING THE SITE OR ANY OF THE SERVICES, OR BY REGISTERING AS A MEMBER OF THIS SITE, YOU ARE AGREEING TO BE BOUND BY THESE TERMS OF SERVICE. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS OF SERVICE, YOU ARE NOT AUTHORIZED TO USE THIS SITE IN ANY WAY.

...

Social Networks and other Affiliate Sites. In using certain Services, you authorize us to act on your behalf to access and interact with social networking sites such as Facebook and Twitter (any such site, a "SN Site") and other affiliate sites such as Microsoft Corporation's HealthVault to retrieve information from, and/or submit information to, such SN Sites at your request. We will not collect your username and password, and we will instead store the unique authorization code (or a "token") provided to us by the SN Site to access it on your behalf. You can revoke

²⁰ <https://www.zensey.com/corporate/terms>

our access to an SN Site at any time by amending the appropriate settings from within your account settings on that site. You should note that an SN Site may change or amend its guidelines and our access to it at any time, and we cannot guarantee that our Services will always include a connection to such SN Site.

Although Microsoft Corporation's HealthVault is not a social networking website, we interact with HealthVault in the same manner as we do SN Sites and, consequently, the foregoing paragraph applies to your use of HealthVault through the Site and Services. Additionally, you may only use the Site or Services to access online accounts with HealthVault that you have the right to access. Please be aware that neither we nor Microsoft offer HealthVault as a medical record, medical case management or similar system. Microsoft may, if necessary, suspend connectivity between our Site and Services and HealthVault to maintain its commitments such as security, privacy and integrity of HealthVault for end-users. We do not control the operation or availability of HealthVault. Microsoft can also change or amend its guidelines and our access to HealthVault at any time, and we cannot guarantee that our Services will always include a connection to HealthVault. **You expressly authorize us to use any information we collect from HealthVault in accordance with our Privacy Policy.**

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Notices and Agreement to Be Bound by Electronic Signature. **Your affirmative act of using this Site or any Services, or registering for membership, constitutes your electronic signature to these Terms of Service and your consent to enter into agreements with us electronically.** You also agree that we may send to you in electronic form any privacy or other notices, disclosures, reports, documents, communications or other records regarding the Services (collectively, "Notices"). We can send you electronic Notices (1) to the email address that you provided to us during registration, (2) to any email account you open with a Service, or (3) by posting the Notice on the applicable Service or otherwise through the Site. The delivery of any Notice from us is effective when sent by us, regardless of whether you read the Notice when you receive it or whether you actually receive the delivery. You can withdraw your consent to receive Notices electronically by notifying us in writing via email to info@zensey.com or as otherwise expressly provided by us in writing. All contracts completed electronically will be deemed for all legal purposes to be in writing and legally enforceable as a signed writing.

Authorization For Use And Disclosure Of Protected Health Information²¹

You hereby voluntarily authorize the use and disclosure of your protected health information, as described herein, by Audax Health Solutions, LLC and its affiliates, subsidiaries, and third party vendors acting on its behalf (collectively, "Audax") and your health care providers, health insurers or health plans, and their contractors that contract with Audax, as applicable (collectively, "Partners"), in connection with Audax's provision of products and services through websites and mobile applications to you and other users ("Users") now and in the future (collectively, "Services") for the following purposes:

1. For Audax to, and the Partners to permit Audax to, retain, use and disclose your protected health information to continue to provide Services to you and as otherwise set forth in this Authorization after the occurrence of any of the following events: (a) the termination of your receipt of health benefits or services from a Partner; (b) the termination of the contractual relationship between two Partners; and (c) the termination of the contractual relationship between Audax and a Partner.
2. For Audax to use and disclose your protected health information in connection with a merger, acquisition or sale of all or a portion of Audax's or its parent company's assets that involves an entity that is not a

²¹ <https://www.zensey.com/corporate/hipaa>

HIPAA Covered Entity and will not become a HIPAA Covered Entity following such merger, acquisition or sale.

The protected health information (as that term is defined by the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations) used and disclosed by Audax and Partners may include, but is not limited to, identifiable information about: (a) your physical or mental health or condition, such as diagnoses, test results, and health risk assessment scores and answers; (b) the provision of health care to you, such as treatments, prescription medications, and tests; and (c) payment for the provision of health care to you, such as claims information relating to your health care coverage with a Partner. Protected health information may include information that is created both before and after the date of this Authorization.

Your consent to this Authorization (which may be electronic) means that you understand and agree to the following:

- Your protected health information may be protected by law. **Your protected health information that is disclosed under this Authorization may be re-disclosed by the recipient and no longer protected by federal privacy regulations.**
- Audax will not condition your treatment, payment, enrollment, or eligibility for benefits, but we may condition the Services, on whether you agree to this Authorization.
- You may receive a copy of this Authorization if you ask for it in writing addressed to Audax's Privacy Officer at the address listed below.
- This Authorization will expire upon the ultimate deactivation, for any reason, of your account for the Services. You may revoke this Authorization at any time by notifying Audax's Privacy Officer in writing at the address below. Revoking this Authorization will not have any effect on actions that Audax or any of the Partners took in reliance on the Authorization before it received notice of your revocation.

Audax Health Solutions, LLC
Attn: Privacy Officer
3000 K Street NW Suite 350
Washington, DC 20007
email: info@zensey.com

Revised May 21, 2015

Redbrick

This workplace wellness vendor also obtains passive agreement to all terms of use and the privacy policy, which includes authorization to obtain participants' medical records, claims data, other "sync" data from wearable devices and GPS devices, and to share this information with its partners.

Terms of Use²²

Last updated June 2009

*****IMPORTANT, PLEASE READ THESE TERMS OF USE CAREFULLY.**

Welcome to <https://www.redbrickhealth.com> (the "Site"). RedBrick Health Corporation ("RedBrick Health", "we", "our" or "us") provides this Site for your personal use conditioned on your acceptance of these Terms of Use. **By accessing and using this Site you are agreeing to these Terms of Use. If you do not agree to these Terms of Use, please leave this Site.**

We reserve the right to change these Terms of Use, in our sole discretion, at any time. By continuing to use this Site after such changes are posted, you agree to be bound by the changes.

Please also review our Privacy Policy as it contains important information regarding the collection, the ability to disclose and the protection of your information (agreement to these Terms of Use includes agreement to our Privacy Policy), and the Online Terms of Service, as they set forth the terms of service which may apply if your employer or the employer of the person to whom you are a dependant, has agreed to purchase certain services from us.

...

Privacy Policy²³

Last updated: 21 May 2014

This is RedBrick Health Corporation's Privacy Policy. It applies to anyone who uses our Services either online (via www.redbrickhealth.com), in person, over the phone or via hard copy documents. Please read this Privacy Policy, which among other things, describes how RedBrick Health Corporation ("we," "our" or "us") collects, uses, protects and under what circumstances discloses your information.

...

1. Will This Privacy Policy Change?

²² <https://home.redbrickhealth.com/terms/>

²³ <https://home.redbrickhealth.com/privacy/>

Yes. Every participant should read and understand the following key points about any changes we make. **We may modify, alter or update our Privacy Policy at any time**, so we encourage you to review our Privacy Policy frequently.

...

2. Why Do We Collect Information About You?

We collect information about you in order to determine your eligibility for our Services, to provide you with our Services and for us to tailor our Services for you. Information may include personal information like your name, address, gender, health habit information like how much exercise you get, biometric screening values like your cholesterol measurement, your health goals, and information about how you changed your health habits as a result of the Service you experienced.

We use the information collected from you to tailor our products to your specific needs. One such example would be the program recommendations we make from the answers you provide when taking a health assessment. Other examples would be collecting and then using your preferred communication method(s) and your preferred name.

...

4. Where Do We Get Information About You?

We collect information about you from several sources.

You:

- Provide us or our partners with any information.
- Use any of our online Services.
- Choose to complete surveys or questionnaires.
- Participate in any of the phone or onsite Services.

Your Sponsor

- **Depending on the services your Sponsor has selected, we may collect medical- or pharmacy-related claims information from your insurer(s) at the direction of your Sponsor.**
- Your Sponsor may provide personal information that may include your name, date of birth, gender, postal address, telephone number, email address, social security or other unique identifier, marital status, language spoken.

Our Partners

- **Upon your prior approval, Partners who provide biometric testing services will share those results with us.**
- **Upon your prior approval, Partners who provide other lab testing services will share those results with us.**
- **Upon your authorization and synching, Partners who provide device and mobile app services will share those data with us.**

Your Health Care Provider

- Your health care provider from whom we may obtain your Personal Health Information upon your request and only with your prior approval.

...

Our Sync Partners

You can see an up-to-date list of all of our Sync Partners on our web portal. Upon your prior approval, our Sync Partners will share your information with us. This information could be any information related to the physical device you use with their service and any of the needed information for uniquely identifying you.

Our Sync Partners are not provided any data held by RedBrick. Redbrick also has no control over the agreement you sign when you sign up for their services. Each of these Sync Partners has their own Privacy Policies and their own Terms of Service. You need to review their documents for how they handle your information.

5. Where will we keep your data?

Your data will be kept in the United States in one of our data centers.

6. Do We Share Information We Have About You?

Yes. We will disclose information we have about you in order to provide you with our Services. We will share your personal information with third parties only in the ways that are described in this privacy policy. Disclosures will only be made to entities that are legally entitled to the data and are contractually committed to protect the data in accordance with all regulatory and contractual requirements.

...

Disclosure To Our Business Partners

We enter into agreements with our trusted business partners to assist us in providing you with our health and wellness services. These business partners are authorized to use your personal information only as necessary to provide these services to us. We require these business partners to protect your Personal Information (including your Personal Health Information) and to comply with the HIPAA Privacy & Security Rules along with other applicable laws or regulations. To ensure this occurs, we check our partners on an annual basis to verify their programs meet our requirements, which meet or exceed regulatory and/or contractual requirements.

Disclosure To Sponsors

In the United States (U.S.) we may share Personal Health Information relating to group health plans with the plan sponsors for plan administration purposes and/or coordination of your care. Unless the plan sponsors are permitted to obtain such Personal Health Information under U.S. law, we will de-identify such Personal Health Information before providing it. De-identified information is data that has been separated from information that would tie it to a particular individual. When provide them with access to your information, we ensure we provide them with only the minimum information necessary to satisfy the original need for the data.

Disclosure To Employer

We will not share your individually identifiable Personal Health Information with your employer for employment-related purposes. Unless an employer has a legal right to obtain your Personal Health Information, we will de-identify such Personal Health Information before providing it to your employer.

Disclosure For Marketing Purposes

We **do not** permit advertising. We **do not** sell and **will not** give your individually identifiable information to anyone other entity for any marketing purpose. We will use your information to communicate with you about our Services that are available to you as a benefit under your health plan.

...

7. Do I Have Choices Related To My Personal Data?

You have the ability to “Opt Out” of communications from us or our partners if you wish, by changing your communication preferences under your “Profile,” but this will limit our ability to support you when or if you have questions. It will also limit our ability to provide you with important updates from us, and potentially your Sponsor, about changes or deadlines in your programs.

You may also tell us you do not want your data shared with us or our partners, and we will honor any such request, but if you choose this option we will not be able to provide you with any of our Services.

RedBrick Partners²⁴

Our platform is open for business.

You want a simpler experience, fewer vendors to manage, and better engagement. We can help. We partner with a growing array of leading organizations certified as RedBrick Ready. We help you achieve better returns on your investment in these services by integrating them into our broadly engaging wellness experience.

Let us help you bring it all together for you and your consumers.

Solution Partners

Thinking about adding price transparency? Telemedicine? A second medical opinion? Wondering how to bring it all together? Here are solution partners that come pre-integrated with the RedBrick Platform as plug-ins. They help you expand your focus from better health to smarter healthcare, using our engagement engine to create a better return on your investment.

advance|medical

²⁴ <https://home.redbrickhealth.com/partners/>



MDLIVE

Sync Partners

RedBrick Sync Partners — popular activity devices, weight scales, blood pressure cuffs, mobile apps and more — let you “BYO” data to the RedBrick experience. A growing array of popular RedBrick Ready apps and devices streamline data exchange so individuals can spend more time engaging in health and less time engaging in data entry. Sync Partners integrate with RedBrick Rewards, too.



RedBrick Inside

A growing number of partners have integrated RedBrick’s health engagement platform into their population and consumer health solutions. We are proud to collaborate with these strategic partners.



equityhealthcare



Interested in becoming RedBrick Ready? [Drop us a line.](#)

Attachment B – Newtopia Wellness Program and Genetic Testing

The Newtopia health risk assessment asks about individuals' health status, history, and risk factors, including family history of obesity.

Newtopia Genetics
Genetic Testing for Weight and Lifestyle Management

Family history of being overweight or obesity:

Father: Yes No

Mother: Yes No

Brothers: Yes No

Sisters: Yes No

Children: Yes No

58% of 100

Nutrition Weight Loss Exercise Well-being **Genetics** Medical Health Personal Profile Summary

The Health Risk Assessment also invites individuals to undergo genetic testing.

Newtopia Genetics
Genetic Testing for Weight and Lifestyle Management

You have 0 family members that are either overweight or obese. Based on familial connection, would you be interested in taking a genetic test for weight and lifestyle management as part of your Newtopia program?

Yes No

At Newtopia we are able to offer you a personal genetic test – Newtopia Genetics™ – to help design a completely personalized program for you. The test is non-invasive - just a sample of your saliva is required – and results are kept strictly confidential. Newtopia Genetics™ testing is very unique and highly valuable as it can assess your genetic predisposition for key susceptibility genes for weight gain. Using your genetic information, Newtopia will design a completely personalized program for you based on genetically driven recommendations in nutrition, exercise and behavioural well-being for the best results in sustainable weight loss and healthy living.

61% of 100

Nutrition Weight Loss Exercise Well-being **Genetics** Medical Health Personal Profile Summary

Upon completion of the HRA, individuals are recommended to purchase Newtopia nutritional supplements and vitamins

Welcome | Scheduling | N-E-W Life Profile | **Genetics**

YOUR UNIQUE N-E-W LIFE PROFILE

Your N-E-W Life Profile is as unique as you are - just as your Newtopia program is

Summary | Health | Nutrition | Exercise | Well-Being | Genetics | **Products**

The following natural health products are recommended based on your answers.

- Weight Loss**
Newtopia's Weight Loss contains hypoallergenic vitamins and mineral supplements designed to aid in weight reduction and in the prevention of weight gain. A high potency B complex supports fat, carbohydrate and protein metabolism, as well as supports energy production. Chromium supports weight loss and blood sugar control, and aids in decreasing body fat. Green tea is included to support weight loss and alertness. Gymnema is added to support weight loss and blood sugar control, and aid in the improvement of signs of metabolic syndrome.
- Women's Daily**
Newtopia's Daily Care for Women contains a hypoallergenic and highly absorbable multivitamin and mineral tablet with added ginseng that assists in boosting energy. There is a high potency B vitamin to assist women with energy, hormone balance and deficiencies related to hormone replacement therapy or the birth control pill. A high potency fish oil is added to support mental function, support healthy skin and aid in the prevention of cancer and cardiovascular disease. A calcium and magnesium supplement with vitamin D is included to support bone health and aid in the prevention of osteoporosis and bone fractures. Extra vitamin D is also added to aid in the prevention of cancer and reduction of mortality, and to assist with mood.
- Omega Support**
Newtopia's Omega Support is a rich source of long-chain omega-3 fatty acids. This is a fish oil, providing a mixture of eicosapentaenoic acid (EPA) and docosahexaenoic acid (DHA). Fish oils support mental function, support healthy skin and aid in the regulation of cancer and cardiovascular disease. Fish oils have

product recommendations

The vendor also markets “genetically tailored” nutritional supplements and vitamins to participants based on their results

newtopia aetna

How It Works Our Team Our Community & Blog Success Stories Join Now Contact Us FAQ Media

Now's the time to discover the
"Newtopia Difference"

This pilot program is limited to the first 500 people who sign up

You'll feel better, plus improving your Metabolic Syndrome risk could make you eligible to receive a medical plan premium

Sign up now for FREE!

Newtopia's Genetically Tailored Daily Care and Weight Care products are designed according to your genetic "formula" to address your specific nutrient needs and concerns. Your formula will be assigned a color to ease communication. The natural supplements come in convenient daily packs that contain professional grade, hypoallergenic and highly absorbable multivitamin and mineral tablets.

NEWTOPIA STARTER PACKAGE
Including your Wireless Activity Tracker and Genetic Test

SESSIONS per month FOR 1 YEAR

of GENETICALLY-TAILORED, NATURAL SUPPLEMENTS

Access to NEWTOPIA'S ONLINE AND MOBILE DAILY DASHBOARD

The Terms of Use and Privacy policies disclose that Newtopia is a Canadian company, not subject to US laws, that use of the web site constitutes agreement to all terms, including the privacy policy, and that personal information may be collected, used, and disclosed for purposes of marketing Newtopia products and services, and for offering participants information about products of other businesses.

Newtopia Terms of Use²⁵

...

Acceptance of Contract Terms

The following are terms of a legal agreement between you and Newtopia Inc. ("Newtopia"). By accessing, browsing and/or using this site ("Site"), you acknowledge that you have read, understood, and agree, to be bound by these terms and to comply with all applicable laws and regulations. If you do not agree to these terms, do not use this Site. The material provided on this Site is protected by law, including, but not limited to, Canadian Copyright Law and international treaties. This Site is controlled and operated by Newtopia from its offices within Canada.

Newtopia makes no representation that materials in the Site are appropriate or available for use in other locations, and access to them from territories where their contents are illegal is prohibited. Those who choose to access this Site from other locations do so on their own initiative and are responsible for compliance with applicable local

²⁵ <https://www.newtopia.com/terms-of-service/>

laws. Any claim relating to, and the use of, this Site and the materials contained herein is governed by the laws of the province of Ontario and the laws of Canada applicable therein.

...

Newtopia Privacy Policy²⁶

PRIVACY POLICY, TERMS OF USE AND HIPAA NOTICE

Newtopia, Inc. (the “Company”) knows that you care about how your personal information is used and shared, and we take your privacy seriously. Please read the following to learn more about our privacy policy. By visiting the Newtopia.com website and domain name, and any other linked pages, features, content, or application services offered from time to time by the Company in connection therewith (collectively, the “Sites,” as further defined in our Terms), or using any of our Services, you acknowledge that you accept the practices and policies outlined in this Privacy Policy. Capitalized terms not defined in this Privacy Policy shall have the meanings set forth in our Terms of Use, in Schedule A below (“Terms”).

...

PLEASE NOTE: By using the Services, you consent to, and authorize Newtopia to disclose your genetic color group to the other users of the Sites and Services. The users, including but not limited to Site administrators, Health Coaches, and your fellow support group members will have access to a range of Personal Information such as your name and picture, linking you to your genetic color group and reason for program participation. (The Health Coach and Site Administrator will know your name. Whether you choose to disclose your name, genetic results or photo to any other support group members is at your discretion.) Specifically, as we group participants based on certain characteristics, fellow support group members may be co-workers or other acquaintances.

We take great efforts in protecting your privacy, however, we cannot control, and expressly disclaim any responsibility for, whether or how users who are not our employees or subcontractors will subsequently use or disclose posted or previously disclosed information. If you do not consent to the disclosure of this information, you should not access or use the Sites or the Services.

3. WHAT PERSONAL INFORMATION DO WE SHARE?

²⁶ <https://www.newtopia.com/privacy-policy/>

Personal Information about our participants is an integral part of our business. We will not rent, sell, or share Personal Information about you with other people or non-affiliated companies except to provide Services, when we otherwise have your permission, or under the following circumstances:

...

Agents: We employ other companies and people to perform tasks on our behalf and need to share your information with them to provide products and/or services to you. We are responsible for the actions of our agents. You hereby consent to our sharing of Personal Information for the above purposes and to their use of the Personal Information for any purpose for which you grant permission to Newtopia.

Promotional Offers: We will never disclose your personal information to other businesses for their marketing purposes, but we may send you offers that promote the products of other businesses. These offers will be intended to benefit you, your health, or your Newtopia experience. If you do not wish to receive these offers, please send an email with your request to privacy@newtopia.com, and we will process your request within a reasonable time. Please note that you may receive additional offers as we process your request.

Effective Date: 2015-09-04.

[Schedule A Terms of Use and Schedule B HIPAA Notice follow]

Schedule A – Terms of Use

Welcome to Newtopia!

Welcome to the Newtopia website located at www.newtopia.com (the “Site”). Please carefully read these Terms of Use (the “Terms”) and our Privacy Policy (<https://www.newtopia.com/privacy-policy/>) to which these Terms are a schedule, because they govern your use of our Site (and the other websites we own or operate) and our online services that we provide. To make these Terms easier to read, the Site and our services are collectively called the “Services.”

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If you have been authorized to, and are helping another person visit our Services, these Terms constitute a legally binding agreement between both the helper and the person being helped and Company.

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1. Applicability of These Terms

Your access to, and use of the Services is expressly conditioned on your acceptance of and compliance with these Terms. These Terms apply to all users of the Services, including users who are also contributors of content,

information, and other materials or services in the Services. If you do not agree with these Terms, you are not authorized to access or use any portion of the Services in any manner, for any purpose.

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2. Our Services

As part of the Services, we offer programs to certain individuals (such as web-based health coaching services) for changing behaviors that can lead to health problems. **Our Services may include**, without limitation, the following:

- i. **The ability to access health information shared by you and others through our Services, augmented with information collected about you through authorized third parties (e.g., suppliers of scales, or wearable devices such as FitBit) and build an online community related to your weight loss and health goals.**
- ii. **Access to other information about Company and our products and/or services through the various websites we own and operate**, including, without limitation, the Newtopia.com website and domain name, and any other features, content, or applications offered from time to time by Company in connection therewith.
- iii. The ability to interact with relevant Company personnel in a timely and effective manner from the time of initial application and throughout the course of program participation.

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5. Privacy and your Personal Information

These Terms are Schedule A to Company's current privacy policy, located at <https://newtopia.com/privacy/> (the "Privacy Policy") which is expressly incorporated into these Terms. The Privacy Policy discloses Company's practices regarding the collection, use and disclosure of your personal information. By agreeing to these Terms, you are also agreeing to the terms of Company's Privacy Policy and consenting to the use and disclosure of information provided to Company as set forth herein. For inquiries in regard to the Privacy Policy, or to report a privacy-related problem, please contact privacy@newtopia.com.

The Services may include the ability to connect with a small social network of people diagnosed with certain medical conditions, including metabolic syndrome. **BY VISITING OR USING THE SERVICES, YOU CONSENT TO OUR COLLECTION, USE AND DISCLOSURE OF YOUR PERSONAL INFORMATION, INCLUDING HEALTH-RELATED INFORMATION SUCH AS YOUR MEDICAL CONDITIONS, IN ACCORDANCE WITH OUR PRIVACY POLICY. IF YOU DO NOT CONSENT TO THE DISCLOSURE OF THIS INFORMATION, YOU SHOULD NOT ACCESS OR USE THE SITES OR THE SERVICES.**

By posting, creating, using, and disclosing data, including your individually identifiable health information through User Submissions on or at any of the Sites or otherwise through the Services, you hereby irrevocably and unconditionally acknowledge that all such data is owned by Company, subject to Company's compliance with the current Privacy Policy, the HIPAA Notice (attached as Schedule B to Company's current privacy policy), and all applicable federal and state privacy laws.

As a condition of participating in our Services, you will be required to provide Company with the personal information identified in s.5 above. As part of the Sites you may, and Services, you will, receive from us email and other communications (e.g., SMS messages and voice calls) relating to your use of our Sites and/or your participation in our Services. By disclosing this contact information or otherwise sending electronic communications through the Services or the Sites, you acknowledge and agree that we may send you communications through registered mail, email and other electronic communications, SMS messages, voice calls or otherwise, that we determine, in our sole discretion, are related to your use of our Sites and/or participation in our Services. As part of using our Sites and or Services you agree to receive all agreements, notices, disclosures and other communications that we provide to you in electronic form, and acknowledge that receipt of such documents in electronic form satisfies any legal requirement that such communications be in writing.

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THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

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Health-related products and services. We may use and disclose your PHI to tell you about our health-related products or services that may be of interest to you.

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Marketing. We must also obtain your written authorization (“Your Marketing Authorization”) prior to using your PHI to send you any marketing materials. We can, however, provide you with marketing materials in a face-to-face encounter without obtaining Your Marketing Authorization. We are also permitted to give you a promotional gift of nominal value, if we so choose, without obtaining Your Marketing Authorization. In addition, we may communicate with you about products or services relating to your care, case management or care coordination, or alternative approaches, therapies, providers or care settings without Your Marketing Authorization. If we receive any direct or indirect payment for making such a communication, however, we would need your prior written permission to contact you. The only exception for seeking such permission are when our communication describes only a drug or medication that is currently being prescribed for you and our payment for the communication is reasonable in amount.

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7. Minimum Necessary.

To the extent required by law, when using or disclosing your PHI or when requesting your PHI from another covered entity, we will make reasonable efforts not to use, disclose, or request more than a limited data set (as defined below) of your PHI or, if needed by us, no more than the minimum amount of PHI necessary to accomplish the intended purpose of the use, disclosure, or request, taking into consideration practical and technological limitations. For purposes of this Notice, a “limited data set” means health information that excludes the following items:

- Names
- Postal address information, other than town or city, State, and zip code
- Telephone numbers
- Fax numbers
- Electronic mail addresses
- Social security numbers
- Health record numbers
- Health plan beneficiary numbers
- Account numbers
- Certificate/license numbers
- Vehicle identifiers and serial numbers, including license plate numbers
- Device identifiers and serial numbers
- Web Universal Resource Locators (URLs)
- Internet Protocol (IP) address numbers
- Biometric identifiers, including finger and voice prints
- Full face photographic images and any comparable images