

HES GDPR DATA PROCESSING AGREEMENT

This Data Processing Agreement (“DPA”) forms part of the Contract for Services (“Agreement”) between Health Enhancement Systems, Inc (“HES”) and the Customer. This DPA includes and incorporates by reference the annexes and addenda referenced at the bottom of this document. All capitalized terms not defined in this DPA shall have the meanings set forth in the Agreement. Customer enters into this DPA on behalf of itself and, to the extent required under Data Protection Laws, in the name and on behalf of its Authorized Affiliates (defined below).

1. **Definitions.** Unless otherwise defined in the Agreement, all capitalised terms used in this DPA will have the meanings given to them below:

“**Customer**” means you or the entity you represent.

“**Authorized Affiliate**” means any of Customer Affiliate(s) permitted to or otherwise receiving the benefit of the Services pursuant to the Agreement.

“**Customer Data**” means the “personal data” (as defined in the GDPR) that is uploaded to HES Services.

“**Services**” means any product or service provided by HES to Customer pursuant to and as more particularly described in the Agreement.

“**GDPR**” means Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

“**Processing**” has the meaning given to it in the GDPR and “process”, “processes” and “processed” will be interpreted accordingly.

“**Standard Contractual Clauses**” means Annex 1, attached to and forming part of this DPA pursuant to the European Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC.

“**Sub-processor**” means any person appointed by or on behalf of HES to process Personal Data on behalf of HES in connection with the Agreement.

2. **Data Processing.**

- 2.1. **Scope and Roles.** This DPA applies when Customer Data is processed by HES. In this context, HES will act as “processor” to Customer who may act either as “controller” or “processor” with respect to Customer Data (as each term is defined in the GDPR).
- 2.2. **Details of Data Processing.**
 - 2.2.1. **Subject matter.** The subject matter of the data processing under this DPA is Customer Data.
 - 2.2.2. **Duration.** As between HES and Customer, the duration of the data processing under this DPA is determined by Customer.
 - 2.2.3. **Purpose of processing.** The purpose of the data processing under this DPA is the implementation of wellness campaigns initiated by Customer from time to time.
 - 2.2.4. **Categories of Data:** Customer Data uploaded to the wellness campaigns under Customer’s user accounts.
 - 2.2.5. **Data Subjects:** Data subjects, if any, are within the control of the data exporter and may include individuals about whom data is provided to data importer by or at the direction of the data exporter pursuant to applicable terms of service between them.
- 2.3. HES shall not process Customer Personal Data other than on the relevant Customer’s documented instructions.
- 2.4. The Customer instructs HES to process Customer Personal Data.
3. **Processor Personnel.** HES shall take reasonable steps to ensure the reliability of any employee, agent or contractor of any Contracted Processor who may have access to the Customer Personal Data, ensuring in each case that access is strictly limited to those individuals who need to know / access the relevant Customer Personal Data, as strictly necessary for the purposes of the Principal Agreement, and to comply with Applicable Laws in the context of that individual's duties to the Contracted Processor, ensuring that all such individuals are subject to confidentiality undertakings or professional or statutory obligations of confidentiality.
4. **Compliance with Laws.** Each party will comply with all laws, rules and regulations applicable to it and binding on it in the performance of this DPA, including the GDPR.
5. **Security**
 - 5.1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of Processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, HES shall in relation to the Customer Personal Data implement appropriate technical and organizational measures to ensure a level of security appropriate to that risk,

including, as appropriate, the measures referred to in Article 32(1) of the GDPR.

- 5.2. In assessing the appropriate level of security, HES shall take account in particular of the risks that are presented by Processing, in particular from a Personal Data Breach.

6. International Transfers

- 6.1. **Processing Locations.** HES may transfer and process Customer Data in the United States and anywhere in the world where HES and/or its Sub-processors maintain data processing operations. HES shall implement appropriate safeguards to protect the Customer Data, wherever it is processed, in accordance with the requirements of Data Protection Laws.
- 6.2. **Application of Standard Contractual Clauses.** The Standard Contractual Clauses will apply to Customer Data that is transferred outside the EEA, either directly or via onward transfer, to any country not recognised by the European Commission as providing an adequate level of protection for personal data (as described in the GDPR). The Standard Contractual Clauses will not apply to Customer Data that is not transferred, either directly or via onward transfer, outside the EEA. Notwithstanding the foregoing, the Standard Contractual Clauses (or obligations the same as those under the Standard Contractual Clauses) will not apply if HES has adopted Binding Corporate Rules for Processors or an alternative recognised compliance standard for the lawful transfer of personal data (as defined in the GDPR) outside the EEA.

7. Subprocessing

- 7.1. **Authorized Sub-processors.** Customer agrees that HES may engage Sub-processors to process Personal Data on Customer's behalf. The Sub-processors currently engaged by HES and authorized by Customer are listed in Annex 2.
- 7.2. **Changes to Sub-processors.** HES shall provide Customer reasonable advance notice (for which email shall suffice) if it adds or removes Sub-processors.

8. Data Subject Rights

- 8.1. Taking into account the nature of the Processing, HES shall assist the Customer by implementing appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the Customer's obligations, as reasonably understood by HES, to respond to requests to exercise Data Subject rights under the Data Protection Laws.
- 8.2. HES shall:

- 8.2.1. promptly notify Customer if it receives a request from a Data Subject under any Data Protection Law in respect of Customer Personal Data; and
- 8.2.2. ensure that it does not respond to that request except on the documented instructions of Customer or as required by Applicable Laws to which HES is subject, in which case HES shall to the extent permitted by Applicable Laws Data Processing Agreement inform Customer of that legal requirement before HES responds to the request.

9. Personal Data Breach

- 9.1. HES shall notify Customer without undue delay upon HES becoming aware of a Personal Data Breach affecting Customer Personal Data, providing Customer with sufficient information to allow the Customer to meet any obligations to report or inform Data Subjects of the Personal Data Breach under the Data Protection Laws.
- 9.2. HES shall cooperate with the Customer and take reasonable commercial steps as are directed by Customer to assist in the investigation, mitigation and remediation of each such Personal Data Breach.

10. Data Protection Impact Assessment and Prior Consultation

HES shall provide reasonable assistance to the Customer with any data protection impact assessments, and prior consultations with Supervising Authorities or other competent data privacy authorities, which Customer reasonably considers to be required by article 35 or 36 of the GDPR or equivalent provisions of any other Data Protection Law, in each case solely in relation to Processing of Customer Personal Data by, and taking into account the nature of the Processing and information available to, the Contracted Processors.

- 11. **Deletion or Return of Data.** The Services provide Customer with controls that Customer may use to retrieve or delete Customer Data as described in the Documentation. Up to the Termination Date, Customer will continue to have the ability to retrieve or delete Customer Data in accordance with this Section. For 2 years following the Termination Date, Customer may retrieve or delete any remaining Customer Data from the Services, subject to the terms and conditions set out in the Agreement, unless prohibited by law or the order of a governmental or regulatory body or it could subject HES or its Affiliates to liability. No later than the end of this 2 year period, all Personal Data shall be deleted, save that this requirement shall not apply to the extent HES is required by applicable law to retain some or all of the Personal Data.

12. Audit Rights

- 12.1. Subject to this section 12, HES shall make available to the Customer on written request all information necessary to reasonably demonstrate compliance with this Agreement.
- 12.2. To the extent the Standard Contractual Clauses apply and the Customer reasonably argues and establishes that the above documentation and/or other third party audit reports are not sufficient to demonstrate compliance with the obligations laid down in this DPA, the Customer may execute an audit as outlined under Clause 5 lit.f) of the Standard Contractual Clauses accordingly, provided that in such an event, the parties agree: (a) Customer is responsible for all costs and fees relating to such audit (including for time, cost and materials expended by HES); (b) a third party auditor must be mutually agreed upon between the parties to follow industry standard and appropriate audit procedures; (c) such audit must not unreasonably interfere with HES's business activities and must be reasonable in time and scope; and (d) the parties must agree to a specific audit plan prior to any such audit, which must be negotiated in good faith between the parties. For avoidance of doubt, nothing in this Section 5.2 modifies or varies the Standard Contractual Clauses, and to the extent a competent authority finds otherwise or any portion of Section 5.2 is otherwise prohibited, unenforceable or inappropriate in view of the Standard Contractual Clauses, the relevant portion shall be severed and the remaining provisions hereof shall not be affected.
- 12.3. Information and audit rights of the Customer only arise under section 12.1 and 12.2 to the extent that the Agreement does not otherwise give them information and audit rights meeting the relevant requirements of Data Protection Law.

13. **General Terms**

- 13.1. **Confidentiality.** Each Party must keep this Agreement and information it receives about the other Party and its business in connection with this Agreement ("Confidential Information") confidential and must not use or disclose that Confidential Information without the prior written consent of the other Party except to the extent that:
 - (a) disclosure is required by law;
 - (b) the relevant information is already in the public domain.

Notices. All notices and communications given under this Agreement must be in writing and will be delivered personally, sent by post or sent by email to the address or email address set out in the heading of this Agreement at such other address as notified from time to time by the Parties changing address.

Annex 1

STANDARD CONTRACTUAL CLAUSES (PROCESSORS)

For the purposes of Article 26(2) of Directive 95/46/EC for the transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection

The Customer under the Health Enhancement Systems DPA accepting the clauses
(the data exporter)

and

Health Enhancement Systems Inc.
800 Cambridge St, Suite 101, Midland, MI 48642, USA.
(the data importer)

each a 'party'; together 'the parties',

HAVE AGREED on the following Contractual Clauses (the Clauses) in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1.

Clause 1

Definitions

For the purposes of the Clauses:

- (a) 'personal data', 'special categories of data', 'process/processing', 'controller', 'processor', 'data subject' and 'supervisory authority' shall have the same meaning as in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
- (b) 'the data exporter' means the controller who transfers the personal data;
- (c) 'the data importer' means the processor who agrees to receive from the data exporter personal data intended for processing on his behalf after the transfer in accordance with his instructions and the terms of the Clauses and who is not subject to a third country's system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;
- (d) 'the sub-processor' means any processor engaged by the data importer or by any other sub-processor of the data importer who agrees to receive from the data importer or from any other sub-processor of the data importer personal data exclusively intended for processing activities to be carried out on behalf of the data exporter after the transfer in accordance with his instructions, the terms of the Clauses and the terms of the written subcontract;
- (e) 'the applicable data protection law' means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established;
- (f) 'technical and organisational security measures' means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Clause 2

Details of the transfer

The details of the transfer and in particular the special categories of personal data where applicable are specified in Appendix 1 which forms an integral part of the Clauses.

Clause 3

Third-party beneficiary clause

1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.
2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.
3. The data subject can enforce against the sub-processor this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

Clause 4

Obligations of the data exporter

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;
- (b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;

- (c) that the data importer will provide sufficient guarantees in respect of the technical and organisational security measures specified in Appendix 2 to this contract;
- (d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;
- (e) that it will ensure compliance with the security measures;
- (f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;
- (g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;
- (h) to make available to the data subjects upon request a copy of the Clauses, with the exception of Appendix 2, and a summary description of the security measures, as well as a copy of any contract for sub-processing services which has to be made in accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;
- (i) that, in the event of sub-processing, the processing activity is carried out in accordance with Clause 11 by a sub-processor providing at least the same level of protection for the personal data and the rights of data subject as the data importer under the Clauses; and
- (j) that it will ensure compliance with Clause 4(a) to (i).

Clause 5

Obligations of the data importer1

The data importer agrees and warrants:

- (a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (c) that it has implemented the technical and organisational security measures specified in Appendix 2 before processing the personal data transferred;
- (d) that it will promptly notify the data exporter about:
 - (i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
 - (ii) any accidental or unauthorised access; and
 - (iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;
- (e) to deal promptly and properly with all inquiries from the data exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (f) at the request of the data exporter to submit its data-processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the data exporter, where applicable, in agreement with the supervisory authority;
- (g) to make available to the data subject upon request a copy of the Clauses, or any existing contract for sub-processing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, with the exception of Appendix 2 which shall be replaced by a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the data exporter;
- (h) that, in the event of sub-processing, it has previously informed the data exporter and obtained its prior written consent;

(i) that the processing services by the sub-processor will be carried out in accordance with Clause 11;

(j) to send promptly a copy of any sub-processor agreement it concludes under the Clauses to the data exporter.

Clause 6

Liability

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.

2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity.

The data importer may not rely on a breach by a sub-processor of its obligations in order to avoid its own liabilities.

3. If a data subject is not able to bring a claim against the data exporter or the data importer referred to in paragraphs 1 and 2, arising out of a breach by the sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the sub-processor agrees that the data subject may issue a claim against the data sub-processor with regard to its own processing operations under the Clauses as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the sub-processor shall be limited to its own processing operations under the Clauses.

Clause 7

Mediation and jurisdiction

1. The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject:

(a) to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;

(b) to refer the dispute to the courts in the Member State in which the data exporter is established.

2. The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

Clause 8

Cooperation with supervisory authorities

1. The data exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.

2. The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.

3. The data importer shall promptly inform the data exporter about the existence of legislation applicable to it or any sub-processor preventing the conduct of an audit of the data importer, or any sub-processor, pursuant to paragraph 2. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 5(b).

Clause 9

Governing law

The Clauses shall be governed by the law of the Member State in which the data exporter is established.

Clause 10

Variation of the contract

The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

Clause 11

Sub-processing

1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses. Where the sub-processor fails to fulfil its data protection obligations under such written agreement the data importer shall remain fully liable to the data exporter for the performance of the sub-processor's obligations under such agreement.
2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
3. The provisions relating to data protection aspects for sub-processing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the data exporter is established.
4. The data exporter shall keep a list of sub-processing agreements concluded under the Clauses and notified by the data importer pursuant to Clause 5(j), which shall be updated at least once a year. The list shall be available to the data exporter's data protection supervisory authority.

Clause 12

Obligation after the termination of personal data-processing services

1. The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the data importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.

2. The data importer and the sub-processor warrant that upon request of the data exporter and/or of the supervisory authority, it will submit its data-processing facilities for an audit of the measures referred to in paragraph 1.

APPENDIX 1 TO THE STANDARD CONTRACTUAL CLAUSES

Data exporter

The data exporter is the entity defined as the data exporter above.

Data importer

The data importer is Health Enhancement Systems Inc.

Data subjects

Data subjects are defined in Section 2.2 of the DPA.

Categories of data

The personal data are defined in Section 2.2 of the DPA.

Processing operations

The processing operations are defined in Section 2.2 of the DPA.

APPENDIX 2 TO THE STANDARD CONTRACTUAL CLAUSES

This Appendix forms part of the Clauses and must be completed by the parties.

Description of the technical and organisational security measures implemented by the data importer in accordance with Clauses 4(d) and 5(c) (or document/legislation attached):

The technical and organisational security measures implemented by the data importer are as described in the DPA.

Annex 2

Sub-processors and affiliated operational entities

Third Party Entities	Location
Amazon Web Services Inc	USA
Zendesk, Inc.	USA
Google LLC	USA

IN WITNESS WHEREOF, this Agreement is entered into with effect from the date first set out below.

Your Company

Signature: _____

Name: _____

Title: _____

Date Signed: _____

Processor Company (HES)

Signature: _____

Name: _____

Title: _____

Date Signed: _____