**Appendix 12**

**Non-Disclosure and Data Supplier Agreement with Benefitfocus**

This Data Supplier Agreement (“**DSA**”) and Non-Disclosure Agreement (“**NDA**”), dated xxxx, 2024 is entered between and among [PBM vendor] on behalf of itself and its subsidiaries (collectively “**Data Supplier**”), The Department of Employee Trust Funds*,* (“**Department**”), and Benefitfocus.com, Inc. (“**BENEFITFOCUS**”), collectively the “Parties”. Terms not defined herein may be defined in the applicable agreements between the Parties. If the terms are found to conflict, the terms of this DSA supersede and govern any transfer of Data between the parties.

# Background & Purpose

Data Supplier and **Department** have entered into an Administrative Services Agreement (“**Department Agreement**”), pursuant to which Data Supplier provides claim administration services to a self-insured Uniform Pharmacy Benefit program sponsored by the Department (the “**Plan**”) and to individuals eligible for benefits under the Plan (“**Participants**”).

Department and BENEFITFOCUS have entered into an agreement (the “**BENEFITFOCUS Agreement**”) pursuant to which BENEFITFOCUS provides certain healthcare decision support systems and services which will be used by the Department and Participants to evaluate, analyze and manage their healthcare benefits and costs (collectively “**Services**”). The Department has instructed Data Supplier to make certain specified claim, capitation, encounter and/or other information available to BENEFITFOCUS to enable BENEFITFOCUS to perform its Services, which claim information will include, without limitation, social security numbers, dates of service and dollar amounts of claims (collectively “**Data**”). BENEFITFOCUS will share the Data with the Department in accordance with the Health Insurance Portability and Accountability Act (HIPAA), Health Information Technology for Economic and Clinical Health Act (HITECH) and the Genetic Information Nondiscrimination Act (GINA); and

BENEFITFOCUS recognizes Data Supplier’s legitimate interests in maintaining the confidentiality of the Data, protecting the proprietary nature of its systems and processes, avoiding unnecessary disruption of its claim administration, and protecting itself from certain legal liability. Data Supplier is willing to make the Data available to BENEFITFOCUS in accordance with the request of the Department, upon the condition that BENEFITFOCUS provides certain assurances, including assurances of protection against claims or liability arising out of BENEFITFOCUS’s performance of services or Data Supplier’s release of the Data to BENEFITFOCUS; and

BENEFITFOCUS is willing to make such assurances and in consideration of the foregoing premises and the mutual covenants set forth in this DSA,

The parties acknowledge and agree as follows:

# Data Release

Data Supplier agrees to release the Data to BENEFITFOCUS as requested by the Department and use all commercially reasonable efforts to protect and securely deliver the Data to BENEFITFOCUS.

1. **Definition**

“Confidential Information” shall mean all of the following whether disclosed directly or indirectly: (i) Data Suppliers’ financial, customer, product, technical, and business information, including, but not limited to, financial statements, strategic plans, intellectual property, customer lists, other customer information, marketing plans, software, forms, service methods, personnel information, trade secrets, and know-how, both written and oral; (ii) any confidential information of a third party used by, held by, or otherwise in the possession of Data Supplier; and (iii) any protected health information or other information protected by the Health Insurance Portability and Accountability Act (“HIPAA”); provided, however, that “Confidential Information” shall not include any information that: (a) at the time of disclosure is generally available to the public or, after disclosure, becomes generally available to the public other than by a breach of this Agreement or by any breach of confidentiality by a third party; or (b) is already in BENEFITFOCUS’ possession at the time of disclosure by Data Supplier and was not acquired directly or indirectly from Data Supplier; or (c) is later received by BENEFITFOCUS on a non-confidential basis from a third party having the right to impart that information.

1. **Scope of Disclosure**

This Agreement shall not be construed to obligate Data Supplier to disclose any particular information; rather, all such disclosures shall be at Data Supplier’ sole discretion.

1. **Ownership of Confidential Information**

BENEFITFOCUS understands and agrees that the Confidential Information is a valuable asset of Data Supplier, has substantial competitive value, and is of a confidential nature, and that Data Supplier owns and reserves all proprietary rights and interests in that Confidential Information.

1. **Use**

BENEFITFOCUS shall not directly or indirectly use or induce or permit others to use any of the Confidential Information for any purpose whatsoever, except as may be necessary for purposes of the Business Relationship, and in any event shall not use the Confidential Information in a manner that is detrimental to Data Supplier.

1. **Nondisclosure**

BENEFITFOCUS shall not directly or indirectly divulge, disclose, or communicate to any person, firm, entity, or other third party in any manner whatsoever any information relating to or constituting a part of the Confidential Information; provided, however, that such disclosures may be made to those of BENEFITFOCUS’ directors, officers, and employees (collectively, “Representatives”) with a specific need to know for purposes of the Business Relationship.

1. **Legal Process**

If BENEFITFOCUS or its representatives are requested or required (by deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process) to disclose any Confidential Information, BENEFITFOCUS will provide Data Supplier with prompt notice of such requests so that Data Supplier may seek an appropriate protective order or waive compliance with the provisions of this Agreement. If BENEFITFOCUS is required by law to disclose any Confidential Information, BENEFITFOCUS shall disclose only that portion of the Confidential Information that its counsel advises in writing is legally required to be disclosed, and BENEFITFOCUS shall take all commercially reasonable steps necessary to prevent the further disclosure of any Confidential Information so disclosed.

1. **Return of Confidential Information**

Upon written request by Data Supplier for any reason and at any time, BENEFITFOCUS shall immediately take the following actions, whether or not BENEFITFOCUS has completed its use of such items at the time of the request:

* 1. Return to Data Supplier all copies of documents and tangible items provided by Data Supplier under this Agreement containing, referring, or relating to the Confidential Information, without retaining any copies thereof, including any copies in electronic format or otherwise; and
	2. Destroy or delete according to back-up policies, and provide to Data Supplier written certification of such destruction or deletion, all summaries, analyses, compilations, descriptions, modifications, and other tangible items created by BENEFITFOCUS from the documents and items referred to in subparagraph (a), in whatever format, including electronic format, that those items may be contained.
1. **Injunction**

BENEFITFOCUS further acknowledges that damages for the breach of the covenants contained in this Agreement would be an inadequate remedy, and that in the event of any such breach, Data Supplier shall be entitled to injunctive or other equitable relief against BENEFITFOCUS in addition to any and all remedies at law, including the recovery of damages and reasonable attorney’s fees.

# Indemnification

BENEFITFOCUS agrees to defend Data Supplier by indemnifying Data Supplier against all costs and damages (including reasonable attorneys' fees) finally awarded by a court of competent jurisdiction or included in a settlement arising from BENEFITFOCUS’s negligence or willful misconduct resulting in misuse, unauthorized disclosure, or other misappropriation of the Data. Data Supplier will provide BENEFITFOCUS with prompt notice of any claim for which indemnification is sought. BENEFITFOCUS will be allowed to control the defense and settlement of any such claim, and Data Supplier agrees to reasonably cooperate with BENEFITFOCUS in connection with such defense and settlement. Notwithstanding the foregoing, BENEFITFOCUS agrees that a settlement may not include an admission of guilt or liability or any injunctive remedy affecting Data Supplier without prior written consent. In no event will BENEFITFOCUS be liable to Data Supplier for incidental, consequential, special, or punitive damages (including loss of profits, data, business, or goodwill, or government fines, penalties, taxes, or filing fees), regardless of whether such liability is based on breach of contract, tort, strict liability, breach of warranty, failure of essential purpose or otherwise, and even if advised of the likelihood of such damages.

# Liability

Except for BENEFITFOCUS’s obligations to Data Supplier under Section 10 (Indemnification), BENEFITFOCUS will have no liability to any party under this DSA. For clarity, any third party claims arising under or relating to Data Supplier’s acts or omissions, or Department’s or a third party’s acts or omissions, are not subject to this Agreement.

# Term

This DSA shall continue in force from year-to-year, but shall terminate automatically upon the earliest of the following:

* 1. the date agreed to by mutual agreement among the parties; (b) upon 60 days’ notice to Data Supplier from the Department; and (c) immediately by Data Supplier or the Department, where either has a reasonable belief that BENEFITFOCUS has breached this DSA.

# Survival

The indemnification obligations shall survive any termination, cancellation or expiration of this DSA. All other provisions of this Agreement shall continue for five years from the later of the termination date of this Agreement or the termination of all of the business relationship; provided, however, that with respect to any Confidential Information that constitutes a trade secret, the provisions of this Agreement shall continue for as long as such Confidential Information constitutes a trade secret under applicable law. Additionally, any limitations on the use of Confidential Information governed by state or federal law will continue for the time periods set forth in such state or federal laws in addition to any other limitations on the use and disclosure of such Confidential Information set forth herein.

# Controlling Law

Any dispute arising out of or in connection with this DSA will be governed by the laws of the State of Wisconsin. BENEFITFOCUS shall follow the notification requirements in Wis. Stat. § 134.98 for personal information. The Department is subject to the provisions of the Wisconsin Public Records Law (Wis. Stat. § 19.31 et seq.).

This DSA, including any applicable supplements, is the complete agreement regarding the data transfer of information, and replaces all prior oral or written communications, representations, warranties, covenants, and Agreements between Data Supplier, Department and BENEFITFOCUS regarding the transfer of such information. Each party accepts the terms of this DSA by signing this DSA (or another document that incorporates it by reference) by hand or electronically. Once signed, any reproduction of this DSA or a supplement made by reliable means is considered an original.

Agreed to: Agreed to:

**[PBM Vendor] Benefitfocus.com, Inc.**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: Name:

Title: Title:

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Agreed to:

**Department of Employee Trust Funds**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name:

Title: Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_