



**4A's/IAB Education Guide to the  
Standard Terms and Conditions for Interactive  
Advertising for Media Buys One Year or Less**

**Version 3.0**

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## **Introduction**

Version 3.0 of the Standard Terms and Conditions for Interactive Advertising for Media Buys One Year or Less ("**Standard Ts&Cs**") covers a broad range of interactive advertising issues and scenarios. Version 2.0, released in 2002, served the market well for a number of years, but as the industry matured, new technologies became available, and business processes changed, the old document became less relevant and multiple addenda became the norm.

In April of 2009, legal, financial, operations, sales, and buying representatives from a large cross-section of media companies and agencies agreed to update the Standard Ts&Cs for current marketplace conditions as well as any future needs that could reasonably be expected. Version 3.0 is the result of many meetings of media companies and agencies who shared a common goal: create a fair and balanced document that covers the majority of standard media buys and therefore streamlines the buying process.

## **Using This Education Guide**

The goal of this document is to help inform readers and users of the Standard Ts&Cs Version 3.0 on the intent of the contract language and the practical business expectations and responsibilities that result from its execution. In this Education Guide, explanations in **orange** and **green** text follow many paragraphs or sections of the Standard Ts&Cs. The **orange** explanations are what remain from the Version 2.0 educational guide. The **green** explanations are new and relate to Version 3.0 updates.

Although each section of the Standard Ts&Cs is important on its own, the document should be read as a whole. Sections are interrelated in ways that are meant to create a fair and balanced representation of all aspects of an interactive media buy.

## **A Voluntary Standard**

Due to the voluntary nature of this agreement, no agency or publisher is required to use Version 3.0. Some may choose to add additional language and/or modify recommended guidelines. In such cases, both the IAB and AAAA urge parties to use the recommended "Addendum" format to outline modifications. It is important to note that the agreements in these Standard Ts&Cs were achieved by negotiating a balanced document and therefore attempts to alter its contents could result in additional modifications being requested by the other party.

**STANDARD TERMS AND CONDITIONS FOR INTERNET ADVERTISING  
FOR MEDIA BUYS ONE YEAR OR LESS**

These Standard Terms and Conditions for Internet Advertising for Media Buys One Year or Less, Version 3.0, are intended to offer media companies and advertising agencies a standard for conducting business in a manner acceptable to both. This document, when incorporated into an insertion order, represents the parties' common understanding for doing business. This document may not fully cover sponsorships and other arrangements involving content association or integration, and/or special production, but may be used as the basis for the media components of such contracts. This document is not meant to cover the relationship between a publisher and a network, or direct advertiser buys with publishers.

**DEFINITIONS**

“**Ad**” means any advertisement provided by Agency on behalf of an Advertiser.

“**Advertiser**” means the advertiser for which Agency is the agent under an applicable IO.

“**Advertising Materials**” means artwork, copy, or active URLs for Ads.

“**Affiliate**” means, as to an entity, any other entity directly or indirectly controlling, controlled by, or under common control with, such entity.

“**Agency**” means the advertising agency listed on the applicable IO.

“**CPA Deliverables**” means Deliverables sold on a cost per acquisition basis.

“**CPC Deliverables**” means Deliverables sold on a cost per click basis.

“**CPL Deliverables**” means Deliverables sold on a cost per lead basis.

“**CPM Deliverables**” means Deliverables sold on a cost per thousand impression basis.

“**Deliverable**” or “**Deliverables**” means the inventory delivered by Media Company (*e.g.*, impressions, clicks, or other desired actions).

“**IO**” means a mutually agreed insertion order that incorporates these Terms, under which Media Company will deliver Ads on Sites for the benefit of Agency or Advertiser.

“**Media Company**” means the publisher listed on the applicable IO.

“**Media Company Properties**” are websites specified on an IO that are owned, operated, or controlled by Media Company.

“**Network Properties**” means websites specified on an IO that are not owned, operated, or controlled by Media Company, but on which Media Company has a contractual right to serve Ads.

“**Policies**” means advertising criteria or specifications made conspicuously available, including content limitations, technical specifications, privacy policies, user experience policies, policies regarding consistency with Media Company's public image, community standards regarding obscenity or indecency (taking into consideration the portion(s) of the Site on which the Ads are to appear), other editorial or advertising policies, and Advertising Materials due dates.

“**Representative**” means, as to an entity and/or its Affiliate(s), any director, officer, employee, consultant, contractor, agent, and/or attorney.

“**Sites**” means Media Company Properties and Network Properties.

“**Terms**” means these Standard Terms and Conditions for Internet Advertising for Media Buys One Year or Less, Version 3.0.

“**Third Party**” means an entity or person that is not a party to an IO; for purposes of clarity, Media Company, Agency, Advertiser, and any Affiliates or Representatives of the foregoing are not Third Parties.

“**Third Party Ad Server**” means a Third Party that will serve and/or track Ads.

The Definitions section was added in Version 3.0 to help streamline the language and decrease confusion over definitions that were buried throughout and therefore difficult to locate.

## **I. INSERTION ORDERS AND INVENTORY AVAILABILITY**

- a. From time to time, Media Company and Agency may execute IOs that will be accepted as set forth in Section I(b). As applicable, each IO will specify: (a) the type(s) and amount(s) of Deliverables, (b) the price(s) for such Deliverables, (c) the maximum amount of money to be spent pursuant to the IO, (d) the start and end dates of the campaign, and (e) the identity of and contact information for any Third Party Ad Server. Other items that may be included are, but are not limited to, reporting requirements, any special Ad delivery scheduling and/or Ad placement requirements, and specifications concerning ownership of data collected.

Media Company will make commercially reasonable efforts to notify Agency within two (2) business days of receipt of an IO signed by Agency if the specified inventory is not available. Acceptance of the IO and these Terms will be deemed the earlier of (a) written (which, unless otherwise specified, for purposes of these Terms, will include paper, fax, or e-mail communication) approval of the IO by Media Company and Agency, or (b) the display of the first Ad impression by Media Company, unless otherwise agreed in the IO. Notwithstanding the foregoing, modifications to the originally submitted IO will not be binding unless signed by both Media Company and Agency.

Consult with legal counsel for definitions of terms such as “commercially reasonable efforts,” “in good faith” and the like. These terms have specific legal meaning. Note also that “written” is defined here as paper, fax, or e-mail, and when “written” appears anywhere in this document it means any of these methods, unless otherwise specified. The contract is binding when it is either signed by the receiving party, or delivering of impressions begins. If the media company intends to begin delivering impressions “in good faith” but does not agree to the terms of the IO, a modified IO should be submitted to the agency with a specific note that starting delivery does not constitute acceptance. Under the last sentence of this section, if more than one version of an IO is floating around, both parties must sign the final version.

- b. Revisions to accepted IOs will be made in writing and acknowledged by the other party in writing.

## **II. AD PLACEMENT AND POSITIONING**

- a. Media Company will comply with the IO, including all Ad placement restrictions, and will create a reasonably balanced delivery schedule, except as set forth in Section VI(c). Media Company will provide, within the scope of the IO, an Ad to the Site specified on the IO when such Site is visited by an Internet user. Any exceptions will be approved by Agency in writing.

This paragraph was updated to explicitly state that a reasonably balanced delivery schedule is both expected by the Agency and required of the Media Company. The exception in Section VI(c) refers to performance inventory, such as Cost-Per-Click inventory, which does not share the balanced delivery expectation or requirement.

- b. Media Company will use commercially reasonable efforts to provide Agency at least 10 business days prior notification of any material changes to the Site that would materially change the target audience or materially affect the size or placement of the Ad specified in the applicable IO. Should such a modification occur with or without notice, as Agency’s and Advertiser’s sole remedy for such change, Agency may cancel the remainder of the affected placement without penalty within the 10-day notice period. If Media Company has failed to provide such notification, Agency may cancel the remainder of the affected placement within 30 days of such modification and, in such case, will not be charged for any affected Ads delivered after such modification.

Agencies are concerned that if a Site is modified in such a way that they are no longer advertising to the audience they expected, they have lost the value of their purchase. A “material change” is

described in this section, but a common sense definition would be to think about whether the change would impact the value of the placement to the advertiser.

The agency may cancel the entire IO if such a change is made because there is no way to know whether the affected placement was the campaign's critical component. The media company may discuss the best remedy with the agency, but the agency has discretion to cancel the entire IO.

- c. Media Company will submit or otherwise make electronically accessible to Agency final technical specifications within two (2) business days of the acceptance of an IO. Changes by Media Company to the specifications of already-purchased Ads after that two (2) business day period will allow Advertiser to suspend (without impacting the end date, unless otherwise agreed by the parties) delivery of the affected Ad for a reasonable time in order to (i) send revised Advertising Materials; (ii) request that Media Company resize the Ad at Media Company's cost, and with final creative approval of Agency, within a reasonable time period to fulfill the guaranteed levels of the IO; (iii) accept a comparable replacement; or (iv) if the parties are unable to negotiate an alternate or comparable replacement in good faith within five (5) business days, immediately cancel the remainder of the affected placement without penalty.

It is important to communicate ad specifications clearly at the start of the campaign. Note that changes to the specifications give the Advertiser some options, including canceling the affected Ad. Note that in this case, only the affected Ad can be canceled, since the changes in this case are only technical.

- d. Media Company acknowledges that certain Advertisers may not want their Ads placed adjacent to content that promotes pornography, violence, or the use of firearms, contains obscene language, or falls within another category stated on the IO ("**Editorial Adjacency Guidelines**"). Media Company will use commercially reasonable efforts to comply with the Editorial Adjacency Guidelines with respect to Ads that appear on Media Company Properties, although Media Company will at all times retain editorial control over the Media Company Properties. For Ads shown on Network Properties, Media Company and Agency agree that Media Company's sole responsibilities with respect to compliance with these Editorial Adjacency Guidelines will be to obtain contractual representations from its participating network publishers that such publishers will comply with Editorial Adjacency Guidelines on all Network Properties and to provide the remedy specified below to Agency with respect to violations of Editorial Adjacency Guidelines on Network Properties. Should Ads appear in violation of the Editorial Adjacency Guidelines, Advertiser's sole and exclusive remedy is to request in writing that Media Company remove the Ads and provide makegoods or, if no makegood can be agreed upon, issue a credit to Advertiser equal to the value of such Ads, or not bill Agency for such Ads. In cases where a makegood and a credit can be shown to be commercially infeasible for the Advertiser, Agency and Media Company will negotiate an alternate solution. After Agency notifies Media Company that specific Ads are in violation of the Editorial Adjacency Guidelines, Media Company will make commercially reasonable efforts to correct such violation within 24 hours. If such correction materially and adversely impacts such IO, Agency and Media Company will negotiate in good faith mutually agreed changes to such IO to address such impacts. Notwithstanding the foregoing, Agency and Advertiser each acknowledge and agree that no Advertiser will be entitled to any remedy for any violation of the Editorial Adjacency Guidelines resulting from: (i) Ads placed at locations other than the Site, or (ii) Ads displayed on properties that Agency or Advertiser is aware, or should be aware, may contain content in potential violation of the Editorial Adjacency Guidelines.

Editorial adjacency guidelines and violation remedies are covered here in depth. Version 3.0 incorporates significant modifications from Version 2.0 language. The first sentence now includes and defines general Editorial Adjacency Guidelines meant to cover the vast majority of advertiser concerns. A common practice had been to addend the Standard Ts&Cs with a list of adjacency guidelines and each Agency/Advertiser had a custom set. Upon further study, however, most guidelines covered a common set of concerns which were then codified in this first sentence as "content that promotes pornography, violence, or the use of firearms, contains obscene language

or falls within another category stated on the IO.” The last phrase, “falls within another category stated on the IO” allows for additional guidelines based on the individualized needs of different advertisers. While this language should cover a large number of advertisers’ concerns, both media companies and agencies acknowledge that this standard adjacency language will probably not satisfy special needs and requirements of advertisers in the Pharmaceutical or Airline categories.

The sole remedy language here specifies the process by which an adjacency issue needs to be reported, what the Media Company must do once a report has been filed, and how the two parties will resolve the problem. A makegood or credit are the two preferred methods of resolution. In the rare cases where those two options are not possible, the agency and publisher have the option to negotiate other solutions.

For any page on the Site that primarily consists of user-generated content, the preceding paragraph will not apply. Instead, Media Company will make commercially reasonable efforts to ensure that Ads are not placed adjacent to content that violates the Site’s terms of use. Advertiser’s and Agency’s sole remedy for Media Company’s breach of such obligation will be to submit written complaints to Media Company, which will review such complaints and remove content that Media Company, in its sole discretion, determines is objectionable or in violation of such Site’s terms of use.

The special situation of User-Generated Content (UGC) pages and sites needed to be addressed in Version 3.0. Because the content on these pages/sites is not developed by the owners of those sites and the nature of those areas creates a far less controlled content environment than non-UGC sites, a different set of adjacency rules are necessary. **It is important to understand that the standard editorial adjacency guideline language in the first sentence of the prior paragraph is voided for UGC pages by this paragraph.** If an adjacency conflict is found by an Agency or Advertiser on a UGC site, written notice must be provided. A determination of adjacency violation will be based, however, on the UGC site’s Terms of Use. Because of the nature of UGC, agencies and advertisers should understand that the basis for UGC page/site popularity lies in the openness provided by the platform. Therefore, agencies and advertisers should familiarize themselves with a Site’s Terms of Use and be comfortable with the types of content allowed on that Site before agreeing to buy inventory.

The phrase “primarily consists of user-generated content” is intended to describe pages like blogs, user reviews, profiles, “walls,” or anything else where the vast majority of the content displayed is sourced from users. An example of a web page that falls outside of the intent of this definition would be a site-written news story that has a user-comment area at the bottom.

### **III. PAYMENT AND PAYMENT LIABILITY**

#### **a. Invoices**

The initial invoice will be sent by Media Company upon completion of the first month’s delivery, or within 30 days of completion of the IO, whichever is earlier. Invoices will be sent to Agency’s billing address as set forth in the IO and will include information reasonably specified by Agency, such as the IO number, Advertiser name, brand name or campaign name, and any number or other identifiable reference stated as required for invoicing on the IO. All invoices (other than corrections of previously provided invoices) pursuant to the IO will be sent within 90 days of delivery of all Deliverables. Media Company acknowledges that failure by Media Company to send an invoice within such period may cause Agency to be contractually unable to collect payment from the Advertiser. If Media Company sends the invoice after the 90-day period and the Agency either has not received the applicable funds from the Advertiser or does not have the Advertiser’s consent to disburse such funds, Agency will use commercially reasonable efforts to assist Media Company in collecting payment from the Advertiser or obtaining Advertiser’s consent to disburse funds.

In order to expedite payment, invoices need to be sent on time and include important information such as the IO number. Late invoices, exclusion of important identifying information, and sending the invoice to an address other than the one specified on the IO will likely result in confusion and

delayed payment. Once a campaign is complete, all invoices must be sent by the media company within 90 days. Version 3.0 removes the Media Company's waiver of payment language in Version 2.0 and moves the 90 day requirement down from 180 days. It is strongly encouraged, however, that all invoices are sent within 30 days or less upon completion of an IO in order to ensure timely payment. After 90 days, it generally becomes a much more difficult process to receive payment because of advertisers' billing requirements.

Upon request from the Agency, Media Company should provide proof of performance for the invoiced period, which may include access to online or electronic reporting, as addressed in these Terms, subject to the notice and cure provisions of Section IV. Media Company should invoice Agency for the services provided on a calendar-month basis with the net cost (*i.e.*, the cost after subtracting Agency commission, if any) based on actual delivery, flat-fee, or based on prorated distribution of delivery over the term of the IO, as specified in the applicable IO.

Version 2.0 required proof of performance to be included with invoices. Not only was this a significant operational challenge for media companies because proof of performance reports were run on different systems than invoices, but the delivery of proof is not as prevalent as it was a few years ago. Proof of performance is now required only upon request by the agency. The broad use of 3rd-party reporting systems enables agencies to track campaigns in real-time. Furthermore, systems integration projects like the IAB E-business standards will enable automated digital delivery of reports between parties. One situation where this request would likely be made is if an invoice is delivered that differs from the IO agreement or 3<sup>rd</sup>-party ad serving counts.

b. **Payment Date**

Agency will make payment 30 days from its receipt of invoice, or as otherwise stated in a payment schedule set forth in the IO. Media Company may notify Agency that it has not received payment in such 30-day period and whether it intends to seek payment directly from Advertiser pursuant to Section III(c), below, and Media Company may do so five (5) business days after providing such notice.

The 30-day requirement here was debated by the Version 3.0 Taskforce. It was agreed that keeping the payment requirement to 30 days should continue to be encouraged. If an Advertiser or Agency wish to pursue other payment terms, they should do so in the IO, not in the Standard Ts&Cs. An important goal of both the AAAA and the IAB is to improve efficiency in the marketplace and encouraging quick payment plays an integral part. All parties are encouraged to develop operational practices that allow for 30 day payment periods.

c. **Payment Liability**

Unless otherwise set forth by Agency on the IO, Media Company agrees to hold Agency liable for payments solely to the extent proceeds have cleared from Advertiser to Agency for Ads placed in accordance with the IO. For sums not cleared to Agency, Media Company agrees to hold Advertiser solely liable. Media Company understands that Advertiser is Agency's disclosed principal and Agency, as agent, has no obligations relating to such payments, either joint or several, except as specifically set forth in this Section III(c) and Section X(c).

This is the sequential liability clause.

Agency agrees to make every reasonable effort to collect and clear payment from Advertiser on a timely basis.

Agency's credit is established on a client-by-client basis.

If one of the Agency's Advertisers is not paying, the Agency's other Advertisers' credit is not affected.

If Advertiser proceeds have not cleared for the IO, other advertisers from the representing Agency will not be prohibited from advertising on the Site due to such non-clearance if such other advertisers' credit is not in question.

Agency will make available to Media Company upon request written confirmation of the relationship between Agency and Advertiser. This confirmation should include, for example, Advertiser's acknowledgement that Agency is its agent and is authorized to act on its behalf in connection with the IO and these Terms. In addition, upon the request of Media Company, Agency will confirm whether Advertiser has paid to Agency in advance funds sufficient to make payments pursuant to the IO.

Because of the sequential liability clause, it is important for the Media Company to have written confirmation of the Agency/Advertiser relationship. For example, if there is any doubt whether the Advertiser agrees to the purchase of media, the Media Company may want to confirm the Agency's authority to purchase for the Advertiser. The Media Company may also confirm that the Agency has already been paid, if there is any doubt as to the Advertiser's ability to pay in a timely fashion.

If Advertiser's or Agency's credit is or becomes impaired, Media Company may require payment in advance.

#### **IV. REPORTING**

- a. Media Company will, within two (2) business days of the start date on the IO, provide confirmation to Agency, either electronically or in writing, stating whether the components of the IO have begun delivery.
- b. If Media Company is serving the campaign, Media Company will make reporting available at least as often as weekly, either electronically or in writing, unless otherwise specified in the IO. Reports will be broken out by day and summarized by creative execution, content area (Ad placement), impressions, clicks, spend/cost, and other variables as may be defined in the IO (e.g., keywords).

Media companies are no longer required to provide reporting at least as often as weekly if a campaign is completely 3<sup>rd</sup> party served. It was agreed that this was an unnecessary burden because agencies rely on 3<sup>rd</sup> party campaign reporting in these situations. When a Media Company is serving the campaign, reporting must still be provided – even if an Agency is using a 3<sup>rd</sup> party to track the campaign. Generally in this situation, the Agency only has access to an impression count and needs the additional metrics normally available if the campaign were 3<sup>rd</sup> party served, including metrics like clicks, interactions, complete video views, etc.

Minimum reporting requirements such as which fields need to be included are also laid out in this paragraph. Any additional reporting requirements must be included by the agency in the IO.

Once Media Company has provided the online or electronic report, it agrees that Agency and Advertiser are entitled to reasonably rely on it, subject to provision of Media Company's invoice for such period.

- c. If Media Company fails to deliver an accurate and complete report by the time specified, Agency may initiate makegood discussions pursuant to Section VI, below.

If Agency informs Media Company that Media Company has delivered an incomplete or inaccurate report, or no report at all, Media Company will cure such failure within five (5) business days of receipt of such notice. Failure to cure may result in nonpayment for all activity for which data is incomplete or missing until Media Company delivers reasonable evidence of performance; such report will be delivered within 30 days of Media Company's knowledge of such failure or, absent such knowledge, within 180 days of delivery of all Deliverables.



## **V. CANCELLATION AND TERMINATION**

- a. Unless designated on the IO as non-cancelable, Advertiser may cancel the entire IO, or any portion thereof, as follows:
  - i. With 14 days' prior written notice to Media Company, without penalty, for any guaranteed Deliverable, including, but not limited to, CPM Deliverables. For clarity and by way of example, if Advertiser cancels the guaranteed portions of the IO eight (8) days prior to serving of the first impression, Advertiser will only be responsible for the first six (6) days of those Deliverables.
  - ii. With seven (7) days' prior written notice to Media Company, without penalty, for any non-guaranteed Deliverable, including, but not limited to, CPC Deliverables, CPL Deliverables, or CPA Deliverables, as well as some non-guaranteed CPM Deliverables.
  - iii. With 30 days' prior written notice to Media Company, without penalty, for any flat fee-based or fixed-placement Deliverable, including, but not limited to, roadblocks, time-based or share-of-voice buys, and some types of cancelable sponsorships.
  - iv. Advertiser will remain liable to Media Company for amounts due for any custom content or development ("**Custom Material**") provided to Advertiser or completed by Media Company or its third-party vendor prior to the effective date of termination. For IOs that contemplate the provision or creation of Custom Material, Media Company will specify the amounts due for such Custom Material as a separate line item. Advertiser will pay for such Custom Material within 30 days from receiving an invoice therefore.

Four different types of inventory and cancelation terms are now designated in the Standard Ts&Cs, including custom content like microsites where development costs are in addition to media costs. The language also includes the right to designate certain placements or types of inventory as non-cancelable. Paragraph (iv) explicitly lists payment requirements to ensure the understanding that, although the IO has been canceled, the advertiser is still liable for any sunk costs and must pay within the normal 30-day period after receipt of invoice. Regarding the practice of including these sunk development costs into a CPM, this should be operationally discouraged by both parties unless the portion that is non-refundable is duly noted somewhere in the IO.

- b. Either Media Company or Agency may terminate an IO at any time if the other party is in material breach of its obligations hereunder, which breach is not cured within 10 days after receipt of written notice thereof from the non-breaching party, except as otherwise stated in these Terms with regard to specific breaches. Additionally, if Agency or Advertiser breaches its obligations by violating the same Policy three times (and such Policy was provided to Agency or Advertiser) and receives timely notice of each such breach, even if Agency or Advertiser cures such breaches, then Media Company may terminate the IO or placements associated with such breach upon written notice. If Agency or Advertiser does not cure a violation of a Policy within the applicable 10-day cure period after written notice, where such Policy had been provided by Media Company to Agency, then Media Company may terminate the IO and/or placements associated with such breach upon written notice.

This allows either party to terminate the IO if the other breaches the Agreement and does not cure the breach within 10 days. There is also a "three strikes" clause. This is intended to allow the Media Company to terminate the IO when the Agency or Advertiser simply refuses to cooperate. This is the only provision that allows you to terminate the contract in the normal course of business.

- c. Short rates will apply to canceled buys to the degree stated on the IO.

## **VI. MAKEGOODS**

- a. Media Company will monitor delivery of the Ads, and will notify Agency either electronically or in writing as soon as possible (and no later than 14 days before the applicable IO end date unless the length of the campaign is less than 14 days) if Media Company believes that an under-delivery is likely. In the case of a probable or actual under-delivery, Agency and Media Company may arrange for a makegood consistent with these Terms.
- b. If actual Deliverables for any campaign fall below guaranteed levels, as set forth in the IO, and/or if there is an omission of any Ad (placement or creative unit), Agency and Media Company will use commercially reasonable efforts to agree upon the conditions of a makegood flight, either in the IO or at the time of the shortfall. If no makegood can be agreed upon, Agency may execute a credit equal to the value of the under-delivered portion of the contract IO for which it was charged. If Agency or Advertiser has made a cash prepayment to Media Company, specifically for the campaign IO for which under-delivery applies, then, if Agency and/or Advertiser is reasonably current on all amounts owed to Media Company under any other agreement for such Advertiser, Agency may elect to receive a refund for the under-delivery equal to the difference between the applicable pre-payment and the value of the delivered portion of the campaign. In no event will Media Company provide a makegood or extend any Ad beyond the period set forth in the IO without the prior written consent of Agency.
- c. If an IO contains CPA Deliverables, CPL Deliverables, or CPC Deliverables, the predictability, forecasting, and conversions for such Deliverables may vary and guaranteed delivery, even delivery, and makegoods are not available.

Clarifying that makegoods are not available with performance advertising is an important addition to Version 3.0. The nature of performance deliverables makes it impossible to guarantee items like delivery goals and balanced delivery, and therefore makegoods cannot apply to this type of inventory.

## **VII. BONUS IMPRESSIONS**

- a. Where Agency uses a Third Party Ad Server, Media Company will not bonus more than 10% above the Deliverables specified in the IO without the prior written consent of Agency. Permanent or exclusive placements will run for the specified period of time regardless of over-delivery, unless the IO establishes an impression cap for Third Party Ad Server activity. Agency will not be charged by Media Company for any additional Deliverables above any level guaranteed or capped in the IO. If a Third Party Ad Server is being used and Agency notifies Media Company that the guaranteed or capped levels stated in the IO have been reached, Media Company will use commercially reasonable efforts to suspend delivery and, within 48 hours of receiving such notice, Media Company may either (1) serve any additional Ads itself or (2) be held responsible for all applicable incremental Ad serving charges incurred by Advertiser but only (A) after such notice has been provided, and (B) to the extent such charges are associated with overdelivery by more than 10% above such guaranteed or capped levels.

This section addresses a key concern of agencies: they have a specific budget approved for third-party ad serving. They must pay the ad server for all impressions, and severe overdelivery significantly increases ad serving charges. **The section above makes the Media Company potentially liable for those excess charges.** When combined with a balanced delivery requirement, the Media Company may find itself required to continue delivering impressions, but already at the contracted maximum. The Media Company has the option of serving additional ads itself or paying for the excess charges.

- b. Where Agency does not use a Third Party Ad Server, Media Company may bonus as many ad units as Media Company chooses unless otherwise indicated on the IO. Agency will not be charged by Media Company for any additional Deliverables above any level guaranteed in the IO.

### **VIII. FORCE MAJEURE**

- a. Excluding payment obligations, neither Agency nor Media Company will be liable for delay or default in the performance of its respective obligations under these Terms if such delay or default is caused by conditions beyond its reasonable control, including, but not limited to, fire, flood, accident, earthquakes, telecommunications line failures, electrical outages, network failures, acts of God, or labor disputes (“**Force Majeure event**”). If Media Company suffers such a delay or default, Media Company will make reasonable efforts within five (5) business days to recommend a substitute transmission for the Ad or time period for the transmission. If no such substitute time period or makegood is reasonably acceptable to Agency, Media Company will allow Agency a pro rata reduction in the space, time, and/or program charges hereunder in the amount of money assigned to the space, time, and/or program charges at time of purchase. In addition, Agency will have the benefit of the same discounts that would have been earned had there been no default or delay.
- b. If Agency’s ability to transfer funds to third parties has been materially negatively impacted by an event beyond the Agency’s reasonable control, including, but not limited to, failure of banking clearing systems or a state of emergency, then Agency will make every reasonable effort to make payments on a timely basis to Media Company, but any delays caused by such condition will be excused for the duration of such condition. Subject to the foregoing, such excuse for delay will not in any way relieve Agency from any of its obligations as to the amount of money that would have been due and paid without such condition.
- c. If a Force Majeure event has continued for five (5) business days, Media Company and/or Agency has the right to cancel the remainder of the IO without penalty.

### **IX. AD MATERIALS**

- a. Agency will submit Advertising Materials pursuant to Section II(c) in accordance with Media Company’s then-existing Policies. Media Company’s sole remedies for a breach of this provision are set forth in Section V(c), above, Sections IX (c) and (d), below, and Sections X (b) and (c), below.
- b. If Advertising Materials are not received by the IO start date, Media Company will begin to charge the Advertiser on the IO start date on a pro rata basis based on the full IO, excluding portions consisting of performance-based, non-guaranteed inventory, for each full day the Advertising Materials are not received. If Advertising Materials are late based on the Policies, Media Company is not required to guarantee full delivery of the IO. Media Company and Agency will negotiate a resolution if Media Company has received all required Advertising Materials in accordance with Section IX(a) but fails to commence a campaign on the IO start date.

Late Creative policy is handled here. The first sentence explains the policy. If the advertising materials are not received by the start date (not the date required by the Media Company for QA, etc) the Advertiser will be charged each day an amount equal to a day’s worth of the guaranteed portion of the total IO. For example, if an IO is all guaranteed inventory, is worth \$10, and the IO length is 10 days, then each day’s late charge would be \$1. Performance portions of the IO are excluded because they are not guaranteed. The Taskforce chose to begin the late charges on the start date of the IO instead of on the Media Company’s required creative delivery date. Because media companies have different creative delivery deadlines, beginning charges on the start date creates a clear, objective timeline for late creative across an entire campaign.

However, the second sentence states that if materials are late per each individual Media Company’s creative delivery policies, the Media Company is no longer required to fulfill the full IO. The intent of this sentence is to clearly acknowledge the possibility that late creative may materially affect the inventory availability for the campaign. The first and second sentences set up the possibility of a scenario where the creative is delivered before the start date (thus voiding the ability

of the Media Company to charge a late fee) but after the required creative delivery deadline. For example, a Media Company's policy may require materials to be delivered five days before the start date for QA and trafficking, but the Advertiser delivers the creative three days before the start date. The Media Company cannot get the campaign live until two days after the start date and because of a tight inventory situation or a sell-out, the two lost days cannot be made up before the end of the IO period. The media companies on the Taskforce agreed that the intent would be to make best efforts to fulfill the IO in order to fully bill for the IO, but there would be situations that the Advertiser and Agency should be aware of that might preclude that from occurring.

The final sentence handles the scenario when all materials, built to Media Company specifications, are received on time and the campaign still launches late. In this case, the Taskforce agreed that each instance would need to be handled on a case-by-case basis and would not benefit from a formal standard process.

Taken in full, the primary intent of this paragraph is to create a balanced policy that is acceptable to both media companies and agencies and, most importantly, encourages on-time delivery of ad materials. Late creative is one of the leading causes of operational inefficiencies in interactive advertising and strong efforts by both sides must be made if the situation is to be improved.

- c. Media Company reserves the right within its discretion to reject or remove from its Site any Ads for which the Advertising Materials or the website to which the Ad is linked do not comply with its Policies, or that in Media Company's sole reasonable judgment, do not comply with any applicable law, regulation, or other judicial or administrative order. In addition, Media Company reserves the right within its discretion to reject or remove from its Site any Ads for which the Advertising Materials or the website to which the Ad is linked are, or may tend to bring, disparagement, ridicule, or scorn upon Media Company or any of its Affiliates (as defined below), provided that if Media Company has reviewed and approved such Ads prior to their use on the Site, Media Company will not immediately remove such Ads before making commercially reasonable efforts to acquire mutually acceptable alternative Advertising Materials from Agency.
- d. If Advertising Materials provided by Agency are damaged, not to Media Company's specifications, or otherwise unacceptable, Media Company will use commercially reasonable efforts to notify Agency within two (2) business days of its receipt of such Advertising Materials.
- e. Media Company will not edit or modify the submitted Ads in any way, including, but not limited to, resizing the Ad, without Agency's approval. Media Company will use all Ads in strict compliance with these Terms and any written instructions provided on the IO.
- f. When applicable, Third Party Ad Server tags will be implemented so that they are functional in all aspects.
- g. Media Company, on the one hand, and Agency and Advertiser, on the other, will not use the other's trade name, trademarks, logos, or Ads in any public announcement (including, but not limited to, in any press release) regarding the existence or content of these Terms or an IO without the other's prior written approval.

## **X. INDEMNIFICATION**

The majority of this section has been reorganized for clearer delineation of each party's indemnification responsibilities and should be reviewed carefully with legal counsel. Paragraph (a) deals with the Media Company indemnification, (b) deals with the Advertiser, and (c) deals with the Agency. Paragraph (d) has not changed from Version 2.0 and discusses claims notification and other obligations.

- a. Media Company will defend, indemnify, and hold harmless Agency, Advertiser, and each of its Affiliates and Representatives from damages, liabilities, costs, and expenses (including reasonable attorneys' fees) (collectively, "**Losses**") resulting from any claim, judgment, or proceeding (collectively, "**Claims**") brought by a Third Party and resulting from (i) Media Company's alleged breach of Section XII or of Media Company's representations and warranties in Section XIV(a),

- (ii) Media Company's display or delivery of any Ad in breach of Section II(a) or Section IX(e), or
- (iii) Advertising Materials provided by Media Company for an Ad (and not by Agency, Advertiser, and/or each of its Affiliates and/or Representatives) ("**Media Company Advertising Materials**") that: (I) violate any applicable law, regulation, judicial or administrative action, or the right of a Third Party; or (II) are defamatory or obscene. Notwithstanding the foregoing, Media Company will not be liable for any Losses resulting from Claims to the extent that such Claims result from (1) Media Company's customization of Ads or Advertising Materials based upon detailed specifications, materials, or information provided by the Advertiser, Agency, and/or each of its Affiliates and/or Representatives, or (2) a user viewing an Ad outside of the targeting set forth in the Insertion Order, which viewing is not directly attributable to Media Company's serving such Ad in breach of such targeting.
- b. Advertiser will defend, indemnify, and hold harmless Media Company and each of its Affiliates and Representatives from Losses resulting from any Claims brought by a Third Party resulting from (i) Advertiser's alleged breach of Section XII or of Advertiser's representations and warranties in Section XIV(a), (ii) Advertiser's violation of Policies (to the extent the terms of such Policies have been provided (*e.g.*, by making such Policies available by providing a URL) via email or other affirmative means, to Agency or Advertiser at least 14 days prior to the violation giving rise to the Claim), or (iii) the content or subject matter of any Ad or Advertising Materials to the extent used by Media Company in accordance with these Terms or an IO.
- c. Agency represents and warrants that it has the authority as Advertiser's agent to bind Advertiser to these Terms and each IO, and that all of Agency's actions related to these Terms and each IO will be within the scope of such agency. Agency will defend, indemnify, and hold harmless Media Company and each of its Affiliates and Representatives from Losses resulting from (i) Agency's alleged breach of the foregoing sentence, or (ii) Claims brought by a Third Party alleging that Agency has breached its express, Agency-specific obligations under Section XII.
- d. The indemnified party(s) will promptly notify the indemnifying party of all Claims of which it becomes aware (provided that a failure or delay in providing such notice will not relieve the indemnifying party's obligations except to the extent such party is prejudiced by such failure or delay), and will: (i) provide reasonable cooperation to the indemnifying party at the indemnifying party's expense in connection with the defense or settlement of all Claims; and (ii) be entitled to participate at its own expense in the defense of all Claims. The indemnified party(s) agrees that the indemnifying party will have sole and exclusive control over the defense and settlement of all Claims; provided, however, the indemnifying party will not acquiesce to any judgment or enter into any settlement, either of which imposes any obligation or liability on an indemnified party(s) without its prior written consent.

## **XI. LIMITATION OF LIABILITY**

Excluding Agency's, Advertiser's, and Media Company's respective obligations under Section X, damages that result from a breach of Section XII, or intentional misconduct by Agency, Advertiser, or Media Company, in no event will any party be liable for any consequential, indirect, incidental, punitive, special, or exemplary damages whatsoever, including, but not limited to, damages for loss of profits, business interruption, loss of information, and the like, incurred by another party arising out of an IO, even if such party has been advised of the possibility of such damages.

This section means that for the most part, the Media Company liability under an IO is restricted to direct damages. Any party cannot be held liable for things such as "brand damage" or "lost profits." This is significant, because, for example, either party does not want to be exposed to millions of dollars of damages if an Ad appears in a chat room where someone types something obscene. Discuss this section with legal counsel.

## **XII: NON-DISCLOSURE, DATA USAGE AND OWNERSHIP, PRIVACY AND LAWS**

This section has been almost entirely rewritten. Please review carefully.

Data is highly sensitive and valuable to all parties involved in interactive advertising, and products and services such as data analysis tools and behavioral targeting have evolved significantly since Version 2.0. This section has been updated to reflect the current need for balancing transparency and protection of data with the ability to learn and provide insight.

- a. **“Confidential Information”** will include (i) all information marked as “Confidential,” “Proprietary,” or similar legend by the disclosing party (“**Discloser**”) when given to the receiving party (“**Recipient**”); and (ii) information and data provided by the Discloser, which under the circumstances surrounding the disclosure should be reasonably deemed confidential or proprietary. Without limiting the foregoing, Discloser and Recipient agree that each Discloser’s contribution to IO Details (as defined below) shall be considered such Discloser’s Confidential Information. Recipient will protect Confidential Information in the same manner that it protects its own information of a similar nature, but in no event with less than reasonable care. Recipient shall not disclose Confidential Information to anyone except an employee, agent, Affiliate, or third party who has a need to know same, and who is bound by confidentiality and non-use obligations at least as protective of Confidential Information as are those in this section. Recipient will not use Discloser’s Confidential Information other than as provided for in the IO.

This section was changed to more clearly define obligations and to improve the non-disclosure language. In addition, Confidential Information includes a new third category: IO Details (defined below).

- b. Notwithstanding anything contained herein to the contrary, the term “Confidential Information” will not include information which: (i) was previously known to Recipient; (ii) was or becomes generally available to the public through no fault of Recipient; (iii) was rightfully in Recipient’s possession free of any obligation of confidentiality at, or prior to, the time it was communicated to Recipient by Discloser; (iv) was developed by employees or agents of Recipient independently of, and without reference to, Confidential Information; or (v) was communicated by Discloser to an unaffiliated third party free of any obligation of confidentiality. Notwithstanding the foregoing, the Recipient may disclose Confidential Information of the Discloser in response to a valid order by a court or other governmental body, as otherwise required by law or the rules of any applicable securities exchange, or as necessary to establish the rights of either party under these Terms; provided, however, that both Discloser and Recipient will stipulate to any orders necessary to protect such information from public disclosure.
- c. As used herein the following terms shall have the following definitions:

In this section, we are describing several categories of Confidential Information for which there will be varying degrees of usage restrictions.

- i. **“User Volunteered Data”** is personally identifiable information collected from individual users by Media Company during delivery of an Ad pursuant to the IO, but only where it is expressly disclosed to such individual users that such collection is solely on behalf of Advertiser.

The group debated how to define User Volunteered Data and decided to restrict the definition to personally identifiable information for a few reasons. Mainly, the intent of the

definition and its usage later in the document was to cover users filling out information forms hosted by the Media Company. Information entered into forms through Ads would generally not be controlled or monitored by Media Company unless hosted by Media Company (which is becoming very rare in most display campaigns.)

- ii. **“IO Details”** are details set forth in the IO but only when expressly associated with the applicable Discloser, including, but not limited to, Ad pricing information, Ad description, Ad placement information, and Ad targeting information.

IO Details are all information specifically written in an IO and are “Confidential Information” under Section XII(a). For example, Advertiser (and Agency) cannot release Media Company’s pricing information. Similarly, Media Company cannot tell a competitor of Advertiser about that Advertiser’s placement details.

- iii. **“Performance Data”** is data regarding a campaign gathered during delivery of an Ad pursuant to the IO (*e.g.*, number of impressions, interactions, and header information), but excluding Site Data or IO Details.

Performance Data refers to all data that comes from analysis and performance metrics, including the number of clicks and interactions. It is important to note the Site Data and IO Details exclusion. Simply put, it means that this bucket includes clicks and impressions that have been stripped of all information that can identify the Media Company. Read more about the details of this definition and the implication of this exclusion in the notes on Section X(c)(iv) below.

- iv. **“Site Data”** is any data that is (A) preexisting Media Company data used by Media Company pursuant to the IO; (B) gathered pursuant to the IO during delivery of an Ad that identifies or allows identification of Media Company, Media Company’s Site, brand, content, context, or users as such; or (C) entered by users on any Media Company Site other than User Volunteered Data.

Site Data is data provided or “employed” by Media Company including those targeting parameters specified in the IO such as behavioral targeting (or other) segments, user registration information or Site brand info. To the extent that the referrer URL or other portions of the header information exposes Media Company’s Site, brand, users, or services/content/context it is not usable by Advertiser.

It is important to note here that (B) covers the data that most concerns media companies when considering the ability to harvest users and their data for retargeting or other purposes. (A) covers data collected prior to the campaign. (C) covers user inputted information for both the Media Company and the user themselves, especially if the information is considered PII. The language in (B), however, provides the broadest definition of what Site Data includes, and clearly states that ANY data gathered pursuant to the IO that can be linked to a Media Company is part of Site Data, whether it is clicks, impressions, etc. The linking is critical to understanding the scope of this data bucket. Only when an impression or some other piece of data is linked to Media Company name, brand, content, context, etc, does it fall within Site Data. Looking at the usage restrictions set forth in Section XII(d)(i)., If a user views or clicks or otherwise interacts with an ad and that interaction (even if it is an impression) is linked to Media Company related information and then used for retargeting or profile building, it would be a breach of contract. However, if an Advertiser/Agency needs a report on clicks, impressions, interactions, etc, there is no restriction on that, nor is there a restriction on any usage of data when it is unlinked from Media Company-related data. Paragraph (d)(i) restricts the Repurposing of Site Data and how it must be disclosed but goes no further, allowing analysis, reporting, and any other internal Advertiser activities. Paragraph (h) also clearly states that Agencies can carry on normal media planning operations as long as those do not entail Repurposing.

- v. **“Collected Data”** consists of IO Details, Performance Data, and Site Data.

We are calling Section XII(c)(ii), (c)(iii), and (c)(iv) combined Collected Data.

- vi. **“Repurposing”** means retargeting a user or appending data to a non-public profile regarding a user for purposes other than performance of the IO.

Repurposing means storing Site Data and/or IO Details and using or creating products with them. For example “retargeting” or building profiles from multiple IO data would be considered Repurposing.

- vii. **“Aggregated”** means a form in which data gathered under an IO is combined with data from numerous campaigns of numerous Advertisers and precludes identification, directly or indirectly, of an Advertiser.

d. Use of Collected Data

- i. Unless otherwise authorized by Media Company, Advertiser will not: (A) use Collected Data for Repurposing; provided, however, that Performance Data may be used for Repurposing so long as it is not joined with any IO Details or Site Data; (B) disclose IO Details of Media Company or Site Data to any Affiliate or Third Party except as set forth in Section XII(d)(iii).

It is the Media Companies' firm belief that Repurposing based on any Media Company-related data, including context, should by default not be allowed. This is based on the belief that advertising-based media outlets rely on the ability to successfully attract and monetize valuable audiences for advertisers. The practice of Repurposing users based on Media Company-related data, including context, fundamentally compromises a Media Company's ability to do so no matter how few or many users are “harvested” in this way. A Media Company cannot continue to create and support content in a profitable fashion if their most valuable assets are regularly harvested, and therefore cannot continue to attract the users so valuable to advertisers. This can create a reinforcing negative trend that seriously threatens a Media Company and the availability of free content on the Internet. This is not an outcome that aids any party in the digital marketing ecosystem. If user harvesting and profiling based on Media Company-related information is intended by an Agency, then the relationship becomes one between a data provider and a data licensor or buyer which must be governed by a compensation model not currently reflected in media inventory valuations. This data provider-buyer relationship is not meant to be dealt with as a default in these Ts&Cs, as the document is clearly meant to govern Media Company-Advertiser media buys. Thus, by including the phrase, “Unless otherwise authorized by Media Company” any Agency/Advertiser can negotiate as a data buyer instead of a media buyer through whichever means suits them, but as a default an Agency/Advertiser may not use Media Company-related information for Repurposing.

Advertiser can use data which is not included in the definition of Collected Data for any legally allowed purpose (e.g., user IP address, frequency capping, etc.). Advertiser can also use Collected Data except as specifically restricted in Section XII(d)(i) above. For example, an Agency or Advertiser cannot buy a behavioral targeting segment and use the cookies collected from that IO to retarget those users based on that segment, whether or not the segment was bought from one Media Company or many and then aggregated. However, an Advertiser can retarget a user who has seen one version of an Ad and serve them a different version of that Ad under a particular campaign or IO when they see that user later, as long as the decision is not based on Media Company-related data. In addition, Advertiser cannot share much of the data with other parties without separate agreements.



The value of performance metrics and the data they produce is extremely important, except where information such as brand name, behavioral targeting buckets, and media plan strategies will be used in a way that may compromise either the Advertiser or the Media Company. As a result, internal use is permitted, but these metrics cannot be shared with third parties except and only to the extent the third party is performing services only for the Advertiser under the IO. For example, an Advertiser may compare the performance of an Ad campaign across several Media Company sites for internal use.

- ii. Unless otherwise authorized by Agency or Advertiser, Media Company will not: (A) use or disclose IO Details of Advertiser, Performance Data, or a user's recorded view or click of an Ad, each of the foregoing on a non-Aggregated basis, for Repurposing or any purpose other than performing under the IO, compensating data providers in a way that precludes identification of the Advertiser, or internal reporting or internal analysis; or (B) use or disclose any User Volunteered Data in any manner other than in performing under the IO.

Similarly, Media Company can use data other than IO Details for any purpose (e.g., inventory forecasting, optimization, etc.). Media Company cannot create profiles, products such as placement packages, etc, based on Advertiser or Advertiser's brands without permission of Advertiser. For example, a Media Company can create a sales product for targeted to auto advertisers based on successful results from a number of auto advertisers, but it cannot create a sales product based on a single auto advertiser.

This does not limit a Media Company's ability to gain insight into its users' needs and practices. However, the analysis and any development of services must be done with inputs that fully obscure, even indirectly, an Advertiser, Ad or such Advertiser's brand. For example, a product cannot be created and named in such a way that enables anyone to infer a brand (e.g., users who have clicked on ads for mobile phones that use Apple operating systems). Additionally, if, for example, it is known that a Media Company has only one auto brand advertising on its site and it develops a behavioral targeting segment called "auto enthusiasts" based solely or substantially on user interactions with ads from that one auto brand, it would be a breach of contract.

In addition Media Company cannot share Performance Data associated with IO Details with other parties except as may be necessary to perform the services in the IO for and on behalf of the Advertiser. Media Company may compare the performance of several different Ads on its Site for internal use, but may not share this data with third parties except in the aggregate.

The language in Section XII(d)(i) and (d)(ii) is necessary to protect both sides' brand value. The two paragraphs' goals, as with the entire document, are not to disrupt the status quo today but to effectively reach a more comfortable, trusting balance between parties, enabling deeper insight and protecting sensitive and valuable data.

- iii. Advertiser, Agency, and Media Company (each a "**Transferring Party**") will require any Third Party or Affiliate used by the Transferring Party in performance of the IO on behalf of such Transferring Party to be bound by confidentiality and non-use obligations at least as restrictive as those on the Transferring Party, unless otherwise set forth in the IO.

In the Taskforce discussions, both sides spoke of the need for greater transparency on the usage of data within each other's "black boxes." However, through further discussion the most important concept was creating trust around the use of third parties. The concern was that a third party could somehow become a loophole in the non-use obligations. The additional burden of disclosing third parties on an IO and the challenge of defining which third parties were exempt from disclosure and which were required was deemed secondary to the assurance that any third party being used by an Advertiser, Agency, or Media Company would abide by the same rules as the company employing its services.

If, in the future, it is found that this language is allowing harm by a third party, then it will need to be revisited.

- e. All User Volunteered Data is the property of Advertiser, is subject to the Advertiser's posted privacy policy, and is considered Confidential Information of Advertiser. Any other use of such information will be set forth in the IO and signed by both parties.

There is no discussion here of Site Data or Performance Data being owned by either Media Company or Advertiser. This decision was made because of the intertwined nature of the relationship between an Ad, the Site it is on, and the resulting metrics. The group was not able to reach consensus on an effective way to define ownership using the agreed upon data bucket structure. The bucket definitions that have been created in this document were created to restrict usage. Unfortunately, when paired with the idea of ownership, the definitions could not be reconciled with the new ownership requirements. Many in the group also felt that the usage restrictions outlined in Section XII were meant from the beginning to solve the concerns of the owners and creators of data. Intellectual property law and site Policies will have to govern in some way until all sides can develop a method to accurately and effectively define ownership of the large amount of complex and discreet data involved.

- f. Agency, Advertiser, and Media Company will post on their respective Web sites their privacy policies and adhere to their privacy policies, which will abide by applicable laws. Failure by Media Company, on the one hand, or Agency or Advertiser, on the other, to continue to post a privacy policy, or non-adherence to such privacy policy, is grounds for immediate cancellation of the IO by the other party.
- g. Agency, Advertiser, and Media Company will at all times comply with all federal, state, and local laws, ordinances, regulations, and codes which are applicable to their performance of their respective obligations under the IO.
- h. Agency will not: (i) use Collected Data unless Advertiser is permitted to use such Collected Data, nor (ii) use Collected Data in ways that Advertiser is not allowed to use such Collected Data. Notwithstanding the foregoing or anything to the contrary herein, the restrictions on Advertiser in Section XII(d)(i) shall not prohibit Agency from (A) using Collected Data on an Aggregated basis for internal media planning purposes only (but not for Repurposing), or (B) disclosing qualitative evaluations of Aggregated Collected Data to its clients and potential clients, and Media Companies on behalf of such clients or potential clients, for the purpose of media planning.

Language above is meant to allow an Agency to perform all duties with regard to its Advertiser, including media planning, analysis, insight creation, etc, based on (i) and (ii) above. Outside of its direct obligations to a single Advertiser, (A) and (B) above explicitly allow the sharing of knowledge across Advertisers for the purpose of improving an Agency's offerings (including media planning), employee knowledge, etc.

### **XIII. THIRD PARTY AD SERVING AND TRACKING (Applicable if Third Party Ad Server is used)**

- a. Ad Serving and Tracking. Media Company will track delivery through its ad server and, provided that Media Company has approved in writing a Third Party Ad Server to run on its properties, Agency will track delivery through such Third Party Ad Server. Agency may not substitute the specified Third Party Ad Server without Media Company's prior written consent.

The Agency must specify on the IO what 3<sup>rd</sup> party ad server they are going to use and that ad server must be pre-approved by the Media Company. The Agency can not change the 3<sup>rd</sup> party ad server without written consent from the Media Company. This paragraph has nothing to do with the next paragraph on Controlling Measurement.

- b. Controlling Measurement. If both parties are tracking delivery, the measurement used for invoicing advertising fees under an IO (“**Controlling Measurement**”) will be determined as follows:

- i. Except as specified in Section XIII(b)(iii), the Controlling Measurement will be taken from an ad server that is certified as compliant with the IAB/AAAA Ad Measurement Guidelines (the “**IAB/AAAA Guidelines**”).

If either the Media Company or the Agency are using an ad server that has been audited and certified as compliant to the various industry Measurement Guidelines (a list can be found here: [http://www.iab.net/iab\\_products\\_and\\_industry\\_services/508676/guidelines](http://www.iab.net/iab_products_and_industry_services/508676/guidelines)) that ad server must be used to produce the revenue-event (e.g., impressions) numbers on an invoice.

- ii. If both ad servers are compliant with the IAB/AAAA Guidelines, the Controlling Measurement will be the Third Party Ad Server if such Third Party Ad Server provides an automated, daily reporting interface which allows for automated delivery of relevant and non-proprietary statistics to Media Company in an electronic form that is approved by Media Company; provided, however, that Media Company must receive access to such interface in the timeframe set forth in Section XIII(c), below.

In the case where both the Media Company and the Agency are using compliant ad servers, the Agency ad server will be the default for controlling measurement if and only if the Agency server can provide an automated reporting interface to the Media Company. The language here, “automated, daily reporting interface which allows for delivery of relevant and non-proprietary statistics,” is meant to describe the IAB's standardized, automated reporting system outlined in the Impression Exchange Solution document found here: [http://www.iab.net/iab\\_products\\_and\\_industry\\_services/508676/508858/ies](http://www.iab.net/iab_products_and_industry_services/508676/508858/ies). These Terms, however, may outlast this single standard, and not specifically naming the current industry solution allows for other systems or improvements to be developed. The automated delivery of standardized 3<sup>rd</sup> party reports is essential to the ability of Media Companies to detect discrepancies on a daily basis across all active campaigns and input those numbers into billing systems in a timely fashion. It is important to understand that giving a Media Company access to the Web-based reporting system, as is the typical current procedure, does not satisfy the requirement of “automated delivery... in an electronic form” because it requires manual login and a manual report delivery request. The automated reporting interface must also be approved by the Media Company, protecting against the creation of a tool that does not, for instance, satisfy functional requirements such as those set out in the IAB Impression Exchange Solution.

- iii. If neither party’s ad server is compliant with the IAB/AAAA Guidelines or the requirements in subparagraph (ii), above, cannot be met, the Controlling Measurement will be based on Media Company’s ad server, unless otherwise agreed by Agency and Media Company in writing.

- c. Ad Server Reporting Access. As available, the party responsible for the Controlling Measurement will provide the other party with online or automated access to relevant and non-proprietary statistics from the ad server within one (1) day after campaign launch. The other party will notify the party with Controlling Measurement if such party has not received such access. If such online or automated reporting is not available, the party responsible for the Controlling Measurement will provide placement-level activity reports to the other party in a timely manner, as mutually agreed to by the parties or as specified in Section IV(b), above, in the case of Ads being served by Media Company. If both parties have tracked the campaign from the beginning and the party responsible for the Controlling Measurement fails to provide such access or reports as described herein, then the other party may use or provide its ad server statistics as the basis of calculating campaign

delivery for invoicing. Notification may be given that access, such as login credentials or automated reporting functionality integration, applies to all current and future IOs for one or more Advertisers, in which case new access for each IO is not necessary.

The party with Controlling Measurement as set out in Section XIII(b) above must give reporting access to the other party, whether that is through an online manual tool or an automated system. The other party must be able to compare the Controlling Measurement numbers with their own in order to decrease inventory risk and campaign errors through detection of discrepancies. If access is not granted by the day after campaign launch, notification must be sent in a timely fashion. If access is not granted, even after notification, the other party may use its own numbers on the invoice. This does not preclude invoice and impression reconciliation but instead allows for the operational procedures of billing to continue unhindered by lack of access. It is important not to confuse XIII(c) with the decision logic laid out in Section XIII(b)(i-iii). Once the Controlling Measurement party has been decided through Section XIII(b), whether that includes an automated delivery solution or not, access must be granted by such party.

- d. Discrepant Measurement. If the difference between the Controlling Measurement and the other measurement exceeds 10% over the invoice period and the Controlling Measurement is lower, the parties will facilitate a reconciliation effort between Media Company and Third Party Ad Server measurements. If the discrepancy cannot be resolved and a good faith effort to facilitate the reconciliation has been made, the Agency reserves the right to either:
  - i. Consider the discrepancy an under-delivery of the Deliverables as described in Section VI(b), whereupon the parties will act in accordance with that Section, including the requirement that Agency and Media Company make an effort to agree upon the conditions of a makegood flight and delivery of any makegood will be measured by the Third Party Ad Server, or
  - ii. Pay invoice based on Controlling Measurement-reported data, plus a 10% upward adjustment to delivery.

There are several small changes in the discrepancy resolution language here. Most changes have been for consistency with "Controlling Measurement" language used in XIII(b) and (c). However, Version 2.0 only required reconciliation when the media company numbers were higher by 10% or more. The language now allows for reconciliation regardless of which party's numbers are higher. This is seen as a more balanced position.

- e. Media Company will make reasonable efforts to publish, and Agency will make reasonable efforts to cause the Third Party Ad Server to publish, a disclosure in the form specified by the AAAA and IAB regarding their respective ad delivery measurement methodologies with regard to compliance with the IAB/AAAA Guidelines.
- f. Where Agency is using a Third Party Ad Server and that Third Party Ad Server cannot serve the Ad, Agency will have a one-time right to temporarily suspend delivery under the IO for a period of up to 72 hours. Upon written notification by Agency of a non-functioning Third Party Ad Server, Media Company will have 24 hours to suspend delivery. Following that period, Agency will not be held liable for payment for any Ad that runs within the immediately following 72-hour period until Media Company is notified that the Third Party Ad Server is able to serve Ads. After the 72-hour period passes and Agency has not provided written notification that Media Company can resume delivery under the IO, Advertiser will pay for the Ads that would have run, or are run, after the 72-hour period but for the suspension, and can elect Media Company to serve Ads until the Third Party Ad Server is able to serve Ads. If Agency does not so elect for Media Company to serve the Ads until Third Party Ad Server is able to serve Ads, Media Company may use the inventory that would have been otherwise used for Media Company's own advertisements or advertisements provided by a Third Party.

- g. Upon notification that the Third Party Ad Server is functioning, Media Company will have 72 hours to resume delivery. Any delay in the resumption of delivery beyond this period, without reasonable explanation, will result in Media Company owing a makegood to Agency.

#### **XIV. MISCELLANEOUS**

- a. Media Company represents and warrants that Media Company has all necessary permits, licenses, and clearances to sell the Deliverables specified in the IO subject to these Terms. Advertiser represents and warrants that Advertiser has all necessary licenses and clearances to use the content contained in the Ads and Advertising Materials as specified in the IO and subject to these Terms, including any applicable Policies.

This section specifically refers to the Media Company's ability "to sell the inventory" and the Advertiser's rights to use the content and is not a representation or warranty for all the content on the site.

- b. Neither Agency nor Advertiser may resell, assign, or transfer any of its rights or obligations hereunder, and any attempt to resell, assign or transfer such rights or obligations without Media Company's prior written approval will be null and void. All terms and conditions in these Terms and each IO will be binding upon and inure to the benefit of the parties hereto and their respective permitted transferees, successors, and assigns.
- c. Each IO (including the Terms) will constitute the entire agreement of the parties with respect to the subject matter thereof and supersede all previous communications, representations, understandings, and agreements, either oral or written, between the parties with respect to the subject matter of the IO. The IO may be executed in counterparts, each of which will be an original, and all of which together will constitute one and the same document.
- d. In the event of any inconsistency between the terms of an IO and these Terms, the terms of the IO will prevail. All IOs will be governed by the laws of the State of [\_\_\_\_\_]. Media Company and Agency (on behalf of itself and Advertiser) agree that any claims, legal proceedings, or litigation arising in connection with the IO (including these Terms) will be brought solely in [\_\_\_\_\_], and the parties consent to the jurisdiction of such courts. No modification of these Terms or any IO will be binding unless in writing and signed by both parties. If any provision herein is held to be unenforceable, the remaining provisions will remain in full force and effect. All rights and remedies hereunder are cumulative.
- e. Any notice required to be delivered hereunder will be deemed delivered three days after deposit, postage paid, in U.S. mail, return receipt requested, one business day if sent by overnight courier service, and immediately if sent electronically or by fax. All notices to Media Company and Agency will be sent to the contact as noted in the IO with a copy to the Legal Department. All notices to Advertiser will be sent to the address specified on the IO.
- f. Sections III, VI, X, XI, XII, and XIV will survive termination or expiration of these Terms, and Section IV will survive for 30 days after the termination or expiration of these Terms. In addition, each party will promptly return or destroy the other party's Confidential Information upon written request and remove Advertising Materials and Ad tags upon termination of these Terms.