

**ASSOCIATION OF NATIONAL ADVERTISERS  
NON-DISCLOSURE AGREEMENT TEMPLATE  
VERSION 1.0  
October 12, 2018**

This Association of National Advertisers (ANA) Non-Disclosure Agreement (NDA) Template (collectively, the NDA Template) is a non-disclosure agreement template for use between an auditor (Auditor) and a media buying agency (Agency). It can be used as an exhibit to the master services Agreement between an advertiser (Advertiser) and its Agency. This NDA Template should therefore be considered in conjunction with the [ANA Master Media Buying Services Agreement v2.0](#) released on July 10, 2018 (MSA Template).

The purpose of an NDA in the context of an Agency audit is to give the Agency and Auditor comfort that each party will protect the other party's confidential information and to give the parties a cause of action against each other in the event of a breach of the NDA. The NDA should only be entered into between the Auditor and the Agency and only if confidential information of the Agency or Auditor is likely to be disclosed in the course of the audit. The Advertiser should consider making the NDA Template a part of its master services agreement with the Agency at the outset to avoid later delay when the Advertiser decides to audit the Agency. The NDA Template does not address and should not address the exchange of confidential information between the Agency and the Advertiser or the Advertiser and the Auditor. Such obligations between the Advertiser and the Agency should be addressed in the master services agreement. Confidentiality between the Advertiser and Auditor should be addressed in its own agreement as well.

The NDA Template does not go into detail about the scope or description of the audit as it is addressed in the MSA Template by virtue of the Audit section and definition of Records contained in the MSA Template. The NDA Template intentionally omits an assignment provision because the services provided in connection with the NDA (i.e., the audit) are being provided to benefit the Advertiser, not the Agency. Thus, it should be up to the Advertiser to decide whether the Auditor can assign its right under the separate Advertiser/Auditor audit agreement. Whether the Agency can assign any rights or obligations should be set forth in the Advertiser/Agency master services agreement. Furthermore, in the NDA Template both the Auditor and Agency have rights with respect to having the receiving party delete or destroy the disclosing party's confidential information (subject to certain carve outs) once the audit is complete.

There is no obligation on ANA members to use the NDA Template. Each member is free to negotiate whatever terms and conditions such member deems appropriate. The ANA makes no representations or warranties as to the content of the NDA Template. Anyone using the NDA Template is advised to consult with experienced legal counsel before adopting the NDA Template in whole or in part. Furthermore, if an Advertiser has a preferred Auditor that it works with, then it should obtain the Auditor's feedback on the NDA Template before including it as a form to the Advertiser/Agency master services agreement.

The ANA would like to acknowledge the work of its General Counsel, Reed Smith LLP, in preparing the NDA, particularly Douglas Wood, Keri Bruce, and Michael Isselin. Questions may be directed to Bill Duggan, ANA, 10 Grand Central, 155 East 44<sup>th</sup> Street, New York, NY 10017, telephone: + (212) 455-8010, email: [bduggan@ana.net](mailto:bduggan@ana.net) or to Keri S. Bruce (telephone: +1 (212) 549-0220, email: [kbruce@reedsmith.com](mailto:kbruce@reedsmith.com)) or Douglas Wood (telephone: +1 (212) 549-0377, email: [dwood@reedsmith.com](mailto:dwood@reedsmith.com)), Reed Smith LLP, 599 Lexington Avenue, New York, New York 10022.

The ANA would like to thank the consultants and other industry experts who provided insight and recommendations to improve the NDA Template, including AdFin, Ad | Optics, Cortex Media, Ebiquity, FirmDecisions, KPMG, MediaLink, PJJ Media LLC, and Ron Pullem.

Please note that the suggested terms in the NDA Template are not intended to represent the only methodology by which the contractual relationship between an Advertiser, its Agency, and Auditor can be addressed. The NDA Template does, however, highlight issues that should be openly discussed and resolved in order to ensure transparency and consequent stability in any relationship.

Bracketed provisions highlighted in yellow are items that require insertions or should be considered, completed, and/or modified in utilizing the NDA Template. This annotated version of the NDA Template is also provided in a clean format.

## Non-Disclosure Agreement

between

[Agency] and [Auditor]

This Non-disclosure Agreement (the "**Agreement**") is entered into by and between [Insert name of Auditor] ("**Auditor**"), with offices located at [insert address], and [insert name of Agency] (the "**Agency**"), with offices located at [insert address].

Whereas Agency entered into a Master Media Buying Services Agreement (the "**Master Agreement**") with [Advertiser Name] (the "**Advertiser**") dated [effective date of Master Agreement] pursuant to which the Advertiser is entitled to audit certain Records (as defined in the Master Agreement) (the "**Audit**"). Whereas the Advertiser has appointed Auditor to conduct an Audit in accordance with the terms of the Master Agreement. The parties agree that this Agreement shall govern the disclosure of Confidential Information between Agency and Auditor as hereinafter defined. Capitalized terms used but not defined herein shall have the meaning set forth in the Master Agreement.

The parties hereby agree as follows:

1. Each party acknowledges that it may receive or otherwise become aware of Confidential Information belonging to the other party whether by virtue of or in the course of the Audit.
2. "**Confidential Information**" means information, in oral, tangible or electronic form relating to either party, its Affiliates (as defined in the Master Agreement), employees and/or customers, businesses, business plans or affairs, which information is proprietary and confidential to such disclosing party ("**Disclosing Party**"), including materials protected by the Defend Trade Secrets Act. Confidential Information will include any document marked specifically as confidential information of the Disclosing Party (i.e., not Advertiser confidential information), or any information which the receiving party ("**Receiving Party**") has been informed is confidential or which the Receiving Party ought reasonably to expect the Disclosing Party would regard as confidential.
3. Confidential Information shall not include information that:
  - (a) at the time of receipt by the Receiving Party is in the public domain;
  - (b) subsequently comes into the public domain through no fault of the Receiving Party or its employees;

**Commented [Comments1]:** This Agreement does not need to go into more detail about the scope or description of the Audit. The Master Agreement should address the audit scope by virtue of the Audit section and definition of Records.

**Commented [Comments2]:** The Confidential Information covered by this Agreement is only the Confidential Information of the Agency and the Confidential Information of the Auditor. The Advertiser's confidential information is addressed in the Advertiser's agreements with the Agency and the Auditor. This provision is very important so that there is no confusion that Advertiser's confidential information is not covered.

- (c) is lawfully received by the Receiving Party from a third party on an unrestricted basis;
- (d) can be demonstrated to have already been known to the Receiving Party before receipt hereunder; or
- (e) is independently developed by the Receiving Party without use of or reliance on the Disclosing Party's Confidential Information.

In addition, with respect to Advertiser confidential information (including without limitation, Deliverables and media rates), both parties acknowledge and agree that their treatment of any such information disclosed that may be considered Advertiser confidential information, shall be governed by their respective agreements with the Advertiser. In order to prevent confusion about whether certain Records are Agency Confidential Information or Advertiser confidential information, Agency shall identify on Exhibit A hereto, subject to Advertiser's approval, the Records or type of Records which will or will likely be disclosed in the Audit and which constitute Agency Confidential Information.

4. The Receiving Party agrees to take reasonable measures to protect the confidentiality of the Disclosing Party's Confidential Information that it receives, but no less than the standard of care the Receiving Party applies to its own Confidential Information and, except as requested or directed by the Disclosing Party, or as permitted in this Agreement or the Master Agreement, the Receiving Party will not disclose the Disclosing Party's Confidential Information to third parties without the Disclosing Party's prior written consent.

5. The Auditor may disclose the Agency's Confidential Information (i) to the Advertiser in furtherance of the Audit [and in a manner consistent with Section 6 below]; and (ii) to its subsidiaries or other member firms or within its global network of separate and independent firms and other parties that the Auditor engages to assist with its back office business operations (e.g., IT support, outsourcers); and/or (iii) for internal, administrative and/or regulatory compliance purposes who reasonably require access to such information for purposes of the Audit (collectively, "Auditor Representatives"); provided that such Auditor Representatives have been informed of the confidential nature of the Agency's Confidential Information and agree to be bound by confidentiality obligations to the Auditor consistent with the terms hereof. Notwithstanding the foregoing, the Auditor shall be responsible for all Confidential Information provided to any Auditor Representatives. Notwithstanding the foregoing, as part of the Audit, the Auditor and the Auditor Representatives may use media pricing and audience data relating to the Advertiser provided to the Auditor by or on behalf of the Advertiser (including, without limitation, data supplied by the Agency) in an aggregated and anonymised form to form part of a database/pool to be used to provide comparative auditing or benchmarking services to the Advertiser and other customers of Auditor.]

6. Consistent with the Master Agreement, Auditor will not disclose any of the following Agency Confidential Information without the Agency's consent:

- (a) [information relating to the Agency's other clients (unless such disclosure is in anonymized form and is necessary to confirm compliance with the Master Agreement);]
- (b) [any salary, payroll and personnel records (other than timesheets)]; or
- (c) [Overhead.]

**Commented [Comments3]:** Identifying which Records are Agency Confidential Information versus Advertiser confidential information should help alleviate confusion in the future. This is particularly important when it comes to Records which include data, such as media rates, agency fees and campaign performance data where there may be disagreement. Advertisers and their Agencies should discuss and address these concepts before the Auditor and Agency finalize the NDA. The chart in Exhibit A should be completed by the Agency at the beginning of the Audit.

**Commented [Comments4]:** If the audit relates to benchmarking, and provided that the Advertiser agrees that the Auditor can add information collected during the audit to a data pool, then this provision might need to be added if this information would not be considered a Deliverable under the Master Agreement between the Advertiser and the Agency.

**Commented [Comments5]:** Some Advertisers might agree with their Agency that there are certain Records that the Auditor may see, but which the Auditor may not disclose to the Advertiser. These materials can be addressed here. This Section should be omitted if there are no such items noted in the Master Agreement.

Nothing in this Section 6 shall prevent the Auditor from recalculating amounts pertaining to the Advertiser's account, and disclosing the amount and nature of any discrepancy to the Advertiser, it being understood that the Auditor will endeavour to disclose the minimum necessary for the Audit.

7. Notwithstanding anything to the contrary, neither party will be in breach of this Agreement for disclosing the other party's Confidential Information in circumstances where such disclosure is required by law, regulation or order of a competent authority, provided that the owner of the Confidential Information is given reasonable advance notice (if legally permissible) of the intended disclosure and a reasonable opportunity to challenge the same.
8. All of the Disclosing Party's Confidential Information provided to the Receiving Party and any copies thereof or derivatives thereof in whatever form shall be returned to the Disclosing Party or destroyed upon request or upon completion or termination of the Audit. Notwithstanding the foregoing or anything to the contrary, the Auditor may retain its work papers, the Advertiser audit deliverables and the Agency's Confidential Information to comply with its document retention policies or automatic electronic archiving and back-up procedures, applicable law, rule, regulation or professional standards. Any information so retained shall be maintained in confidence in accordance with this Agreement.
9. This Agreement shall be governed and construed pursuant to the laws of the state of [●], without giving effect to any conflict-of-law provisions that would require the laws of another jurisdiction to apply and the parties irrevocably submit to the exclusive jurisdiction of the [●] courts in respect of any dispute (contractual or non-contractual) arising from it.
10. The Auditor's confidentiality obligations under this Agreement will terminate [three (3)] years from date of execution.
11. Each party's aggregate liability to the other party for all claims, losses, liabilities or damages in connection with this Agreement or its subject matter, whether as a result of breach of contract, tort (including negligence) or otherwise, regardless of the theory of liability asserted, is limited to no more than [insert amount \$XXX]. In addition, neither party will be liable to the other party in any event for lost profits, consequential, indirect, punitive, exemplary or special damages. Further, neither party shall have any liability to the other party arising from or relating to any third party hardware, software, information or materials selected or supplied by or on behalf of the other party.
12. The parties agree that this Agreement does not modify the existing agreement(s) between the Agency and the Advertiser and the existing agreement(s) between the Auditor and the Advertiser.
13. If all or any portion of a provision of this Agreement is found to be unenforceable or invalid, the remainder of such provision and this Agreement shall be enforced to the maximum extent permitted by law.
14. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one single document between the parties. Counterparts may be exchanged by facsimile, or attached as a pdf, jpeg, or similar file type to an email.
15. This Agreement represents the entire agreement between the parties hereto with regard to the subject matter hereof, and supersedes any prior understandings, proposals or agreements, if any,

between the Auditor and the Agency concerning either party's Confidential Information as it relates to the Audit. Any changes to this Agreement must be agreed by the parties in writing.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed on its behalf by its duly authorized representative and is effective as of the later of the dates set forth below (the "**Effective Date**").

**[Auditor]:**

**[Agency]:**

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

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

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

EXHIBIT A

Record/Record Category	Description