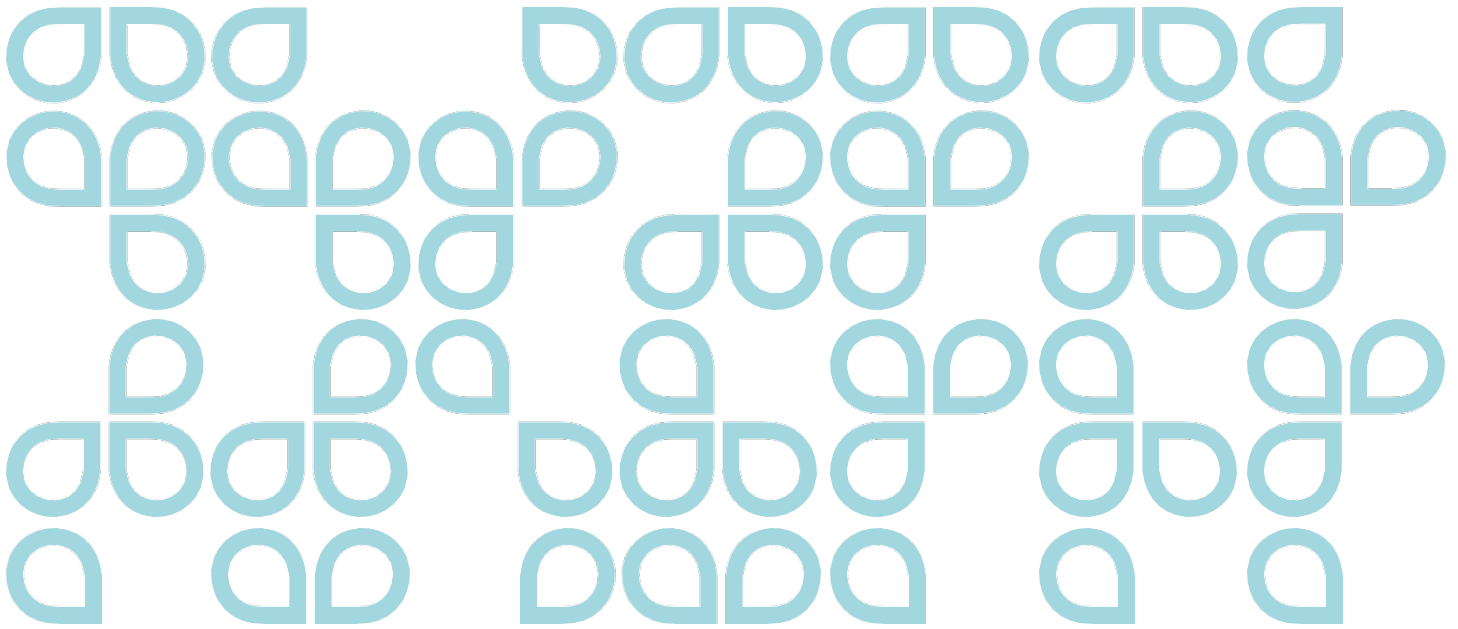




PERFORMANCE **MARKETING** ASSOCIATION



## Guide to Retailer Affiliate Agreements

*Updated by the PMA Compliance Council 2023*

## Purpose

The purpose of this updated guide is to provide best practices to advertisers, specifically retailers, on establishing affiliate marketing agreements for the changing online environment. This document is to be used to inform the intended audience of comprehensive marketing practices and elements to be considered in affiliate marketing agreements. This guide does not constitute legal advice; it is strongly recommended that involved parties consult legal advice to complete final agreements.

## Audience

### Primary

- Retailers (Affiliate Program Managers, Directors of Marketing)
- Agencies and Affiliate Managers supporting Retailers

### Secondary

- Publishers who work with Retailers

## Perspective & Considerations

Retailer advertisers have unique business models that can impact affiliate programs in ways different than other types of advertisers. It is beneficial to understand some of these attributes and situations:

1. Retailers often deal with product brands separate from the retailer's brands. As such, they may be constrained by parameters outside their control.
2. For example, some brands provided by a retailer might be ineligible for promotion within the channel.
3. Pure online retailers and retailers that also have brick-and-mortar stores can have different advertising, budget, product, pricing, availability, margin, compliance, and program policies, tax implications and approaches. It is important to understand the differences.
4. Pure online retailers may not allow affiliate partnerships to exist in certain states where laws would require them to collect sales tax.
5. The representation and protection of retailers' brand names and trademarks may impact the formulation of the affiliate programs.

## Trends

Increasingly, brick-and-mortar stores are blending their online and offline advertising budgets. They are responding to the blended experiences consumers have between online, offline, and mobile commerce, with concerted efforts to reach consumers across whatever devices or interactions they have with the retailers. Apart from traditional publishers such as content sites or cashback programs, social media influencers are rapidly taking on a growing portion of the affiliate marketing space.

## Best Practices

It is strongly recommended to develop affiliate agreements that are thorough and detailed, without ambiguity. This is an important approach to not only protect an advertiser's program, but it is an effective way to communicate with publishers, who in turn can move forward with confidence. A strong agreement is an extremely effective way to mitigate against problems and to attract publishers. This guide does not constitute legal advice; it is strongly recommended that involved parties consult legal advice to complete final agreements.

The following includes elements to thoroughly consider when creating agreements between retailer advertisers and affiliate publishers.

### Paid Search and Display Advertising

#### 1. Paid Search

Because paid search is so popular and competitive, and the rules governing it are complex, it is imperative that advertisers thoroughly detail acceptable terms of use in their affiliate agreements. Publishers can provide added value through enhanced search engine visibility, which an advertiser might not otherwise attain. Lack of clarity regarding paid search policies can drain time resources from both advertisers and publishers, derailing program momentum.

- Does the program permit publishers to advertise via paid search?
- Are there specific keywords that are to be excluded?
- Are there non-compete parameters?
- Does the advertiser require that these terms be negative matched?
- Are there different policies for different search engines?
- Are publishers allowed to promote the advertiser while bidding against a competitor (known as competitive brand bidding)?

#### 2. Display

- Direct Linking
  - Are publishers permitted to "direct link" from purchased advertisements to the advertiser's site (must a publisher-controlled landing page serve as an interstitial before visitors arrive at the advertiser's site)?
  - If direct linking is allowed, is it permissible for the publisher to use the advertiser's URL as the display URL for the paid search ad (also referred to as ad-hijacking)?
- Link Cloaking
  - Must the link referrer be exposed?
  - What specific rules govern this activity?
- Adherence to Editorial Guidelines provided by advertising network
  - Is this a requirement for engaging in paid search or display advertising?

### Software and Toolbar Advertising Restrictions

A class of publishers who develop software programs allowing consumers to interact with advertisers that can result in a commissionable action. This type of publisher

model can be quite effective and compelling to consumers in their shopping journey but may also attract its own type of fraudulent and non-compliant activity as it may usurp advertiser's own paid marketing efforts, prior publishers' promotional efforts, or take credit for transactions for which the software publisher did little or nothing to earn. Toolbar publishers, a type of software download, alert the consumer to better prices from other advertisers, an offer, or a loyalty/rewards opportunity when the consumer is visiting one of its advertiser sites. These publishers can be roughly grouped as:

1. First party toolbars – Often these are recognizable publisher brands with whom consumers may be familiar from their online shopping experiences, and whose sole purpose is to replicate the offers and deals the consumer could get by going directly through the publisher's site.
2. Bundled toolbars or apps – These are typically distributed through a third-party application, such as a user downloading a search toolbar and receiving a coupon app bundled with the installation, and they are less likely to have a consumer-oriented website. These bundled toolbars may cause unexpected or even unwanted browser behaviors to consumer's shopping journey. Also, it may be difficult to completely uninstall these toolbars and apps once installed.

Application publishers may be first-party based or bundled, but in contrast to toolbars and plug-in apps, these may operate in the background without any outward appearance on the consumer's browser.

When considering software-based publishers for your program, consider

1. How clearly the consumer is made aware of how the application will perform, how easily it can be uninstalled, the point at which the application cookies the user, and what data the application has access to.
2. How the software publisher's application interacts with an advertiser's own paid marketing efforts and other publishers. For example, will an application stand down from cookie-ing the consumer if another publisher already cookie'd the user upstream, and if not, is there some demonstrable value that the application provided to the consumer that would reasonably allow the application to take credit instead of the upstream paid marketing effort/publisher? Does the software comply with your network's software and toolbar compliance guidelines?
3. Should software publishers be put on a different commission plan or should you reserve the right to alter their commission plan based on their performance (either raising or lowering it based on the incremental values they drive)?
4. Does the consumer's experience with the toolbar/apps negatively impact your brand? For example, does the application provide a site overlay in which the publisher's brand slides out, pops-up or pops-down on top of your website?
5. How you'll audit software publishers and the behavior of the software. Behaviors of extensions can change over time, differ by geography, by browser type, or different time of the day.

## Social Media and Influencer Advertising

Social Media presents tremendous distribution opportunities for advertisers, and publishers are motivated to find ways to insert promotions into online social experiences.

1. Does the publisher follow the terms of service of the social media platforms on which they are promoting you?
2. Does the promotion mesh well with your brand?
3. Do you allow unmonitored user comments?
4. Do you allow incentives?
5. Are you paying out for “likes” or other non-sale actions?
6. Are there user/visitor engagement restrictions?
7. Do you allow the publisher to direct link to your site?
8. Is the publisher following FTC Affiliate and Influencer Guidelines?

## Represented Use of Trademarks and Brand Names

1. Are publishers permitted to advertise using representations of the retailer’s trademarks or brand names and/or those of the products sold by the retailer?
2. How about “confusingly similar” uses and typo-squatting? Specific examples would include bidding in paid search, domain name registrations, Facebook pages and Twitter handles.
3. Are some uses permitted or is a zero-tolerance policy in effect?
4. Are publishers required to indemnify you for unauthorized usage of both the retailer’s own trademarks or those of the products sold by the retailer?
5. Are publishers permitted to associate trademarks and brand names with AI-generated content?

## Advertiser Offered Tools

Some advertisers offer tools to publishers that go above and beyond those presented by networks. These tools might help with commission reporting and calculations, might provide promotional assistance to publishers or might be utilities like product feeds or other APIs to access product data.

1. Are you contractually reserving the right to modify or remove those tools?
2. Are you explicitly disclaiming warranties on those tools?

## Permitted Publisher Classes

Depending on the retailer’s business model, there may be a desire to exclude certain types of publishers or certain marketing models. This could be because there is conflict with internal departments, the publisher types don’t match the retailer’s target markets, or the margins don’t support such models.

Do you exclude any publisher types?

- Paid Search
- Content/Bloggers
- Offers and Rewards

- Email
- Shopping Comparison
- Niche
- Display
- Lead Generation
- Pay-Per-Call
- Mobile
- Social
- Software/Download/Toolbars
- Sub-Affiliate Aggregators
- Local and Offline
- Emerging Business Models
  - BNPL: Buy Now Pay Later
  - CLO: Card Linked Offers
  - CTV: Connected TV (streaming/gaming devices that can access video contents)
- International – Any specific countries?
- Solely AI-generated content

## Order Reversals and Back Orders

1. How are orders affected by returns, consumer fraud, and network overlap addressed?
2. Do you reverse commissions for item returns and unfulfilled orders?
3. Do you reverse commissions for publishers' personal orders? Under what circumstances? Do you allow any exceptions?
4. What is your customer facing return policy and return duration?
5. Do you pay out commissions when a product is purchased, or when it is shipped? If there is a back-order, when do you pay out commissions?

## Cookie Duration

1. What is the commissionable time period after a visitor is directed to the retailer's site?
2. Do you pay commissions on return visits and subsequent purchases?

## Promotional Code Distribution

1. Are publishers permitted to distribute promotional codes?
2. Are these restricted solely to promotional codes provided directly from advertiser to publishers? Or can publishers redistribute promotional codes from other publishers?
3. Do you reverse commissions on orders that include an unauthorized promotional code?
4. Is user generated content permitted on promotional code pages?
5. Are publishers permitted to use promotional codes found on the advertiser website?

## Program Terms Violations

1. How will publishers who are found to be in violation of Terms and Conditions be addressed?
2. Is there a notice of termination time period?
3. Including language that the retailer will terminate publishers found to be in violation of terms conveys the seriousness with which the terms are maintained. During actual enforcement, the retailer can subsequently address specific situations as they arise.

## Commissionable Events and Payouts

It is imperative to clearly state what you will pay for and what you won't pay for. Like many attributes of a strong agreement, it not only protects retailers but also recruits the best publishers.

1. On which types of actions will you pay commission? At what rate?
  - Combined sales
  - Mobile app installations
  - Items and categories covered or excluded
  - Items and categories with differing commission rates
  - Performance bonuses and incentives
  - Scaling commission rate based on overall performance for a time period
  - Contests
2. Are there other items or related sites for which the affiliate refers visitors also commissionable?
3. Do you pay commissions for referrals to other sites or retailers?
4. Do you pay a different rate for different levels of influence in the referral?
5. Varying commission rates based on attribution: do you pay only on the last click?
6. Do you pay a different rate for new customers versus returning customers?
7. Do you pay a different rate for desktop versus mobile web and/or app users?
8. Do you have a customer referral program and do you allow your publishers to earn a commission in addition to any benefit they would receive through the referral program?

## Compliance with rules, laws, and industry standards

It is imperative to set clear expectations with publishers regarding certain laws (whether local, state or federal), as well as other established guidelines governing advertising. Set clear expectations as well as consequences for non-compliance.

Examples:

- FTC Disclosure Rules
- CAN-SPAM
- Apple App Tracking Transparency
- Trademark Restrictions
- Copyright Restrictions
- Licensing Restrictions

- Privacy policies such as GDPR, the California Consumer Privacy Act, and other similar laws

## Exceptions—Custom Program Terms

Many retailers are willing to make exceptions to standard program terms for high performing publishers. These are custom program terms for specific publishers and should be documented appropriately.

1. Excepted terms could include the use of branded search terms, customer returns or other aspects of the program terms.
2. Either the retailer or the publisher can initiate discussions regarding exclusions.
3. These can sometimes take the form of a verbal agreement, however both parties benefit by having a written record of the exception, for subsequent referencing.





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Updated by: PMA Compliance Council 2023, chaired by *Rebecca Stern*

For more information on the PMA, our resources, or membership, please visit [www.thepma.org](http://www.thepma.org).

