

# Flurry For Advertisers Terms of Service

Last Updated: April 20, 2014

## Acceptance of Terms

Flurry welcomes you ("You" or "Your"). By checking the Terms and Conditions box in Flurry's account sign-up, or registering for Flurry for Advertisers (as defined below), you agree that you have read, understand, and accept the terms and conditions described below (the "Terms of Service") and you agree to be bound by these Terms of Service and all terms, policies and guidelines incorporated in the Terms of Service by reference, including, but not limited to, Flurry's Privacy Policy located at <http://www.flurry.com/privacy-policy.html> ("Privacy Policy") (or such other URL that Flurry may provide from time to time) (collectively, the "Agreement"). If you do not agree to this Agreement, you should not use Flurry for Advertisers in any way. Flurry for Advertisers is offered to you conditioned on your acceptance without modification of this Agreement. To the extent you use Flurry Analytics in conjunction with the Service, Flurry's Analytics Terms of Service, located at <http://www.flurry.com/tos.html>, are incorporated herein by reference.

Flurry for Advertisers is available only to individuals who are at least 18 years old and to companies that are appropriately licensed and otherwise legally permitted to conduct business. You represent and warrant that (i), if you are an individual, you are at least 18 years old, and (ii) if you are a company, you are appropriately licensed and are legally permitted to conduct business.

## Modification of Agreement

Flurry reserves the right to change or modify any of the terms and conditions contained in this Agreement at any time, in its sole discretion, by posting changes at <http://www.flurry.com> (or such other URL that Flurry may provide from time to time). Your continued use of Flurry for Advertisers following the posting of such changes or modifications will constitute your acceptance of such changes or modifications.

## Description and Features of Flurry for Advertisers

"Flurry for Advertisers" or the "Service" means the ad network services and Software (as defined below) provided by Flurry to you, which facilitates the purchase and placement of digital ad campaigns promoting your product or service ("Recommendations") on Flurry's network of publisher partners or on third party network partners with whom Flurry has a contractual relationship. Such campaigns may include promoting the install or relaunch of your application ("App Recommendations" and "Re-Engagement Recommendations," respectively), the viewing of your video clip ("Clips Recommendations") or display ad campaigns. Your campaigns may integrate Flurry for Advertisers rewards, an optional feature of a virtual currency system in your Recommendation as a reward for installs or views.

## Registration

To register for Flurry for Advertisers, you must complete the registration process at <http://www.flurry.com> (or such other URL that Flurry may provide from time to time) by providing Flurry with current, complete and accurate information. Upon registration you will be required to provide Flurry with your email password and user name. You understand and agree that you are solely responsible for maintaining the confidentiality of your password and that you shall be solely and fully responsible for all activities that occur under your username and password. Flurry shall not be responsible for any loss, claim or other liability that may arise from the unauthorized use of any password. You agree to immediately notify Flurry of any unauthorized use of your password or username or any other breach of security. If a password is lost or stolen, it is your responsibility to change the password, and immediately

notify Flurry, so that your account remains both secure and functional. For certain advertiser and media campaigns, you may be required to register for and integrate the Flurry software development kit ("Software") into your mobile applications.

## Content

"Content" means all materials accessible through Flurry for Advertisers, including but not limited to the Recommendations. You hereby grant to Flurry a non-exclusive, worldwide, royalty-free, transferable right to fully exploit Content (including all related intellectual property rights) and to allow others to do so in connection with Flurry for Advertisers. To the extent allowed by law, the foregoing includes all rights of paternity, integrity, disclosure and withdrawal and any other rights that may be known as or referred to as moral rights. To the extent you retain any such moral rights under applicable law, you hereby ratify and consent to any action that may be taken with respect to such moral rights by Flurry and agree not to assert any moral rights with respect thereto. Recommendations may include applications created by you and by outside developers through Flurry's use of preferred affiliate networks. If you offer Recommendations, you shall ensure that your Recommendations comply with all applicable laws and policies, including Flurry's Content Guidelines at <http://www.flurry.com/contentGuidelines.html> ("Content Guidelines") and do not contain any content that is infringing, libelous, defamatory, obscene, pornographic, abusive, and offensive or otherwise violate any right of any third party. Flurry reserves the right to remove any Content from the Service at any time, for any reason, or for no reason.

## Fees and Payment

The Service is subject to the fees and payments as described below. Flurry may change its fees and payment policies at any time.

If you order and purchase Recommendations through Flurry for Advertisers, you agree to pay (or have Flurry deduct from your Recommendation account) any and all applicable fees incurred in connection with your use of Flurry for Advertisers at the then-current prices in effect. Such prices will be specified on Flurry's website at <http://www.flurry.com> or such other location as Flurry may specify from time to time. In addition, if you order and purchase App Recommendations, Clips Recommendations or Re-Engagement Recommendations, you shall pay all applicable fees for each instance in which an end-user installs and launches an App Recommendation, completes a view of the video advertisement of a Clips Recommendation, or launches a Re-Engagement Recommendation, as applicable. Pricing for such Recommendations shall be determined by a bidding process setting the price you are willing to pay per install, click or view. You may select the price you want to bid per install, click or view provided that such price is equal to or greater than the minimum bid established by Flurry. Additional fees may be charged by Flurry for mutually agreed upon enhancements to the Recommendations. Other pricing metrics or fees may apply upon mutual agreement by you and Flurry.

You shall fund your Recommendation account prior to ordering Recommendations for a minimum of \$250 USD. You may do this via check or credit card. Such funds shall be drawn down as fees become due to Flurry. If you do not fund your Recommendation account and fees become due to Flurry, Flurry shall issue an invoice to you which shall be due immediately upon receipt. Notwithstanding the foregoing, Flurry reserves the right to not place the Recommendations ordered by you if your account is not funded. If your account is terminated, except for your breach, such termination will be effective immediately, and you shall receive a refund for any amounts you have pre-paid for Flurry for Advertisers that have not been rendered. In addition, you may request a partial refund of any unused amount in your Recommendations account in writing. Such requests shall be limited to once per calendar quarter.

The terms set forth in any Insertion Order ("IO") that conflict with or are in addition to any of the terms and conditions relating to Flurry for Advertisers as set forth herein shall be void and of no effect, unless expressly agreed to by the parties in writing and signed by an officer of Flurry.

## **Incidental Costs Associated with Use of the Service**

You agree that you are solely liable for all costs, fees, and other expenses resulting from your use of Flurry for Advertisers. This specifically includes, but is not limited to, incidental costs incurred by you in connection with your use of Flurry for Advertisers, including, but not limited to, costs owed by you to your communication service providers.

## **Limited License**

Flurry hereby grants to you a non-exclusive, limited, non-transferable, revocable and non-sublicensable license to use the Service in accordance with this Agreement. Flurry hereby reserves all rights not expressly granted herein. Any use of the Service other than as specifically authorized herein, without the prior written permission of Flurry, is strictly prohibited and will terminate the license granted herein. Such unauthorized use may also violate applicable laws, including, without limitation, copyright and trademark and other intellectual property laws.

You hereby grant to Flurry the limited right to utilize your company name, trademarks, service marks and/or logos for limited public relations purposes of identifying you as a customer of Flurry in any press release, marketing publication or Flurry's website.

## **Privacy and Information Collection**

As a condition of your access to Flurry for Advertisers, you agree that Flurry has the right, for any purpose, to collect, retain, use, and publish in an aggregate manner, subject to the terms of Flurry's Privacy Policy, information collected in your use of the Service, including without limitation, the characteristics and activities of end users of your mobile applications and of Recommendations ("User Data"). Unless you have expressly agreed otherwise, Flurry will not disclose to any third parties any User Data collected by Flurry for Advertisers from your mobile applications or Recommendations in a manner that is specifically attributable to you, your applications or your customers. You will not (and will not allow any third party to) use Flurry for Advertisers to track or collect personally identifiable information of end users, nor will you (nor will you allow any third party to) associate any data gathered from your mobile application(s) or Recommendations with any personally identifying information from any source as part of your use (or such third parties' use) of the Service. If you provide Flurry with a list of device identifiers of your end users for the purpose of Flurry serving Recommendations to the devices of your end users, you must have provided all necessary notice to, and obtained all necessary consents from, such end users to collect, use and transmit such information to Flurry for that purpose prior to your providing such list to Flurry. You may not provide to Flurry device identifiers of devices not belonging to your end users. You agree that you will comply with all applicable laws relating to the collection of information from end users of your mobile applications and Flurry for Advertisers.

You must post a privacy policy. Your privacy policy must (i) provide notice of your use of a tracking pixel, agent or any other visitor identification technology that collects, uses, shares and stores data about end users of your applications and Recommendations and (ii) contain a link to Flurry's Privacy Policy and/or describe Flurry's opt-out of Flurry Analytics to your end users in such a manner that they can easily find it and opt-out of Flurry Analytics tracking and personalized ads and/or recommendations from Flurry. The opt-out is specific to Flurry activities and does not affect the activities of other ad networks or analytics providers that you use. If an end user opts-out, Flurry will stop tracking data for the device identified by the provided MAC Address and/or device identifier going forward. The Flurry Analytics tracking will stop across all applications within the Flurry network. In addition, Flurry will stop providing Recommendations to that MAC Address and/or device identifier across all publishers. You agree to obtain all end-user consents required by applicable law before you use Flurry for Advertisers.

You agree that you will not use Flurry for Advertisers in connection with any application labeled or described as a "Kids" or "Children" application and will not use Flurry for Advertisers (i) in connection with any application, advertisement or service directed towards children or (ii) to collect any personal information from children.

## **Confidential Information**

"Confidential Information" includes any proprietary data and any other information disclosed by one party to the other in writing and marked "confidential" or disclosed orally and, within ten business days, indicated in writing as "confidential". Notwithstanding the foregoing, Confidential Information will not include any information which is or becomes publicly known, which is already in the receiving party's possession prior to disclosure by a party or which is independently developed or collected by the receiving party without the use of Confidential Information. Neither party will use or disclose the other party's Confidential Information without the other's prior written consent except for the purpose of performing its obligations under this Agreement or if required by law, regulation or court order. Upon termination of this Agreement, the parties will promptly either return or destroy all Confidential Information and, upon request, provide written certification of such.

## **Representations and Warranties**

You represent and warrant to Flurry that: (i) you are the owner of each mobile application you designate in connection with the use of Flurry for Advertisers or that you are legally authorized to act on behalf of the owner of such mobile application for the purposes of this Agreement; (ii) you have all necessary right, power and authority to enter into this Agreement and to perform the acts required of you hereunder; (iii) you have and will maintain during your use of Flurry for Advertisers all rights, authorizations and licenses (including without limitation any copyright, trademark, patent, publicity or other rights) that are required with respect to the Content to permit Flurry to perform the Service contemplated under this Agreement (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of the Content); (iv) the Content will comply with Flurry's Content Guidelines and all applicable laws and will not contain any content that is infringing, libelous, defamatory, obscene, pornographic, abusive, and offensive or otherwise violates any right of any third party; (v) you have complied and will continue to comply with all applicable laws, statutes, ordinances, and regulations (including, without limitation, any relevant data protection or privacy laws); (vi) you will comply with and have any and all consents, authorizations and clearances from end users to allow Flurry to collect, store, and use User Data; and (vii) you will at all times comply with all applicable Flurry policies.

## **Indemnity**

You agree to indemnify, defend and hold harmless Flurry, its employees, officers and directors, or users from and against any and all claims, liabilities, penalties, settlements, judgments, fees (including reasonable attorneys' fees) arising from (i) any Content that you or anyone using your account may submit or access in the course of using Flurry for Advertisers; (ii) your violation of the terms of this Agreement; and (iii) any violation or failure by you to comply with all laws and regulations in connection with your use of Flurry for Advertisers, whether or not described herein.

## **Disclaimer of Warranties and Limitation of Liability**

You specifically agree that Flurry shall not be responsible for unauthorized access to or alteration of the User Data or data from your mobile applications or Recommendations. You acknowledge that the availability and operation of and the Content made available within the Service are subject to many factors outside of your control. You are solely responsible for determining whether Content is appropriate or acceptable to you.

FLURRY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY REGARDING FLURRY FOR ADVERTISERS TO THE FULL EXTENT PERMITTED BY LAW. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, FLURRY FOR ADVERTISERS IS PROVIDED "AS-IS" AND WITHOUT WARRANTIES OF ANY KIND, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF PERFORMANCE OR IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. FURTHER, FLURRY DOES NOT MAKE, AND HAS NOT MADE, ANY REPRESENTATION OR WARRANTY THAT FLURRY FOR ADVERTISERS IS ACCURATE, COMPLETE, RELIABLE, CURRENT, ERROR-FREE, OR VIRUS-FREE OR THAT THE OPERATION OF ANY SERVICE WILL BE UNINTERRUPTED. SOME STATES DO NOT ALLOW EXCLUSION OF AN IMPLIED WARRANTY, SO THIS DISCLAIMER MAY NOT APPLY TO YOU.

IN NO EVENT WILL FLURRY, ITS SUBSIDIARIES, AFFILIATES OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS (COLLECTIVELY, THE "FLURRY PARTIES"), BE LIABLE TO YOU OR ANY OTHER PERSON OR ENTITY UNDER ANY THEORY FOR INDIRECT, ACTUAL, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES, LOST INCOME, REVENUE OR PROFITS, LOST OR DAMAGED DATA, OR OTHER COMMERCIAL OR ECONOMIC LOSS, THAT RESULT FROM YOUR USE OF, OR INABILITY TO USE, THE SOFTWARE OR ANY SERVICE, EVEN IF FLURRY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES ARE FORESEEABLE. THE FLURRY PARTIES' AGGREGATE LIABILITY ARISING OUT OF THIS AGREEMENT OR ANY SERVICE WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) USD OR THE AMOUNT YOU HAVE PAID TO FLURRY IN THE PAST TWELVE MONTHS FOR SUCH SERVICES. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, THE FLURRY PARTIES' LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

## **Other Restrictions**

You shall not, directly or indirectly, authorize or encourage any third party to generate fraudulent impressions or fraudulent clicks, or take similar fraudulent actions or any other actions that interferes with, disrupts or interacts in an unauthorized manner with the Service (or servers and networks which are connected to the Service), in the use of Flurry for Advertisers, including but not limited to, through repeated manual clicks, the use of robots, scrapers or other automated query tools and/or computer generated search requests, and/or the fraudulent use of other search engine optimization services and/or software. Flurry may terminate your account at any time for any reason, including without limitation such fraudulent activity, in its sole discretion.

## **International Use; Export Controls**

Software available in connection with Flurry for Advertisers and the transmission of applicable data, if any, is subject to United States export control laws. No Software may be downloaded from the Service or otherwise exported or re-exported in violation of the export control laws of the United States.

## **Modifications to and Termination of the Service**

Flurry reserves the right to discontinue offering Flurry for Advertisers or to modify Flurry for Advertisers at any time in its sole discretion. If you are dissatisfied with any aspect of Flurry for Advertisers at any time, your sole and exclusive remedy is to cease using it. Notwithstanding anything contained in this Agreement to the contrary, Flurry may also, in its sole discretion, terminate or suspend your access to Flurry for Advertisers at any time. Upon any termination of this Agreement, Flurry will cease providing Flurry for Advertisers, and you will delete all applicable Software and certify thereto in writing to Flurry within five (5) business days of such termination.

## Waiver and Severability

If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of this Agreement remain in full force and effect. Flurry's acquiescence in the breach of a provision of this Agreement or failure to act upon such breach does not waive Flurry's right to act with respect to subsequent or similar breaches. Likewise, the delay or failure of Flurry to exercise or enforce any right or provision of this Agreement shall not constitute a waiver of such right or provision.

## Choice of Law and Forum

This Agreement and the relationship between you and Flurry shall be interpreted in accordance with the laws of the State of California without regard to conflict of laws principles. Subject to the arbitration provision below, you and Flurry hereby agree to submit, exclusively, to the personal jurisdiction of the state courts with jurisdiction over San Francisco, California and/or the U.S. District Court for the Northern District of California.

## Arbitration

Certain portions of this Section are deemed to be a "written agreement to arbitrate" pursuant to the Federal Arbitration Act. Each of you and Flurry agrees that it intend that this Section satisfies the "writing" requirement of the Federal Arbitration Act.

You or Flurry may elect to have any controversy, allegation or claim arising out of or relating to this Agreement, the Service or the User Data, including but not limited to claims for indemnification, contribution, or cross-claims in a pending action involving one or more third parties (collectively, a "Dispute") finally and exclusively resolved by binding arbitration before a sole arbitrator under the rules and regulations of the American Arbitration Association. If an in-person arbitration hearing is required, then it will be conducted in San Francisco, California; but if the applicable arbitration rules or laws require the arbitration to be conducted in the "metropolitan statistical area" (as defined by the U.S. Census Bureau) where you are a resident at the time the Dispute is submitted to arbitration, Flurry shall have the right to elect to proceed to arbitration in such location. All parties to the arbitration will have the right, at their own expense, to be represented by an attorney or other advocate of their choosing. You and Flurry will pay the administrative and arbitrator's fees and other costs in accordance with the applicable arbitration rules; but if applicable arbitration rules or laws require Flurry to pay a greater portion or all of such fees and costs in order for this Section to be enforceable, then Flurry will have the right to elect to pay the fees and costs and proceed to arbitration.

TO THE FULLEST EXTENT PERMITTED BY LAW, YOU AGREE THAT (I) NO ARBITRATION SHALL BE JOINED WITH ANY OTHER; (II) THERE IS NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE ARBITRATED ON A CLASS-ACTION BASIS OR TO UTILIZE CLASS ACTION PROCEDURES; AND (III) THERE IS NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC OR ANY OTHER PERSONS.

YOU AGREE TO WAIVE HIS/HER/ITS RIGHT TO A JURY TRIAL AND UNDERSTAND THAT, ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS.



TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IF A PARTY WANTS TO ASSERT A DISPUTE AGAINST THE OTHER, THEN SUCH PARTY MUST COMMENCE IT WITHIN ONE (1) YEAR AFTER THE DISPUTE ARISES – OR IT WILL BE FOREVER BARRED.

In the event either you or Flurry elects arbitration, for any Dispute where the total amount of the award sought is less than \$10,000 USD, the party requesting relief may further elect to resolve the dispute in a cost effective manner through binding non-appearance-based arbitration through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: (i) the arbitration shall be conducted by telephone, online and/or be solely based on written submissions, and the specific manner shall be chosen by the party initiating the arbitration; (ii) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and (iii) any judgment on the award rendered by the arbitrator shall be final and may be entered in any court of competent jurisdiction.

## **Entire Agreement**

This Agreement constitutes the entire agreement between you and Flurry and governs your use of Flurry for Advertisers, superseding any prior agreements between you and Flurry with respect to Flurry for Advertisers.

## **Survival**

The terms and conditions contained in this Agreement that by their sense and context are intended to survive the performance hereof by the parties hereunder, including but not limited to the provisions relating to Indemnity, Disclaimer of Warranties and Limitation of Liability, shall so survive the completion of the performance, cancellation or termination of this Agreement.