Media Buying 2018

Transparency at a Crossroads

November 2018

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Introduction

The transparency debate and distrust between advertisers and media buying agencies has been a topic in C-suites since Jon Mandel's 2015 speech at the Association of National Advertisers' (ANA) annual media conference. Interest took a new, unprecedented turn on October 10, 2018 when the ANA notified its members that the U.S. Federal Bureau of Investigation (FBI) asked the ANA to inform its members about the investigation and to ask its members to consider cooperating with the FBI investigation if they believed they might have been defrauded by their agencies.

On October 18, 2018, the ANA held a webinar for its brand members conducted by Douglas J. Wood, the ANA's general counsel, and Steven A. Miller, Mr. Wood's partner at Reed Smith. Mr. Miller formerly served in the Chicago United States Attorney's Office for over 17 years, five of which were as chief of the Special Prosecutions Division. At Reed Smith, Mr. Miller investigates suspected fraud claims for clients who believe they may have been defrauded and conducts internal investigations in criminal matters.

The purpose of this White Paper is to provide a historical perspective of the transparency issues and to outline the options that advertisers have to cooperate or not cooperate with the FBI. The complexity of the decision can perhaps best be put in perspective by a quote from the great Yogi Berra – "When you reach a fork in the road, take it."

Caveats

At this point, no one has been accused or charged with any crimes and no one is accusing anyone of criminal behavior. No one should assume anyone is guilty of any criminal infraction. Nothing in this White Paper ascribes improper activities to any organization or individuals. Its sole purpose is to provide background on the ANA's activities with respect to transparency and media accountability and the recent request for cooperation from the FBI. Any examples provided are not intended to ascribe any behavior to anyone and are for illustrative and educational purposes only.

Due to the complex nature of the subject matter, this White Paper does not constitute legal advice nor a privileged communication. Every internal investigation will turn on its own unique facts and no generalizations can be made and none are intended in this White Paper.

The path to the fork in the road

The issues of transparency and distrust in media buying in the United States initially surfaced in three reports issued by the ANA:

2011: ANA: *Agency trading desks: Basics marketers need to know & questions to ask*. The key findings in this report included:

- When agency trading desks came on the scene, they were not adequately explained to advertisers (by their agencies). It was clear that many advertisers lacked knowledge regarding the role of agency trading desks.
- An outline of key concerns – notably a lack of transparency and the fact that agencies became both buyers and sellers of media, possibly creating a conflict of interest.

2012: ANA and Reed Smith: *Media rebates/incentives require full transparency*. This report concluded that:

- Advertisers need to be aware of the issue of media incentives/rebates and know that the practice is not limited to foreign markets – it is happening in the United States.
- Barring up-front agreements to the contrary, best practices suggest that:
    - The entire benefit of media incentives/rebates belongs to the advertiser, and agencies need to be completely transparent regarding any incentives/rebates received.
    - Advertisers should have clear language in their agency contracts specifying how rebates made on their business will be handled or allocated.
    - Advertisers should consider periodic audits to ensure that unauthorized incentive/rebate activity is not occurring.

2014: ANA and Forrester Research: *Media buying's evolution challenges marketers*. This report concluded that:

- Almost half of the advertisers surveyed expressed concern about transparency of media buys, and that concern had grown in the past year.
- With regard to specific areas of concern, "media rebates to agency" was high on the list.

Following the report, it was necessary to dig deeper into the issue of transparency overall and rebates in particular, which led to the creation of the ANA Media Transparency Task Force.

On March 5, 2015, Jon Mandel, formerly the CEO of Mediacom, one of the largest media buying agencies in the world, delivered a speech at the ANA's annual media conference in which he claimed media buying agencies were engaging in non-transparent financial transactions that deprived advertisers from revenues and discounts owed to them. Coverage in the media included headlines such as "Yes. They're real. Kickbacks. Secret rebates, sketchy services and offshore deals. Inside the murky new world of ad buying."

In response, many of the media buying agencies denied they engaged in any improper transactions.

The ANA and the American Association of Advertising Agencies (4A's) formed a joint committee to address the concerns. That committee split up when the two sides were unable to reach an agreement on standards for media audits.

In part because the ANA and 4A's could not find common ground, the ANA issued a request for a proposal (RFP) for an independent investigation into media buying and rebates and other incentives being offered by media companies to media buying agencies.

K2 Intelligence won the RFP and Ebiquity and its subsidiary, FirmDecisions, were retained as industry expert resources for K2 Intelligence should it need them. The ANA's goal of the investigation was to identify, illuminate and document non-transparent business practices in the U.S. media buying industry, to the extent they exist. The investigation had no preconditions set and the ANA was prepared for critical review of actions by both advertisers and media agencies.

On June 7, 2016, K2 Intelligence released the results of its eight-month investigation. It included interviews with more than 150 sources, representing a cross-section of the U.S. media buying ecosystem. The report – *An independent study of media transparency in the U.S. advertising industry* – concluded that non-transparent business practices in the U.S. media buying industry were pervasive, raising serious questions.

Release of the K2 Intelligence report set off a firestorm of press and denials. Shortly after release of the K2 Intelligence report, a number of agencies wrote to advertiser clients addressing the issues raised in the K2 Intelligence report, often including assurances that they did not engage in the cited behavior.

On July 18, 2016, the ANA followed the release of the K2 Intelligence report with a report jointly authored by the ANA and Ebiquity/FirmDecisions called *Media transparency: Prescriptions, principles and processes for advertisers*. The report outlined seven strategic principles advertisers should adopt to ensure their agencies are transparent or, as one advertising agency executive said at an industry conference, are transparent about not being transparent.

The seven strategic principles included considerations of whether an agency should act as an advertiser's agent in buying media or as a principal reselling the media to the advertiser, the importance of definitive contracts and audit rights, best practices in governance, and key issues to consider in the ownership and transfer of data and technology.

The ANA's *Media Buying Agency Contract Template* accompanied the Ebiquity/FirmDecisions report. The template supports full transparency in media buying. Updated in 2018 to version 2.0, the

template now includes supplemental guidance on governance – *ANA media buying template/governance framework* – co-authored by Reed Smith and media consultant Ronald Pullem.

Shortly after the 2018 update, the ANA released its *Non-disclosure agreement template* to minimize delays in commencing audits. Audits are increasingly being delayed over arguments between advertisers and agencies relating to confidentiality between auditors and agencies. The template addresses and resolves those concerns.

In May 2017, Ad/Fin, in conjunction with the ANA, Ebiquity and the Association of Canadian Advertisers (ACA) released *Programmatic: Seeing through the financial fog, An in-market analysis of programmatic media at the transaction level*. The study analysed 16.4 million media impressions purchased on behalf of seven major advertisers across five programmatic demand-side platforms (DSPs). The seven participants spanned 30 major brands in auto, banking, beauty, consumer packaged goods, fashion and travel. The data included both real-time bidding and private marketplace transactions. The study did not directly investigate supply-side programmatic costs and fees incurred between the publisher and trading partners, such as supply-side platforms (SSPs).

The report made the following recommendations:

- Programmatic buying should have a rigorous level of financial reporting with clear audit and analysis protocols on par with any other media.
- Advertisers should negotiate and enforce media buying agreements that meet the advertiser's needs and expectations for transparency, accountability and results.
- Advertisers should embrace the key principles from the ANA's *Master media planning and buying services template* or the ACA's *Marketing communications services agreement.*
- If an advertiser agrees to enter into a non-disclosed model, it should receive assurances from the agency about the buying methods for non-disclosed models to ensure that the agency is truly buying the media as a principal without reliance on advertiser funds.
- As part of any agreement, advertisers must have a practical and scalable way to verify delivery, costs, supply chain fees, and contract compliance, and evaluate programmatic media buys. Without such a means, contracts are impossible to enforce. These rights should encompass access to the demand-side supply chain, including all subsidiaries, divisions and affiliates of the advertiser's agency and the chain of suppliers that are part of each transaction.
- Advertisers should demand and secure a source of independent transactional information for their buys. One recommended approach is to access and control programmatic transaction-level data – winning bid log data and metadata – to serve as the advertiser's record of transaction (e.g., programmatic invoices).

On August 9, 2017, the ANA released a study — *Production Transparency in the U.S. Advertising Industry* — reflecting the opinions of various companies in the commercial production ecosystem with regard to transparency in commercial production and the bidding process. The study was timely in that it was released after press reports in late 2016 that the Department of Justice was investigating bid rigging in commercial production. The current status of that investigation is unknown.

In May 2018, McKinsey & Company released an independent report – *Truth in advertising: Achieving transparency with media rebates to fuel growth* – that concluded:

- *Media rebates*. Agencies often do not disclose or pass along rebates (also known as agency volume bonuses or AVBs) they receive from media companies to their clients.
- *Programmatic fees*. Programmatic digital media buys often carry difficult-to-understand and at times opaque agency fees whose face value is small – pennies per activation – but can add up when the numbers involved reach into the millions.
- *Data and tech sharing/ownership*. Agencies typically share only the data generated by ad tech platforms, which may not provide an optimal view for clients.

In September 2018, consultant ID Comms released its *2018 Global media transparency report*, which concluded:

> Since 2016, the industry is now more convinced than ever of the important role transparency has in strong and productive agency/advertiser relationships, with agency respondents now much more assertive in stressing this point. Despite this, the level of trust in 2018 is perceived as significantly lower than two years ago, demonstrating the surprising lack of progress. These findings are disappointing given that the previous [ID Comms report] was conducted at a time when the ANA was investigating rebates in the U.S. and concerns that agencies were benefiting from undeclared income streams were at their height. Since then, advertisers have worked hard to improve their media knowledge and take greater control over how their ad budgets are invested. Many have adjusted contracts with existing suppliers or held pitches that required greater transparency as a condition of participation.

In October 2018 ANA released the report, *The Continued Rise of the In-House Agency*. The number of marketers with in-house agencies has grown substantially – to 78 percent (versus 58 percent in 2013 and 42 percent in 2008). Further, workloads for those agencies are increasing. Transparency issues in the industry are one of the factors that have contributed to the growth of in-house agencies.

As negotiations of contracts with media buying agencies progressed since the release of the K2 Intelligence report, transactions described by K2 Intelligence in its report have evolved, as described in the table below[1].

Circa 2016	2018
Cash rebates	Allocation of value pots/value banks/enhanced media value
Discounted or free media	Disclosure of programming package pricing/proof of performance
Consulting/services contracts	Allocation of cash rebates from global digital suppliers on U.S.-related spends
Volume discounts	Disclosure and allocations of principal buying of cash AVBs from vendors
Dual rate cards	Disclosure of agency-owned tech providers
Programmatic buying mark-ups	Disclosure of agency affiliate relationships
Undisclosed principal buying	Disclosure of affiliate-owned original pricing
Internal pressures to buy from affiliate suppliers	Terminology/language changes in updated contracts – vertical and horizontal limits on the reach of audits
Equity stakes in supply chain	Supplier training courses for agency staff at high fees (e.g., $200,000 per employee)

Today, the lack of transparency in media buying practices continues to burden the industry.

[1] See the Glossary for description of the terms covered in this table.

The FBI reaches out to Reed Smith

Several months ago, the FBI contacted Reed Smith as ANA's general counsel asking for assistance from the ANA and its members. A series of follow-up discussions ensued to better understand what the FBI and the Department of Justice are seeking. The FBI informed Reed Smith that it understands that key information relevant to its investigation is held by advertisers, not the ANA. As such, cooperation is sought from the advertisers.

As Reed Smith learned during the conversations with the FBI, there may be many potential victims. These cases are complex and time consuming to unravel. The FBI does not have the resources to investigate dozens or hundreds of potential financial fraud victims, each of which may present different facts and evidence. As such, the FBI is asking that advertisers first conduct their own investigations. If indicia of fraud is uncovered, the FBI would then like to hear from the advertiser as to what it has found. Reed Smith was told that it will not be helpful for advertisers to contact the FBI merely to say they have read the K2 Intelligence report and that their experiences sound similar.

Based on Reed Smith's discussions with the FBI, it appears this is a very serious investigation. One should not, however, speculate on what companies or individuals may be persons of interest or targets in the investigation as thus far, no one has been charged with any criminal behavior. The FBI's resources are stretched and it therefore asks for assistance from the potential victim advertiser community.

Lessons drawn from the K2 Intelligence report

The K2 Intelligence report is comprehensive and suggests the following may have occurred:

- Possible rebate fraud
- Rebates possibly being structured as service agreements where consulting/research is tied to the volume of agency spend
- Possible principal transaction fraud – agencies possibly acting as undisclosed media suppliers that then resell the media to the advertiser at mark-ups as high as 90 percent, with the mark-ups taking place through intracompany transactions
- Possible undisclosed conflicts of interest
    - Agencies holding equity stakes in media suppliers
    - Agencies making purchase decisions that prefer suppliers in which they have an interest or an incentive program more favorable than offered by an alternative supplier

Potential scale

The K2 Intelligence report contains indications that the scale of potential wrongdoing could be very large. As one example, of the 41 sources that said they had first-hand knowledge of agencies receiving rebates from media suppliers, 34 sources reported that rebates are not fully disclosed and/or passed through to advertisers.

According to published reports[2], between $550 and $630 billion is spent annually on advertising and media purchases. Predictions are that the spending will grow to more than $750 billion by 2021. Of those dollars, nearly 40% is reportedly spent in the United States. If advertisers are being overcharged or not being given even 5 percent of what they are entitled, the annual cost to advertisers is staggering. The criminal statute of limitations for fraud offenses is five years. Extrapolating over that period, at a 5 percent estimate, the potential fraud amount during the limitations period could be in the many billions of dollars. In various states, victims of fraud can recover their losses for even longer periods of time.

One should keep in mind, however, that no one knows the actual damages, if any, advertisers have suffered because of not receiving revenues, credits, discounts and other incentives to which they may be legally or contractually entitled to receive. Moreover, at this point, there is no direct knowledge of the percent, if any, of the market that represents hidden rebates or incentives. It could be higher, lower, or non-existent. The reference to 5 percent is for illustrative purposes only. Only investigations will shed light on what may be occurring.

Federal crimes potentially implicated

It may be useful to understand how the K2 Intelligence report fits into U.S. federal criminal law. This will also help explain why the FBI and Department of Justice are investigating.

18 U.S.C. §§ 1341, 1343 (mail and wire fraud)

The primary statutory offenses likely at issue in this investigation are mail and wire fraud. These laws prohibit schemes to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises. Federal jurisdiction exists so long as the United States mail or interstate communications such as e-mails are used, even if only incidentally, to the scheme.

The mail and wire fraud laws broadly criminalize conduct where the following practices are used with fraudulent intent to obtain money or property belonging to someone else:

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[2] https://magnaglobal.com/video-global-ad-forecast-june-2018; https://www.statista.com/statistics/273288/advertising-spending-worldwide/

- Fraud
- Lies
- Concealment/omissions where a duty to disclose exists
- Half truths
- False/incomplete reporting
- Misrepresentations
- False lulling statements
- False reporting as to what someone has earned or is owed
- Any combination of the above or other form of dishonest conduct

Proving fraudulent intent

Under U.S. law, fraudulent intent may be proven directly or circumstantially. Examples include:

- Deceptive conduct (lies and half-truths)
- Deviation from known standards of conduct
- Internal communications (e-mails)
- External complaints putting offenders on notice
- Cover-ups, concealment showing guilty state of mind
- Co-conspirator statements
- False lulling statements

Advertisers should review correspondence, particularly in the March-May 2015 and June-August 2016 time frames, to determine if their agency took any position or made any assurances on which the advertiser relied with respect to the allegations made by Jon Mandel and reported by K2 Intelligence.

Conspiracy – 18 U.S.C. §371

The government also often investigates for evidence of a conspiracy. The conspiracy statute requires two or more people to agree to do something unlawful plus taking one or more overt acts in furtherance of the scheme. In the media-buying context, if two or more employees agreed to hide, divert or conceal earned rebates and cause a false report to be sent to an advertiser, a conspiracy may have taken place.

Racketeering – 18 U.S.C. §1962

Racketeering consists of so-called predicate offenses. Mail and wire fraud are predicate offenses. An enterprise can be a company, individuals within a company or combination of both. A pattern of racketeering is a series of racketeering offenses over time conducted through the enterprise and/or

its members. The crime is participating or conspiring to conduct the affairs of an enterprise through a pattern of racketeering.

Although the RICO statute is not used often, it can be on the table for negotiation purposes where predicate offenses are long term, pervasive and reflect organized criminal activity. It can be used by the government as a threat and leverage to settle for lesser charges such as mail or wire fraud. Importantly, the RICO statute has a civil cause of action as well as a criminal component.

Questions have been asked about the potential overseas reach of the criminal investigation in light of foreign ownership of certain media buying holding companies. The short answer is that federal criminal jurisdiction exists so long as any unlawful conduct took place within the United States. Given the pervasive interaction between the media holding companies and advertisers within the United States, including meetings, travel, billings, mailings and interstate wire communications, jurisdiction should be easily established, even if crimes were implemented overseas to be executed here.

Look back period and the statute of limitations

Government investigations generally operate under a five-year statute of limitations, which begins to run from the date of the last act in furtherance of the offense. As long as the crime is charged within five years, charges can encompass fraud schemes extending even longer back in time. The duration charged may affect victim restitution and civil claims.

How does the K2 Intelligence report potentially implicate these laws?

The FBI and Department of Justice typically do not commit resources unless they believe, at a threshold level, that potentially criminal activity has taken place. The FBI has told Reed Smith this is a long-term, industry-wide investigation.

If evidence is uncovered proving that the transparency issues outlined in the K2 Intelligence report are fraudulent, criminal charges can be brought against the media buying agencies and those executives and employees who were involved.

What does meaningful FBI cooperation mean?

The FBI has informed Reed Smith that merely raising a hand saying you have been defrauded will not benefit its efforts. Meaningful cooperation means making an investment in conducting an internal investigation first. If and when you uncover indications of fraud, supported by actual evidence, then the FBI wants to hear from you. It is not expected that your evidence will establish proof beyond a reasonable doubt. That is the job of the government. The FBI wants concrete reasons supporting your belief that you may have been defrauded.

Conducting a fraud investigation

Fraud investigations are typically performed by outside counsel with subject matter expertise. An investigation should consist of a number of elements, including:

- Contract analysis to determine advertiser rights and media agency obligations
- Detailed review of your communication histories with your agency. The goal is to understand what representations were made.
- Detailed requests for information addressing concerns or gaps in your understanding
- Cross-referencing of representations historically made to you with other information to determine whether you have been deceived
- Review of your prior historical audits (if any)
- Witness interviews
- Financial analysis
- New audits in light of the K2 Intelligence report and your new investigative findings

All investigations and audits should be structured to maintain the attorney-client privilege. If your internal audit department is involved, it should be engaged by your in-house legal department or outside law firm to conduct a specialized audit to assist it in giving legal advice to the company. If an outside audit firm is used, it is best for outside counsel to engage the auditor.

Retaliation concerns

Certain ANA members have expressed concern that cooperation will result in being “blackballed” if it is known they are cooperating. Reed Smith has had discussions with the FBI about this and the FBI is sensitive to protecting the advertising community consistent with its legal and investigative obligations.

It is a crime for anyone to retaliate against a person or company because they are cooperating with the government in a criminal investigation. 18 U.S.C. §1513 reads as follows:

> Whoever knowingly, with intent to retaliate, takes any action harmful to any person … for providing to a law enforcement officer any truthful information relating to the … possible commission of any federal crime [shall be guilty of a crime].

Corporations are “persons” protected by the statute. This statute applies to overseas conduct as well as conduct within the United States. The FBI has told Reed Smith that if any advertiser learns or suspects it is being blackballed or retaliated against for cooperating, the U.S. government will react very strongly by investigating any such allegations.

Further, the FBI has told Reed Smith that it will endeavor to protect the identities of advertisers who cooperate to the extent consistent to its investigative needs and legal obligation.

Process and flow

The process and flow of exploring cooperation will typically involve the following steps:

- Internal investigation conducted by the advertiser directly or its outside counsel
- Discussion between the advertiser and its legal counsel about:
  - Findings
  - Criminal law implications
  - Civil litigation options
  - Negotiation strategy
  - Decision of whether the advertiser wishes to cooperate by informing the FBI of findings
    - No legal obligation exists to cooperate
- If the cooperation option is selected, the FBI would be notified by the advertiser's counsel that it believes it has evidence of fraud
- The advertiser's counsel should insist that its clients receive a grand jury subpoena before evidence is provided
- The advertiser's counsel can negotiate the scope and language of the subpoena to limit the time, burden and expense of responding
- The FBI evaluates the new evidence and follows leads by:
  - Interviewing your current and former employees with potential knowledge of the fraud
  - Issuing grand jury subpoenas to the suspected wrongdoers
  - Conducting interviews of potential witnesses and wrongdoers

The FBI has told Reed Smith that it will not reveal sources of information during interviews.

If the U.S. government determines that prosecutable crimes have occurred, it will notify lawyers for targeted companies and/or employees that their clients are targets of the investigation. At that point, it is typical for plea negotiations to commence. The plea discussions will involve not only the evidence the government possesses against putative defendants but also the amount of losses suffered by the victims as a result of the fraud. This will then flow into negotiations for restitution.

Would the advertiser necessarily be disclosed as having cooperated?

The first response is to remind the reader that cooperators are legally protected by statute. Next, the government is not required to provide discovery to a criminal defendant until very late in the process – after charges have been filed but before witnesses are called. Often discovery is never provided because only a very few number of cases result in a trial. Even fewer go to trial when dealing with large public companies. As stated earlier, the FBI will endeavor not to identify the source of information during interviews.

If a victim of a fraud wants restitution, it may at some stage have to identify itself as a victim and help the prosecutor establish the amount of its loss. This information would at least partially be assembled during the internal investigation, even before the government knows what happened. It is unclear whether the defendant would ever know that an advertiser cooperated by having informed the FBI of possible wrongdoing, because the FBI has sources of information outside the advertiser community. It would be difficult to know what prompted the issuance of a subpoena.

Can risks be managed regarding cooperation? Reed Smith believes they can be. Sophisticated law firms can advise their clients about the witness retaliation law and how seriously the government would react if retaliation takes place. If an agency retaliates, whomever is suspected of doing so would face another criminal investigation. In many ways that investigation would be viewed as more serious than the underlying fraud investigation. Also, as previously noted, the FBI has told Reed Smith it will endeavor to protect the identity of companies cooperating or subpoenaed to the maximum extent permitted under the law.

Potential benefits of cooperation

The potential benefits in cooperating are monetary and non-monetary. If criminal cases are brought, the likely result will be far more transparency going forward and industry-wide reform.

Financial benefits may also flow. Under the criminal law, the victim of a crime is entitled to restitution. The amount owed is the actual amount of the fraud loss. If, during its internal investigation an advertiser discovers it has been defrauded, it also has the option of pursuing civil litigation or engaging in settlement talks to demand compensation. Civil fraud remedies are potentially much higher than criminal restitution because many jurisdictions allow for recovery of punitive damages. The civil RICO statute allows triple damages. ANA members should understand that if they do not investigate potential claims, even if criminal charges are brought, they may not be designated as a recipient of restitution due to the fact the government was unaware of their victim status.

If you decide to make financial demands or engage in settlement discussions with your agency, you cannot threaten that you will inform law enforcement against the agency as a tool to obtain financial consideration. However, nothing prohibits you from threatening a civil lawsuit or seeking financial recovery. You just cannot tell anyone that if they do not settle, or settle for less than what you want, that you will retaliate by informing the FBI about their conduct.

Even if the Department of Justice decides not to indict any agency, intermediate steps may be taken that will benefit the advertising industry. These can include deferred prosecution agreements and non-prosecution agreements where restitution is still mandated. Lastly, unless advertisers engage in an internal investigation, they may never learn whether they have been defrauded. If they have been, apart from any potential financial benefits of pursuing claims or restitution, an increased knowledge of what occurred will improve the advertiser's negotiation powers going forward.

Insurance considerations

Some insurance policies cover fraud losses. As part of an internal investigation you should gather all potentially relevant policies or indemnity agreements. The internal investigation should also be scoped to discover any covered loss events. If coverage is available, an advertiser should provide timely notice of potential claims to all primary and excess insurers if it uncovers a fraud.

Questions and Contact Information

If you have any questions, please feel free to contact the ANA or Reed Smith.

Contact information is provided below.

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FBI:

If you would like to contact the FBI directly, please reach out to Steve Miller, Doug Wood or Keri Bruce. Reed Smith is acting as a liaison to the FBI for the ANA. Reed Smith will be happy to convey information to the FBI on behalf of any ANA member.

Glossary

Affiliate-Owned Original Pricing: Related to undisclosed buying, these are the prices that the agency's affiliate will offer to the agency for the media buy. This price is not the price that the agency's advertiser client sees when charged for the media buy. Instead, this price is a price that has been inflated before it reaches the agency's advertiser client by adding in mark-ups and other fees that of which the client is not made aware. Mark-up can occur multiple times with related affiliates.

AVB: (i.e., an "agency volume bonus" or an "agency volume bonification"). AVB's are volume discounts, compensation or other benefits that the media buying agency or its affiliates or parent receives from media owners, e.g., networks, digital publishers, etc., on media buys made by the media buying agency. AVB's are usually calculated on the aggregate value of the total media spending with a particular media owner for all of the media buying agency's advertiser clients (including, e.g., commissions, refunds, bonus inventory, sponsorship space, etc.).

Cash Rebates: Cash Rebates are a form of AVB's where the media buying agency receives financial benefits from a media owner for media buys on behalf of its advertiser clients, for example, in the form of monetary credit back to the agency.

Consulting/Services Contracts: Contracts that an agency enters into with a media owner whereby the agency allegedly provides research or other consulting services in exchange for compensation. The compensation for the services is generally more than the actual services would be valued and is actually related to the spend for media buying paid to the media owner.

Discounted or Free Media: The offering of lower-priced or "free" media space available to an agency in connection with media buys on behalf of its advertiser clients, often provided to the agency in connection with large media spends with the media owner or other business arrangements between the agency and the media owner.

Dual Rate Cards: Agreements between an agency (or one of its affiliates) with a media owner or vendor to charge lower rates for media buys purchased where the agency (or its affiliate) is purchasing the media as principal for its advertiser client versus purchasing media as agent of its advertiser client.

Enhanced Media Value: In addition to cash rebates, discounts, and other forms of financial incentives related to media buys, enhanced media value is a type of incentive that an agency receives in exchange for buying media from a certain supplier. Enhanced media value is when a media supplier provides space for an advertisement that is more valuable or more premium inventory than the price paid by the agency, in part, because of the agency's relationship with the supplier and its commitment to spend media with that supplier. In a non-transparent environment, the agency may mark up the costs, making an undisclosed profit.

Equity Stakes in Supply Chain: Agencies often have financial interests in part of the web of companies in the media supply chain, including media suppliers, research companies, technology providers and even auditors. These interests may be owned by the agency or may be housed within a larger family, or affiliates or a holding company. The interests should be disclosed to advertisers.

Internal Pressures to Buy from Affiliate Suppliers: Similar to equity stakes in the supply chain, agencies, as part of large holding companies, are often part of a large web of inter-related companies that include a variety of stakeholders in the media buying chain. Accordingly, agencies may be pushed to encourage their advertiser clients to buy services, technology, etc., from companies that are actual affiliates and part of the same holding company. While this may not seem problematic on its face, this can create issues in a non-transparent environment with respect to the scope of an advertiser's audit, pricing concerns, and questions about whether the agency is acting in the best interest of its client when engaging with affiliate suppliers.

Programmatic Buying Mark-ups: Inflated prices for programmatic media buys charged by an agency to its advertiser client through undisclosed mark-ups. There can be multiple mark-ups among affiliates of the agency in the supply chain.

Programming Package Pricing/Proof of Performance: These relate to information about the actual price of the media buy offered to the agency and other information about the media run that is part of a packaged program an agency puts together for an advertiser client and then delivers to a broadcaster. A traditional proof of performance document typically includes when and where the program aired and other performance indicators that help the advertiser client understand whether it received what it paid for with the media buy/placement. Over time, proof of performance has largely been abandoned. It is a practice that perhaps needs to be reinvigorated.

Undisclosed Principal Buying: A type of media buying whereby the agency purchases media as principal for and not as an agent of its advertiser client. Doing so allows the agency to keep the closing/winning bid prices of the media confidential and undisclosed to its advertiser client. Only the "final price" of the media buy that the advertiser pays to the agency is disclosed. This price will include mark-ups and other fees factored into the advertiser's overall media costs.

Value Banks: A form of AVB, the "bank" of free or discounted media that an agency (or group of agencies, usually within the same holding company) receives once they buy a certain amount of media from the supplier. The banks are problematic because they accrue over time across agencies within a holding company and make it complicated to identify which benefits, rebates or other incentives are due back to which client.

Value Pots: A value pot is free or discounted media offered to agencies by media suppliers in advance on the basis of anticipated volume of media purchased by an agency on behalf of an advertiser, collectively or individually. Value pots are another form of a rebate and incentive received by the media agency that should be passed on to its advertiser client. These are common forms of rebates provided for media buys in the United Kingdom.

Vertical and Horizontal Limits on the Reach of Audits: Audits must be broad enough to expand beyond the scope of the individual agency's records. Given that agencies regularly engage with third parties in their performance of services – including affiliates and other companies with which they may have a larger business relationship – it is critical that the scope of an audit covers other agency affiliates and third parties the agency engages with, as well as those agencies and other holding company members "up the chain" of the holding company/agency structure.

Volume Discounts: Benefits given to an agency for purchasing media in bulk (e.g., buying media space in large volumes on behalf of multiple agency clients) whereby the media owner provides a rebate, discount or other benefit back to the agency for the large volume buy.

These are much of what is seen today. No doubt there are other structures that support a non-transparent environment. The issue is not whether any of these transactions are improper, although many of them raise serious questions. A core issue, however, is whether they are disclosed to the advertiser in a transparent, auditable manner.

About the ANA

The ANA (Association of National Advertisers) makes a difference for individuals, brands, and the industry by driving growth, advancing the interests of marketers and promoting and protecting the well-being of the marketing community.

Founded in 1910, the ANA provides leadership that advances marketing excellence and shapes the future of the industry. The ANA's membership includes nearly 2,000 companies with 25,000 brands that engage almost 150,000 industry professionals and collectively spend or support more than $400 billion in marketing and advertising annually. The membership is comprised of more than 1,100 client-side marketers and more than 800 marketing service provider members, which include leading marketing data science and technology suppliers, ad agencies, law firms, consultants, and vendors. Further enriching the ecosystem is the work of the nonprofit ANA Educational Foundation (AEF), which has the mission of enhancing the understanding of advertising and marketing within the academic and marketing communities.

About Reed Smith

Reed Smith is a global relationship law firm with more than 1,700 lawyers in 28 offices throughout the United States, Europe, Asia and the Middle East.

Founded in 1877, the firm represents leading international businesses, from Fortune 100 corporations to mid-market and emerging enterprises. Its lawyers provide litigation and other dispute-resolution services in multijurisdictional and high-stakes matters, deliver regulatory counsel, and execute the full range of strategic domestic and cross-border transactions. Reed Smith is a preeminent advisor to industries including financial services, life sciences, health care, advertising, entertainment and media, shipping and transport, energy and natural resources, real estate, manufacturing and technology, and education.