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# PRODUCTION TRANSPARENCY

## IN THE U.S. ADVERTISING INDUSTRY

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AUGUST 9, 2017

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## I. Executive Summary

- Transparency is the full disclosure of relevant information required for informed and intelligent decision-making. It is distinguished by the lack of hidden agendas and conditions. A non-transparent business practice is one in which relevant information is not disclosed or is intentionally obscured from one party to a transaction.
- Advertising production transparency issues have been building for several years:
  - AICE (the association representing independent post-production) elevated industry awareness when it issued a white paper in October 2014 (**updated in October 2016**) outlining concerns about transparency from in-house editorial and post services offered by ad agencies.
  - Concerns about non-transparent business practices in production have been voiced specifically in two ANA committees: the Production Management Committee and the Advertising Financial Management Committee.
  - As a by-product of its 2016 report, **“An Independent Study of Media Transparency in the U.S. Advertising Industry,”** K2 Intelligence identified production transparency concerns with multiple advertising agencies.
  - In late 2016, the Department of Justice reinforced industry concerns with its announcement of a probe to assess alleged “bid rigging.” That probe now covers the practices of five major agency holding companies. The case continues to be under review.
  - Issues related to production transparency extend beyond the United States. This is a current topic in Australia, Europe, and South Africa.
- The **ANA Production Transparency Task Force** was launched in August 2016 with a specific two-part mission:
  - *To assess whether there are non-transparent advertising agency practices in the U.S. production industry.*
  - *To assess advertiser advertising production management processes and develop recommendations for improvement.*

## I. Executive Summary

- The Task Force leveraged the insights of:
  - Thirty executives from various ANA member companies sourced exclusively from its committee system
  - Twelve organizations deemed to be subject matter experts. These organizations have a broad, deep, and diverse understanding of the advertising production industry. They are:

### **ANA Outside Legal Counsel**

- Reed Smith LLP

### **ANA Transparency Consultant**

- K2 Intelligence

### **Industry Trade Associations**

- AICE (the association representing independent post-production)
- AICP (Association of Independent Commercial Producers)
- AMP (Association of Music Producers)

### **Production Consultants**

- Advertising Production Resources (APR)
- Bird Bonette Stauderman (BBS)
- Creative Services/Video Opticals (CS/VO)
- Landgraf Consulting Group
- MRA Advertising Production Support Services

### **Auditors**

- DG2 Worldwide Group (also known as AAI)
- A global auditing firm

## I. Executive Summary

Twelve subject matter experts from industry trade associations, production consultants, experienced auditing organizations, an industry law firm, and K2 Intelligence supplemented by an ANA member survey provided consistent perspectives and the following conclusions:

- **Transparency issues exist in the production ecosystem.**
  - Transparency concerns exist at multiple agencies and holding companies. Eleven of the 12 subject matter experts support this conclusion.
  - The use of agency in-house production resources is not always transparent to the advertiser.
  - Production business processes marked by agency control of the bidding system — where the agency also competes for the business — is sometimes dysfunctional and conflicted because the buyer can also be the seller of the services.
  - Non-transparent agency-controlled bidding can lead to costly, inefficient, and sub-optimal advertiser business decisions. The financial impact to marketers can be significant.
  - Where non-transparent practices exist, the production and editing competitive landscape becomes potentially compromised and unreliable. Such situations may jeopardize the health and well-being of competitors in the production and editing ecosystem.
  - The state commercial production incentive system is often not transparent to advertisers, and therefore advertisers may not be receiving the financial benefits they are due.

## I. Executive Summary

- **Improved advertising production management is within advertisers' control. Advertiser disciplines, accountabilities, and controls for production need to be evaluated, upgraded, and restructured to substantially elevate decision-making quality and enhance disciplines and overall financial management.**
  - Advertisers must be aware that many agencies have in-house production/editorial and music production resources and that these resources are bidding against outside suppliers.
  - Advertisers must be more astute in contractual relationships, including those between the advertiser and agency and between the agency and production suppliers.
  - Advertisers must understand the bidding process to help reduce the likelihood of potential conflicts of interest among competing parties.
  - Advertisers must be fully aware of their rights in leveraging state commercial production incentives.
  - Advertisers must understand when the agency is acting as principal versus its legacy role as agent for a disclosed principal.
  - Advertisers must develop internal production management disciplines to ensure consistency and reliability in the decision-making process.

Please note: This report is not a conclusion that the behavioral concerns identified within are engaged in by every company in the ecosystem. Advertisers should discuss these issues with their individual agencies in a fully transparent manner.

## II. Industry Dynamics

- **U.S. Advertising Production Industry Spend.** There is no single source that estimates total advertising production industry spend. According to the AICP, annual spend for video commercial production is about \$6 billion (Source: AICP Member Survey, June 2016). That consists of television commercials, online films, and website content, and includes talent, post-production, and music costs as well as expenditures from projects shot overseas for the U.S. market. But video commercial production is just one segment of the production industry. There is advertising production spend in categories including audio, digital, print, out-of-home, and experiential/event marketing.
- **Industry Evolution — More Content Needed.** The advertising industry has an increasingly fragmented ecosystem for content distribution, including traditional television, digital place-based media, brand websites, YouTube, and other digital media outlets. Historically, a 30-second commercial was the standard video content required for most advertisers, while now more content is needed — especially video content — for multiple platforms in varying lengths and quality levels. Some of this content may have a short shelf life. Advertisers are working with an unprecedented number of agency, media, and production partners to develop and place their content. Furthermore, advertisers often require fast turnaround time for the delivery of content.

Market conditions are changing, which includes significantly expanded client requirements for the production of commercials and content, pressure from advertisers on fees and production budgets, decreasing market share and revenue for agencies, and the need to produce more content for less money with fast turnaround. Agencies are adapting by increasing their service offerings. Many holding companies and individual agencies now have in-house production/editorial and music facilities. Meanwhile, some advertisers have added and/or enhanced their own in-house production and editing capabilities.

- **Advertisers Seek Greater Efficiency in Production Spending.** Advertisers are seeking greater flexibility and efficiency in production spending, and are establishing new and different relationships to accomplish this objective.
  - Production decoupling has accelerated over the past decade. This is the separation of the business of production from creative development. In the broadest sense, production decoupling can be defined as “activities further down the supply chain, traditionally controlled and managed by agencies, which are moved, may be controlled, and are sometimes even managed directly by the client or by a third party designated by the client.”

## II. Industry Dynamics

- Advertisers prequalifying production suppliers is a strategy that helps ensure that advertisers' suppliers are qualified and consistently execute with quality. Prequalification procedures create the potential for the advertiser to negotiate economies of scale. Advertiser agreements with prequalified production suppliers sometimes include prenegotiated discounts tied to exceeding agreed-upon spending thresholds.
- Advertiser direct sourcing of production is a newer trend. Rather than working through their advertising agencies, some advertisers are beginning to source production internally. Some advertisers have also created in-house content studios.

Direct advertiser management and fulfillment of production has resulted in some agency, producer, and post-production supplier disintermediation, reduced work, and lower fees for those entities.

According to a recent ANA member survey, 40 percent of ANA member companies have taken some production management/execution previously handled by an agency and brought it in-house over the past year.

- **Agency In-House Solutions.** Agencies are adapting to marketplace pressures by increasing their service offerings.

Most holding companies and individual agencies now have in-house production/editorial and/or music facilities. In the past it was not uncommon for some larger agencies to have such in-house facilities (often referred to as “studios”) used for simpler projects such as demos, test commercials, video for new business pitches, mechanical edits, resizes, and dubbing. Today’s agency in-house facilities are often more robust, with complete integrated production resources.

Accordingly, agency in-house solutions have become important service centers for clients, offering convenience and savings for certain kinds of work, and profit centers for agencies and holding companies.

See the appendix for a list of agency in-house production/editorial and music facilities.



### III. Detailed Findings

These detailed findings are based on multiple sources, including K2 Intelligence, ANA member companies, and subject matter experts from leading industry trade associations, production consultants, auditors, and an industry law firm.

#### 1. K2 Intelligence

Between October 2015 and May 2016, K2 Intelligence conducted an independent study of media transparency issues in the U.S. advertising industry on behalf of the ANA. **K2's report**, published in June 2016, found that non-transparent business practices were pervasive within the media-buying marketplace. Over the course of the study, K2 conducted 143 interviews with 150 individual sources, representing a cross-section of the U.S. media-buying ecosystem.

This interview sample included a limited number of professionals in the field of post-production; specifically, eight producers/editors at independent post-production companies — one of whom had prior experience at a creative agency in this field within the last three years — and three trade association representatives. During the course of these interviews, K2 was informed of certain transparency issues specific to post-production. As these issues fell outside the scope of K2's study, which was focused on transparency issues in media buying, they were not included in the final report. K2 did not reach any broad conclusions about transparency in post-production due to the limited scope of its interviews in this field. The following summarizes the information provided to K2 through these interviews:

- According to sources interviewed by K2, some creative agencies are increasingly directing post-production projects to affiliated companies within the same agency holding companies. Sources told K2 of a bidding process that suggested agency self-dealing. Specifically, six producers/editors from four separate, independent post-production companies reported firsthand accounts of agency producers asking them to submit a so-called “check bid” on a project that was pre-determined by the agency to go in-house. In these scenarios, the post-production companies were urged to inflate the price they would otherwise quote on a bid. Ostensibly, this enabled the agency producer to create a paper trail that justified to the advertiser its decision to award the project to an in-house facility, which provided a rival bid at a lower price.
- One post-production producer shared with K2 a copy of an email he received in 2016 from a producer at a creative agency within an agency holding company asking them to submit a check bid as a “favor.” The agency producer attached a copy of the in-house bid to the email request and asked the post-production producer to submit a bid that was higher than the in-house bid.

### III. Detailed Findings

- A former senior manager at an in-house post-production facility that is tied to a different agency holding company told K2 that the agency holding company “strongly recommended” that its producers send post-production work to the in-house facility. “At one point, all the work was going in-house,” said the source, who left his role within the last three years.
- An executive producer at a film-editing company told K2 about another example from 2016 of a producer from a different creative agency asking the company to submit a check bid. According to the source, the agency producer said that he was under pressure from agency management to bring the business in-house and that he wanted to be able to show the advertiser, a U.S.-based packaged goods company, that the in-house facility offered a better price than a rival bid from an independent company. “I need the paperwork,” the agency producer told the film-editing company, according to the source. The source told K2 that they agreed to submit a check bid because their company relies so heavily on agencies for business and does not wish to antagonize them. “You never want to appear contentious with [agency] producers in any capacity,” the source said.
- An executive producer at another post-production company said they were happy to comply with agency requests for check bids because they said they know they will win other projects from agencies.
- However, sources reported that creative agencies are not always forthcoming with post-production companies as to when projects are already designated to go in-house. The managing partner of one post-production company told K2 about two occasions in 2015 where agency producers “went silent” after the partner submitted bids on projects involving budgets with six-figure sums. Usually, agency producers call back and negotiate prices on specific line items, the source said; that did not happen on these occasions. After a period of time, the source told K2 that they learned from agency producers that the in-house facility had won the work. The source said that, on each occasion, the agency producer said something to the effect of “Sorry, someone mandated the project go in-house at the last minute.”

### III. Detailed Findings

## 2. Industry Trade Associations

The industry trade associations representing editorial and music registered similar perspectives about non-transparent behavior by agencies in production. The AICE is dedicated to independent post-production, and the AMP (Association of Music Producers) represents music producers. Their perspectives:

- In-house facilities create additional revenue streams for agencies. Holding companies have reportedly begun to mandate that targeted levels of client work be handled by their respective in-house operations. Agency management is incentivized to keep work in-house.
- Agency conflicts of interest exist in some bidding processes. Some agencies manage the bidding process, which includes getting a bid from an internal agency company for editorial or music. Clients are not always fully informed of the ownership status of the agency unit submitting the bids. Some agencies use generic and unrelated names to brand their in-house facilities, which can mask that they are owned by or affiliated with the agency.
- Agency in-house facility estimates are sometimes created with insider information, which can provide an unfair advantage. The agency is able to analyze what competitors are proposing (i.e., when three bids are required) while simultaneously laying out the specs upon which those competitors base their estimates. This raises concerns that agencies are using their positions to ensure that their bids have the potential to appear superior to those from independent companies.
- Agencies competing against their vendors have the unfair advantage of being exposed to the vendors' creative ideas and demo work.
- Some agencies mark up vendor invoices a certain percentage, which may or may not be known to the advertiser.
- Independent post-production houses have been asked by agencies to submit bogus "check bids" on particular jobs. These are ostensibly competitive bids which are, in turn, submitted to clients to meet requirements for multiple bids.

At a June 2017 AICE membership meeting of more than 40 executives attended by the ANA, the consensus opinion was that non-transparent behavior among agencies regarding production is a very serious issue.

For a more in-depth perspective from the AICE, see its white paper, **"In-House Post-Production Policy Statement: A Push for Greater Transparency, Fairness, and Ethics,"** in the appendix.

### III. Detailed Findings

Meanwhile, the AICP (Association of Independent Commercial Producers) acknowledged that its members have been affected by agencies pushing work to their in-house entities, saying, “Yes, we have certainly seen the presence of in-house entities involved in the bidding process, and more recently in bigger numbers and more frequently.”

To address this situation, the AICP issued **“Suggested Best Practices — Bidding”** in November 2016 as guidance for a competitive and transparent bidding process.

In **December 2016** and again in **February 2017**, the AICP reminded and advised its members about fair bidding practices and included an update to its model **Mutual NDA**. The AICP recommended that this Mutual NDA be used (or a similar document created by production company counsel) to ensure that the production company’s bidding information is being used in a lawful way by agencies and consultants when submitted for consideration on a production. Key language suggested by AICP is as follows:

- [Production Company] submits this bid with the understanding that the Agency is soliciting bona fide competitive bids and is not soliciting a “Complementary Bid,”\* which is deemed an illegal, anti-competitive bidding practice according to the U.S. Department of Justice. Unless notified otherwise in writing by the Agency prior to bid submission, [Production Company] submits this bid with the understanding that to ensure a fair and non-conflicted bidding process, no entity in the bidding pool, directly or indirectly, is a parent, subsidiary, division, affiliate, or sibling of the Agency.

\*A bid which is not intended to secure the advertiser’s acceptance but is merely designed to give the appearance of genuine competitive bidding.

### III. Detailed Findings

#### 3. Production Consultants

Five production consultants expressed many of the same transparency concerns as the industry trade associations:

- Agency conflicts of interest can exist in the bidding process. Sometimes agencies manage the bidding process when getting a bid from an internal agency company for editorial or music while also getting bids (and competing with) outside companies.
- Agency in-house facility estimates are sometimes created with insider information. The agency in-house facility may be creating its estimates with existing knowledge of what competitors are proposing, giving the agency in-house facility an unfair advantage to “beat” the competitive estimates. There is a clear conflict of interest when the agency is able to first analyze an outside bid and then offer their in-house services for less.
- Advertisers are not always fully informed of the ownership status of the agency unit or production supplier submitting the bids.

In addition, the production consultants outlined the following advantages of, disadvantages of, and best practices for working with agency-owned production units.

Advantages:

- A good option for some projects (e.g., edits, test spots, social videos)
- Responsiveness — speed, flexibility, effectiveness
- Convenient for agency supervision of staff

Disadvantages:

- Less sophisticated equipment and less experienced staff (e.g., editors, producers, CGI artists) than best-in-class independent companies
- Promised cost savings may not always be realized, if in-house bids that are estimated low have significant overages

### III. Detailed Findings

Some best practices for advertisers when working with agency in-house solutions:

- Advertisers must become more aware of the terms and conditions of their advertiser/agency contract (e.g., principal versus agent, obligations of the agency in the bidding process).
- Advertisers must become more educated on production in general and better understand the items being negotiated. For example, if advertisers are negotiating post or pre-press rates for an in-house facility, cost per day/per unit is only half the equation; one also needs to monitor the number of days/units involved.
- Advertisers should monitor classifications for rates based on low-, mid-, and high-complexity project levels (as complexity drives price). It is not uncommon for an agency in-house facility to outsource the more complex parts of the process (which may be in the client's best interests), which may or may not be disclosed to the client. Without transparency, the client cannot know whether the decision is or is not in its best interests.

### III. Detailed Findings

#### 4. Auditors

Two auditors provided unique perspectives on agencies acting as principal and transparency issues in experiential and event production.

##### *Agencies Acting as Principal*

According to one auditor, agencies sometimes are acting as principal with production suppliers whereby they enter into the contracts directly with the production supplier versus entering into the agreement as the “agent” of their client. For advertisers, knowing the difference is important, as principal transactions generally result in non-disclosure of the original purchase price as well as any incentives/rebates paid by production suppliers, and limit the advertiser’s right to audit.

Sometimes agencies act as principal rather than agent due to the advertiser’s contractual requirements. While this may be to the advertiser’s financial advantage in some instances, principal-based arrangements should be disclosed by the agency and understood by the advertiser to allow proper decision-making. Clients should also be aware that even when the agency is acting as a principal and not as an agent, the same level of transparency can be provided in a contract. The status of principal versus agent has no legal mandate in regard to transparency — that is a great misperception among advertisers.

The following statements from holding company annual reports shows that agencies are sometimes acting as principals in production contracts:

- Holding Company A: “Production expenses can vary significantly between periods depending upon the timing of completion of certain projects where we act as principal, which could affect trends between various periods in the future.”
- Holding Company B: “In certain arrangements, we act as principal and we contract directly with third-party suppliers, media providers, and production companies, and we are the primary obligor. In these circumstances, revenue is recorded at the gross amount billed since revenue has been earned for the sale of goods or services.”
- Holding Company C: “The promotions and experiential businesses were affected by decreased billable pass-through costs incurred on the client’s behalf from the Company acting as principal, which was due to a different mix of programs that had a smaller component of billable pass-through costs as compared to 2014.”

### III. Detailed Findings

#### *Transparency Issues in Experiential and Event Production*

One auditor addressed transparency issues in experiential and event production, where spending can be significant. Convention and trade shows account for almost one-quarter of corporate marketing budgets, on average, according to the Convention Industry Council. The auditor expressed the following concerns:

- Experiential and event production can have significant spend in a short period of time.
- When compared to broadcast ad production:
  - Advertiser business process discipline is often looser, with fewer bidding and reporting requirements.
  - There is often less client, agency, and operational oversight.
  - There are fewer compliance audits performed than with broadcast production.
- There are often more frequent financial, operational, and reporting lapses than are typically found in broadcast and digital ad production due to the just-in-time nature of experiential and event production.

Separately, two production consultants also stated that there are transparency issues in experiential and event production.



### III. Detailed Findings

## 5. State Commercial Production Incentives

State commercial production incentives (also called production rebates) warrant their own unique review with respect to transparency.

Many states offer financial incentives to shoot commercials in their states. The savings can be quite significant, often ranging from 15 to 30 percent of production spending in that state. The ANA has written two white papers on this issue:

- **The Found Money of State Commercial Production Incentives (2012)**
- **State Commercial Production Incentives — Principles for Fair Business Practices (2014)**

The original paper was written to counter the position of the AICP that “production companies should receive the full benefit of the incentive.” The ANA vigorously disagreed with that perspective, as the advertiser, not the production company, funds the production and gives final approval on the shoot location. The paper concluded, “Production incentive rebates belong exclusively to the advertiser, not the production company or the agency.”

The 2014 follow-up provided a dozen principles to help marketers navigate the complexities of state commercial production incentives. The first of these principles is “Transparency is critical,” and reads in part: “Neither agencies nor production companies should apply for state commercial production incentives unless the marketer has given approval in advance in writing, ideally in the contract between the agency (as agent for the marketer) and production company.”

There is poor awareness among advertisers of state commercial production incentives. According to a recent ANA member survey:

- Only 20 percent of ANA members are very familiar with state commercial production incentives. Meanwhile, 39 percent are moderately familiar and 41 percent not familiar at all.
- Among those advertisers whose companies have engaged in productions eligible for state commercial production incentives during the past two years, 61 percent received a rebate/benefit but the remaining 39 percent either didn’t and were “not sure why” or did not know.

Some production companies and agencies file with the knowledge of the advertiser and subsequently return the incentive to the advertiser, or have otherwise agreed that the agency or production company can keep any incentive. However, some file directly and could potentially receive the financial benefits without the advertiser’s knowledge or approval.

### III. Detailed Findings

In production, the agency should represent the best financial and creative interests of the advertiser, and that includes having knowledge of state commercial production incentives and working transparently with advertisers in the filing and distribution of the financial benefits.

Data from state Freedom of Information Act requests is available which provides details on who filed for state commercial production incentive rebates (i.e., the advertiser, agency, or production company) and the final amount received. Advertisers who have had productions in popular commercial production incentive states (including Connecticut, Illinois, and Louisiana) and are unsure if they have received their rightful rebate are encouraged to discuss this matter with their agencies or perhaps file a FOIA request to obtain rebate information. Note that FOIA data will not customarily include information related to the ultimate allocation of the rebate among the parties.

### III. Detailed Findings

## 6. ANA Member Management of Advertising Production

ANA members were surveyed in the spring of 2017 to better understand their advertising production management practices. Broadly, they appear to have respectable oversight, but pockets of significant deficiencies exist:

- Two-thirds have a dedicated internal team (46 percent) or individual (22 percent) responsible for managing advertising production costs.
- Almost half use an outside production consultant (46 percent).
- Three-quarters have internal controls in place to manage production costs (75 percent).
- Almost two-thirds characterize those making advertising production spending decisions at their company as being “very/moderately” knowledgeable about production (63 percent).

However, when respondents were queried on specifics, key deficiencies became apparent:

- Fewer than half require their agency to disclose if they are bidding a production job to an in-house or affiliated production company (43 percent).
- Over 60 percent either do not require (21 percent) or don't know (41 percent) if their agency contract requires that production rebates and other incentives be passed back to their company.
- While one-third (33 percent) confirm knowing that their agency had acted as principal with production suppliers on their business, and 38 percent said their agency had not, a full 29 percent do not know either way.
- Marketers lack familiarity with state commercial production incentives and don't know whether their companies are benefiting.

Separately, production consultants believe that the production knowledge of those making buying decisions at the client varies dramatically, and in many cases is very limited.

## IV. Conclusions

Twelve subject matter experts from industry trade associations, production consultants, experienced auditing organizations, an industry law firm, and K2 Intelligence supplemented by an ANA member survey provided consistent perspectives and the following conclusions:

- **Transparency issues exist in the production ecosystem.**
  - Transparency concerns exist at multiple agencies and holding companies. Eleven of the 12 subject matter experts support this conclusion.
  - The use of agency in-house production resources is not always transparent to the advertiser.
  - Production business processes marked by agency control of the bidding system — where the agency also competes for the business — is sometimes dysfunctional and conflicted because the buyer can also be the seller of the services.
  - Non-transparent agency-controlled bidding can lead to costly, inefficient, and sub-optimal advertiser business decisions. The financial impact to marketers can be significant.
  - Where non-transparent practices exist, the production and editing competitive landscape becomes potentially compromised and unreliable. Such situations may jeopardize the health and well-being of competitors in the production and editing ecosystem.
  - The state commercial production incentive system is often not transparent to advertisers, and therefore advertisers may not be receiving the financial benefits they are due.
- **Improved advertising production management is within advertisers' control. Advertiser disciplines, accountabilities, and controls for production need to be evaluated, upgraded, and restructured to substantially elevate decision-making quality and enhance disciplines and overall financial management.**
  - Advertisers must be aware that many agencies have in-house production/editorial and music production resources and that these resources are bidding against outside suppliers.
  - Advertisers must be more astute in contractual relationships, including those between the advertiser and agency and between the agency and production suppliers.
  - Advertisers must understand the bidding process to help reduce the likelihood of potential conflicts of interest among competing parties.
  - Advertisers must be fully aware of their rights in leveraging state commercial production incentives.
  - Advertisers must understand when the agency is acting as principal versus its legacy role as agent for a disclosed principal.
  - Advertisers must develop internal production management disciplines to ensure consistency and reliability in the decision-making process.

## V. Recommendations for Advertisers

1. Advertisers should be aware that many agencies have in-house production/editorial and music resources. Every advertiser should know, by name, the specific in-house resources for their holding companies, agencies, and affiliates. Agencies should make these relationships transparent. See the appendix for a list of holding company and agency in-house production/editorial and music facilities.
2. Advertisers should require agency disclosure, prior to bidding, when an in-house production or music resource is being considered for a project. When in-house facilities are part of the competitive bidding, establish protocols to avoid conflicts of interest.
  - o Require all bidders to read and sign a statement as part of their bid indicating that they have participated in an open and fair bidding process and that they are not aware of any illicit bidding behavior. The statement should remind bidders that complementary bidding may be viewed as a per se violation of the U.S., antitrust laws. For more information see **specific guidance from the U.S. Department of Justice**.
  - o Have all bids sent directly to a third party (e.g., production consultant) or advertiser staff person first, who should then share them with the agency producer.
3. Advertisers should review production bid specifications and scope prior to the specs being submitted to vendors. Advertisers should also see originally submitted vendor estimates and invoices (to pre-empt the opportunity for markup).
4. Advertiser questions to discuss with agencies:
  - o Does the agency have in-house or affiliated company production, editing, or music operations that provide services to advertisers?
  - o When are agency in-house or affiliated production and other agency resources considered in the bidding process?
  - o How is the advertiser kept informed of agency in-house production resources being involved in the bidding or execution process?
  - o Has the agency or holding company parent set up a mandated in-house quota for the work it creates for your brands? What are the advantages of this approach, if any, to your organization?
  - o Is anyone at the agency or on the advertiser's staff pressured to steer work to either the agency in-house facility or client in-house production group, or rewarded for doing so?
  - o Who are preferred providers, and why? Have you been involved and endorsed the preferred vendor selection process?
  - o If they had their choice, would the creatives and producers who work on your business choose the agency in-house or client in-house facility, or prefer an independent company? Why?

## V. Recommendations for Advertisers

- o Are agencies, producers, and editors optimizing eligibility for credits, discounts, and rebates? And if so, are they being transparent in that regard with the advertiser?
- o Is the agency ever acting as a principal, rather than agent, in production?

If they are acting as principal, understand why and understand any implications for business operations, such as tax and other liabilities. Advertisers should keep in mind that full transparency can be required contractually regardless of whether an agency is acting as an agent or a principal.

- o What controls are in place at the agency to ensure fair and transparent agency production servicing?
5. Be aware that state commercial production incentives can offer significant savings when production occurs in specific states.
    - o Read the **2012** and **2014** ANA white papers.
    - o Discuss state commercial production incentives with agencies.
    - o Review the state commercial production incentive policies of each state with the agency, production company, or production consultant as applicable. Advertisers might also consider a state Freedom of Information Act request to see if the agency or production company has filed for the incentive.
  6. Review and update creative agency contracts. A key learning from the ANA's work on media transparency is that many agencies believe that the client's relationship with the media agency is defined by the contract. From that study, the ANA's general counsel, Reed Smith LLP, developed a media agency **Master Media Planning & Buying Services Agreement** which can be used by advertisers to develop their own agency agreement. Reed Smith has developed recommended approaches for creative agency contracts to address production transparency issues. Details are in the appendix.
  7. Trust but verify. Use compliance reviews from an independent, qualified, objective auditor to ensure that contractual terms are being met by agencies and third-party producers and editors.
  8. Publish and consistently adhere to formal production guidelines. To supplement the contract — which will be written from a legal perspective — develop and publish formal production guidelines which detail client policies related to production and expectations of the agency as well as of third-party producers and editors. Then update the guidelines regularly. The contract will rarely be reviewed by many of the day-to-day people who touch production at the agency. The production guidelines certainly should be.

## V. Recommendations for Advertisers

9. Involve procurement. Procurement can be a great internal partner to establish guidelines and monitor practices for production transparency.
10. Advertisers must understand that there is a direct correlation between the level of transparency and level of control taken by the advertiser — the more control, the more transparency. In models with higher levels of control and transparency, the advertiser (or a qualified third party engaged and managed by the advertiser) could:
  - o Take over the bidding process from the agency
  - o Track costs, data, and deliverables across agencies and production vendors
  - o Make payments directly to vendors

To ensure transparency, it is critical for advertisers to take a proactive role.

## VI. Department of Justice Investigation

In December 2016 it was publicly reported that the U.S. Department of Justice is investigating possible bid-rigging and other practices within the commercial production sector.

Bid rigging, which is enforced by the Sherman Act, is a form of fraud in which a commercial contract is promised to one party even though for the sake of appearances several other parties also present a bid. In other words, competitors agree in advance who will submit the bid that is most likely to win. It's a form of collusion and is illegal, not only in the United States but in most other countries. Not all of the competitors have to be involved. Bid rigging can take many forms, including, but not limited to:

- A non-competitive bid is submitted to the agency in exchange for the promise to be awarded future work or to be a subcontractor in the work being bid.
- A bid is purposefully too high or contains terms that are unacceptable to the advertiser to raise overall prices.
- One or more competitors agrees not to submit a bid so another competitor's bid will be accepted.

Five agency holding companies have now been subpoenaed by the DOJ: Interpublic Group, MDC, Omnicom, Publicis, and WPP. In addition, the records of K2 Intelligence have been subpoenaed.

Please note that, as of this writing, the Department of Justice has not announced any conclusions on its investigation.

The DOJ has released an educational white paper, **“Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For.”**



## VII. Appendices

### VII. Appendix 1: Holding Company and Agency In-House Facilities for Production/Editorial and Music

HOLDING COMPANY PARENT	PRODUCTION/EDITORIAL UNIT	URL
Havas	Studio6	<a href="http://studio6ww.com/">http://studio6ww.com/</a>
IPG	Craft	<a href="http://www.craftww.com/">http://www.craftww.com/</a>
Omnicom	eg+ Worldwide	<a href="https://www.egplusww.com/">https://www.egplusww.com/</a>
Publicis	Prodigious	<a href="http://www.prodigious.com/">http://www.prodigious.com/</a>
WPP	Gramercy Park Studios	<a href="http://gramercyparkstudios.com">http://gramercyparkstudios.com</a>
WPP	Hogarth	<a href="http://www.hogarthww.com/">http://www.hogarthww.com/</a>
WPP	Townhouse	<a href="https://www.townhouseww.com/">https://www.townhouseww.com/</a>

  

AGENCY PARENT	PRODUCTION/EDITORIAL UNIT	URL
180LA	Melvin	<a href="http://www.melvinstudio.com/">http://www.melvinstudio.com/</a>
72andSunny	Hecho En 72	<a href="http://hechoen72.com/#login">http://hechoen72.com/#login</a>
AbelsonTaylor	dose	<a href="http://www.abelsontaylor.com/dose/">http://www.abelsontaylor.com/dose/</a>
BBDO	Flare	<a href="http://flarebbdo.com/">http://flarebbdo.com/</a>
BBDO	The Kitchen	<a href="https://www.behance.net/gallery/200729/The-Kitchen-at-BBDO">https://www.behance.net/gallery/200729/The-Kitchen-at-BBDO</a>
BBH	Black Sheep Creative	
BBH	The Creative Studio	<a href="http://www.bartlebolehegarty.com/losangeles/home/about/">http://www.bartlebolehegarty.com/losangeles/home/about/</a>
Butler Shine Stern & Partners	Cleaver Edit	<a href="http://www.cleaveredit.com">www.cleaveredit.com</a>
Colle+McVoy	Cold Cuts	
Crispin Porter + Bogusky	Plus Productions	<a href="http://www.plusproductions.com/">http://www.plusproductions.com/</a>
Dailey	Dailey In House Studios	
David & Goliath	Spinach	<a href="http://www.spinachla.com/">http://www.spinachla.com/</a>
DDB	Cool Dry Place	<a href="http://www.manta.com/c/mmjb0wt/cool-dry-place">http://www.manta.com/c/mmjb0wt/cool-dry-place</a>
DDB	The Studio	<a href="http://www.theddbstudio.com/">http://www.theddbstudio.com/</a>
Deutsch	Mr. Ed	
Deutsch	Steelhead	
Doner	TUG (The Underground)	
Droga Studios	Droga5	
Fallon	Assembly Line	<a href="http://adsoftheworld.com/creative/fallon_assembly_line">http://adsoftheworld.com/creative/fallon_assembly_line</a>
Fallon	Charm School	
FCB	Lord + Thomas	<a href="http://lordandthomas.net/">http://lordandthomas.net/</a>
FCB	Pipeline PS	<a href="http://www.interpublic.com/our-agencies/agency?company_id=2347&amp;agencyname=">http://www.interpublic.com/our-agencies/agency?company_id=2347&amp;agencyname=</a>
Goodby Silverstein & Partners	eLevel	<a href="http://elevel.tv/">http://elevel.tv/</a>
GTB	The Park	
J. Walter Thompson	Jw2 Productions	
Leo Burnett	Greenhouse	<a href="http://leoburnett.com/articles/news/get-to-know-greenhouse/">http://leoburnett.com/articles/news/get-to-know-greenhouse/</a>
Lopez Negrete	Zap Boom Bang Studios	<a href="http://zapboombang.com/">http://zapboombang.com/</a>
Martin Williams	Chop Shop	<a href="http://www.chopshoptv.com">www.chopshoptv.com</a>
McGarryBowen	Orange Slice	<a href="http://adsoftheworld.com/creative/orange_slice">http://adsoftheworld.com/creative/orange_slice</a>
Ogilvy	Eyepatch Productions	<a href="http://www.eyepatchproductions.com/">http://www.eyepatchproductions.com/</a>
Ogilvy	H&O (Hogarth & Ogilvy)	<a href="http://www.hogarth-ogilvy.com">http://www.hogarth-ogilvy.com</a>
Saatchi & Saatchi	Comprades	
TBWA/Chiat/Day	Venice Beach Editorial	<a href="http://www.venicebeacheditorial.com/">http://www.venicebeacheditorial.com/</a>
Team One	TOM	
The Martin Agency	Running with Scissors	<a href="http://www.rwspost.com/">http://www.rwspost.com/</a>
Venables Bell & Partners	Lumberyard	<a href="http://www.venablesbell.com/news/introducing-lumberyard">http://www.venablesbell.com/news/introducing-lumberyard</a>
Wieden + Kennedy	Joint Editorial	<a href="http://jointeditorial.com/about">http://jointeditorial.com/about</a>
Y&R	3CCC	
Y&R	RAY	<a href="http://iamjwpp.azurewebsites.net">http://iamjwpp.azurewebsites.net</a>

  

AGENCY PARENT	MUSIC UNIT	URL
DDB	The Studio	<a href="http://www.theddbstudio.com/">http://www.theddbstudio.com/</a>
Grey	Crescendo Productions	<a href="https://www.linkedin.com/company-beta/4044831/?pathWildcard=4044831">https://www.linkedin.com/company-beta/4044831/?pathWildcard=4044831</a>
JWT	Music Production Group (MPG)	
Omnicom (via GMR Marketing)	MusicLink	<a href="https://www.omcmusiclink.com/users/auth/login?next=/search/">https://www.omcmusiclink.com/users/auth/login?next=/search/</a>

Company URLs provided where available. In some cases URLs are from an external source that confirm the existence of in-house facilities.

August 2017

## VII. Appendix 2: AICE “In-House Post-Production Policy Statement: A Push for Greater Transparency, Fairness, and Ethics”



### IN-HOUSE POST PRODUCTION POLICY STATEMENT

#### ***A Push for Greater Transparency, Fairness and Ethics***

The proliferation of in-house editorial and post services offered by ad agencies is an area of concern for the independent post production community. While these capabilities have been available for some time, the business practices surrounding their current implementation and their impact on agency clients and the independent post production community has motivated AICE to raise questions about transparency, ethics and fair competition for advertisers, agencies and the industry at large.

Despite being touted by agencies as efficient ways to edit and finish work faster and cheaper – a claim not always supported by facts – in-house facilities exist largely to create additional revenue streams for the agencies themselves.

In addition, holding companies have reportedly begun to mandate that targeted levels of client work be handled by their respective in-house operations, such as WPP’s Hogarth, IPG’s Craft, Publicis’ Prodigious and others, forcing their creatives to work in-house, whether they think it’s in the best interests of the project or not. For advertisers, this can often mean working with second-tier operations that provide no bargain for clients but exist only to funnel additional revenue to holding company coffers.

The presence of these facilities has transformed agencies from being the clients of AICE members to being competitors, and competitors that have gatekeeper access to their bids and their creative approach to problem-solving. This unfair advantage alters the relationship that previously existed between companies that served as the agents for their clients and those that functioned as vendors to those agents. As such, our concerns can be summarized as follows:

- **Transparency:** We believe many marketers may be unaware that their agency or agencies are under a financially-driven holding company directive to keep as much of their work in-house as possible, thereby limiting choice and cutting them off from

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## VII. Appendix 2: AICE “In-House Post-Production Policy Statement: A Push for Greater Transparency, Fairness, and Ethics”

they’re getting when their work is completed at agency in-house facilities, or whether the use of them represents the best option to ensure the best final product and the best talent for their money.

Also, the bidding process is not always done in the open, with clients fully informed as to the ownership status of the post entities submitting the bids. (Some agencies use generic and unrelated names to brand their in-house facilities, which can mask the fact that they’re wholly owned by and housed within the agency.) We believe in-house facilities should clearly identify themselves as such when bids are submitted to help ensure that the bidding process is done in a fair and upfront manner.

■ **Fairness:** For agencies to steer work to in-house facilities is perceived as an overt conflict of interest. Are agencies rewarding senior staff to steer client work to their in-house operations? In addition to holding company mandates, some agencies reportedly offer financial incentives to department heads when they meet targets for in-house volume. If true, this practice can easily corrupt the objectivity of the post production process and smacks of pay for play.

In-house work also raises questions about how potential problems will be addressed. For example, are clients satisfied that there are appropriate means of resolving overages on in-house jobs? And how will the in-house facility address creative or technical problems, or deal with risks or liabilities?

■ **Ethics:** Independent post houses are often asked by agencies to submit bogus ‘check bids’ on particular jobs. These are ostensibly competitive bids which are in turn submitted to clients to meet requirements for multiple bids. AICE contends that requesting ‘check bids’ is a corrupt and potentially illegal practice, and that its members often feel coerced into providing them for fear of alienating an agency and risking future opportunities for work.

Beyond that, the in-house model allows the agency to manipulate the bidding process based on an unfair advantage: They get to analyze what their competitors are proposing while simultaneously laying out the specs upon which their competitors base their estimates. This raises the suspicion that agencies are using this position to ensure that

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damages trust and credibility.

AICE’s position is that transparency can be adversely impacted when it comes to dealing with in-house operations. As a result, we recommend clients insist on the following:

- Ask to see unaltered, originally-submitted bids for every project, and have them evaluated by an independent third party rather than having them go through your agency.
- Require that your agency disclose, on the Agency Cost Estimate, when in-house post production resources are being used on your projects.
- When appropriate, demand to see treatments (particularly in the case of complex jobs requiring visual effects and design services) as originally submitted.
- Insist on knowing who will be the lead post production artist or artists on your project, and consistently review their work.

It’s our fundamental belief that honest competition promises a better product at a lower price. To that end, we urge clients to ask their agencies the following questions when it comes to how their production and post production budgets are being spent:

- 1) Has your holding company parent set up a mandated in-house quota for the work you create for our brands? If so, does anyone at our organization know about it?
- 2) Is anyone at your agency being rewarded for steering our work to your in-house facility?
- 3) If they had their choice, would the creatives and producers who work on our business choose your in-house facility, or go to an independent post company?

AICE is determined to educate the client community on the ramifications of using in-house post production facilities, the inherent conflicts they present and the impact they have on their ability to get the best possible product at the best price. Our goal is for clients to be able to make informed decisions about where their commercial content should be finished, and by whom.

October 2014 / revised October 2016

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## VII. Appendix 3: Production-Related Recommendations for Creative Agency Agreements

Please note that Reed Smith has drafted these recommendations as guidance rather than contract provisions because every agency agreement is different. Contract provisions can be easily drafted from this guidance. Advertisers are encouraged to consult qualified legal counsel when drafting actual contracts.

- Advertisers that produce a significant amount of content should consider adding production guidelines as an exhibit to the creative agency agreement. It should go into detail about the Advertiser's production requirements, including, but not limited to:
  - Roles and responsibilities in the production process for the Agency and the Advertiser and any producers, production consultants, etc. who may be assigned to a production. The document should also include specific procedures for securing and approving bids.
  - Overview of the production planning and bidding process
  - Policies relating to production travel and expenses, including the submission process for reimbursement
  - Policies relating to the use of preferred suppliers, if any
- The creative agency agreement with the Agency should:
  - Identify what (if any) production costs may be marked up by the Agency and anyone else associated with the production. This should include the formula for markup and whether there are any exclusions (e.g., insurance, talent agent commissions, internal agency production services).
  - Identify whether the Agency is entering into production contracts as an agent or as principal.
  - Indicate when/if triple-bidding is required. Require any bid policy deviation to be authorized by the Advertiser in writing pursuant to a bid waiver form. The Agency and the Advertiser (and the Advertiser's production consultant, if applicable) should mutually agree upon all bidding specs and the bidding schedule before the production job is presented to any bidders. All bidders should receive the same specs.
- In the event that the Agency submits a bid from an Agency Affiliate or another third party in which the Agency has a direct or indirect financial interest, the Agency should prominently identify on the first page of the Agency bid that the bidder is an Agency Affiliate or party in which the Agency has a financial interest.
- Bid requests should require that all bidders:
  - Submit a statement as part of their bid acknowledging that they have participated in an open and fair bidding process and that they are not aware of any illicit bidding behavior.

## VII. Appendix 3: Production-Related Recommendations for Creative Agency Agreements

- Acknowledge that complementary bidding may be viewed as a per se violation of the U.S. antitrust laws. For more information, bidders should be directed to: <https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>.
- Submit all bids to the Agency with a copy to the Advertiser or its designees on all submissions (including any post-submission negotiations/correspondence).
- The Agency should identify in writing to the Advertiser whether a production will take place in a state which offers production tax incentives. The Advertiser should encourage the Agency to look for such opportunities and regularly consider them in fielding bids. The Advertiser should work in connection with the Agency and the applicable producer to conduct the production in such a manner as to ensure that the anticipated tax incentives can be earned for the benefit of the Advertiser. The Agency should ensure that all agreements with third parties require such parties to pass back to the Advertiser any tax incentives received, unless otherwise agreed in writing by the Advertiser.
- Any agreement with an Agency should provide that the Agency and its Affiliates should at no time receive or retain (without disclosure to the Advertiser in writing), either inside the United States or outside the United States, any Rebates or Incentives from third parties. Any Rebates or Incentives received should be passed back to Advertiser within thirty (30) days of receipt and should be clearly documented to the Advertiser. To the extent that Rebates and Incentives received by the Agency or an Agency Affiliate are based on spending from multiple clients, the Advertiser should receive its proportional share of such Rebates and Incentives. “Rebates and Incentives” should be defined as all third-party payments (including cash rebates or other incentives); volume discounts; or other items of value received by Agency or Agency Affiliates, in whole or in part, as a result of the Advertiser’s spending with the Agency or Agency Affiliates.
- The agreement between the Agency and the Advertiser should state that it is the mutual intent of the parties that all transactions entered into on the Advertiser’s behalf by the Agency and Agency Affiliates, the flow of the Advertiser’s funds entrusted to the Agency, and any Rebates and Incentives received by the Agency and Agency Affiliates will be transparent and fully disclosed to the Advertiser.
- The Agency should be required at all times to act in the best interests of the Advertiser when negotiating and entering into third-party agreements, including any agreements with Agency Affiliates and third parties in which the Agency or its Affiliates have a financial interest.
- With respect to the Advertiser’s audit rights, the Advertiser’s rights should include the right to audit any and all documentation reasonably required to validate the costs incurred by Advertiser and the proper allocation of Rebates and Incentives.



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