

The Aftermath

A major report on media transparency has forced agencies and advertisers to face an inconvenient truth. So, what were its findings, and what comes next?

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mong advertisers and agencies alike, many hoped the June release of “An Independent Study of Media Transparency in the U.S. Advertising Industry,” a report prepared for the ANA by K2 Intelligence, would deliver the *coup de grace* in a controversy that’s been worsening for at least five years. **Such was not to be the case, however.**

The study found there is “a fundamental disconnect” between advertisers and agencies regarding the nature of their relationship. The majority of advertisers interviewed by K2 expressed a belief that their agencies are, in fact, their agent, but there was a greater disparity of viewpoints among agency sources. Some, for example, felt that any practice not contractually barred was fair game, and one former CEO of an agency group characterized the idea of an ad agency serving as an agent to its clients as an “outmoded concept.” The report also found substantial evidence of non-transparent business practices related to rebates in the U.S. market, substantial evidence of potentially problematic agency conduct concealed by principal transactions, and evidence of non-transparent business practices arising from agencies holding or soliciting equity stakes in media suppliers.

Despite the findings, the major agency holding companies and their trade association, the 4A’s, continue to deny that

widespread transparency problems exist, and most have attacked the report itself rather than address the issues it raises. None would provide comment for this article, although some have released statements avowing their individual commitment to full transparency while simultaneously attacking the integrity of the report.

The primary objection raised by those on the agency side is to the anonymity and confidentiality K2 provided its 150 sources — a group that included a significant number of current and former agency and agency holding company executives. However, as Richard Plansky, executive vice president for complex investigations at K2 Intelligence, explains, “This is extremely common practice in preparing reports of this type, and it’s not limited to the advertising industry.”

When an investigative firm is looking at practices that are arguably unethical, the best source of information is people directly involved in those practices in some capacity, so that’s where K2 focused

its efforts. “We offered them confidentiality because the vast majority are still part of the advertising industry, and many expressed concerns that their careers would be negatively impacted if their participation were to become known,” Plansky says. “I will tell you from experience, having done this for almost 25 years, sometimes confidentiality is the only way to get accurate and reliable information. This is one of those cases.” (See “Transparency Report,” below.)

So how have things gotten to this point? ANA CEO Bob Liodice believes the current situation reflects a foundation of complexity in the digital media supply chain that has completely changed the way clients and agencies do business. “When business was conducted with spreadsheets and face-to-face conversations, agencies and clients had a very clear understanding of what was necessary to get the job done and fulfill marketers’ objectives,” he says. “As the landscape turned increasingly digital, marketers’ ability to follow the money began to decline. We

TRANSPARENCY REPORT

K2 Intelligence is an industry-leading investigative, compliance, and cyber defense services firm founded in 2009 by Jeremy and Jules Kroll, who originated the modern corporate investigations industry. Richard Plansky, executive vice president for complex investigations at K2 Intelligence, points out that in the course of its media transparency investigation K2 spoke with many sources who have first-hand knowledge, from a number of different angles, of the non-transparent practices called out in the report. That information was corroborated against information obtained from other independent sources, emails, contracts, and other documentary evidence related to those practices. “We stand behind the integrity and accuracy of this study 100 percent,” Plansky says. To see the full report, visit ana.net/transparency.

— M.J.M.

became enamored with the opportunities digital presented to improve our ability to target customers and boost efficiency, but we gave up some of our understanding of where our money was going.”

The pattern fell into “an abyss of drift,” as Liodice puts it, with marketers’ ability to follow the money eroding year by year. “The K2 report woke us up to the reality that, in fact, we now have an environment where some agencies are leveraging clients’ financial assets to improve their own profitability and not fully disclosing what they are doing,” Liodice says. “And whether we call them rebates or something else, the whole transaction process has become increasingly opaque.”

To be sure, this “abyss of drift” has not been a one-sided phenomenon. As James Speros, EVP of corporate communications at Fidelity Investments and an ANA board member puts it, “There are no white gloves in all of this. Advertisers are also to blame for the issues we’re experiencing. Many have not taken the time to understand the media planning and buying process and how negotiations are conducted. In part, this is due to the growing complexity and media fragmentation we’ve seen over the past decade.”

Liodice concurs that accountability levels have slipped at some marketing organizations. “We’ve had people tell us they haven’t looked at their media agency contract in years. Well, five years ago, the world was a different place,” he observes.

Many on the marketing side are distressed by the stonewalling response to the K2 study exhibited by the large agency holding companies and the 4A’s. “I find the agency response incredibly disappointing,” says ANA Group Executive Vice President Bill Duggan. He cites wording in the conclusion section of an

ANA follow-up report, “Media Transparency: Prescriptions, Principles, and Processes for Advertisers,” regarding agency denial that the rebate issue and other transparency problems exist in the United States: “To continue that denial would seriously undermine any hope of restoring the equity in the client/agency relationship,” reads the report, which the ANA developed in collaboration with

denial creates when it comes to solving the problem of non-transparent business practices and restoring the agency/advertiser relationship to the basis of trust and shared goals that have been its hallmarks through most of its history. “We take no delight in these findings,” he says. “It would have been better for us if it turned out that the system itself was working pretty well and there were just a few

GET IT IN WRITING

To help marketers implement the strategic platforms laid out in “Media Transparency: Prescriptions, Principles, and Processes for Advertisers,” the ANA has worked with its general counsel, Reed Smith LLP, to create a template agreement that members can use when preparing master media planning and buying services agreements with their media buying agencies. “We developed the template in concert with many experts in the field to be a road map for advertisers as they navigate this very complex and highly charged issue,” says Douglas J. Wood, senior partner with the New York law office of Reed Smith LLP and leader of its advertising and marketing law practice. (As the ANA acknowledges in the new template, one of those outside sources was the “ISBA Framework Agreement for Media Buying and Planning Services,” developed by the Incorporated Society of British Advertisers and its legal counsel, Fieldfisher.) “At the very least, using the template as a basis for negotiations will encourage an open dialogue and result in relationships between advertisers and their media buying agencies that are based upon trust and transparency.”

The 51-page template (which can be downloaded at ana.net/160802) is complex, due in part to the diffused structure of the holding companies that control most of the media buying market and the substantial course corrections necessary to restore trust in the wake of the K2 Intelligence report, Wood notes. “The template sets forth principles of transparency that provide assurances to an advertiser that its media buying agency is always working in the advertiser’s best interest, is avoiding conflicts of interest, is passing through all rebates and incentives to which the advertiser is entitled, and is open to robust audit rights that allow verification that those assurances have been fulfilled,” he says. “Much of the current debate is all about the now hackneyed phrase, ‘Trust but verify.’ In this instance, however, trust has been seriously harmed and needs to be restored before healing will begin. So today’s phrase is more like, ‘Regain trust, then verify.’”

— M.J.M.

Ebiquity, an independent marketing analytics specialist, and FirmDecisions, an Ebiquity subsidiary that is the largest independent global marketing compliance specialist. “Deflection, distraction, and denial are not the strategic pillars that will bring resolution,” the report concludes.

ANA Chairman Tony Pace is also concerned about the difficulties agency

isolated instances of non-transparent practices.” But the K2 report concluded that the use of non-transparent business practices was “pervasive” in the U.S. media-buying marketplace, that those practices were not limited to a specific type of agency nor a specific type of media, and that there were “systemic elements” to some of the non-transparent practices reported and examined. »

Still, in a letter released earlier this year, Pace indicated the marketing community's willingness to mend fences and work with agencies to resolve their differences. "The first step in solving a problem is identifying that one exists," he wrote. "When the agency community concludes that there are issues involving

non-transparent business practices, and that a fundamental disconnect exists in the advertiser/agency relationship, the ANA and the Board of Directors would be pleased to collaborate with them to develop specific, well-defined solutions."

It's important to note that the big agency holding companies and the 4A's

don't speak for the entire advertising community. Jon Mandel, who gave a presentation at a 2015 ANA conference, which Speros characterizes as the tipping point for the current controversy, emphasizes that it was agency-side people who prodded him to go public. "There are many people within the agencies

STRATEGIC PLATFORMS FOR ADVERTISERS

The problems highlighted and examined in the K2 Intelligence report are significant and extensive, and marketers must do what they can to redress them. In "Media Transparency: Prescriptions, Principles, and Processes for Advertisers," the ANA lays out a road map to do just that. The meat of the report can be found in pages 11 through 30, which present seven strategic platforms advertisers can adopt to do a better job of protecting themselves against non-transparent business practices and, ultimately, improving their overall relationships with media buying agencies. Below is a summary of those platforms, which are presented in much greater detail in the full report.

1 Agent versus principal. When the advertiser agrees to the agency acting as a principal, the advertiser should have disciplined, reliable processes to manage the potential conflict of interest. Media agencies now often act in a dual capacity with advertisers as both an agent and a principal. Unless otherwise agreed to in writing by the advertiser, agencies should at all times act as an agent for a disclosed principal when dealing with third parties on the advertiser's behalf. Advertisers should immediately confirm and reaffirm the basis on which their media agency is conducting business.

2 Contract content. Advertisers should ensure that contracts with their media agencies contain robust provisions to deliver full transparency. The negotiation and execution of contracts should become a focal point for advertisers since the contract defines the commercial relationship between advertiser and agency. Advertisers should immediately and consistently reexamine all existing media agency contracts and meticulously review all terms and conditions, using independent expert assistance as needed. (See "Get It In Writing" on page 7.)

3 Contract audit rights. Advertisers should have robust and far-reaching audit rights that allow them to fully track contract compliance and measure media-value delivery. "A critical part of a robust audit, necessary in light of the K2 Intelligence report and statements by other parties, is the advertiser's ability to 'follow the money' through the entire holding company ecosystem," says noted media law attorney Douglas J. Wood, senior partner with the New York law office of Reed Smith LLP and leader of its advertising and marketing law practice, as well as general counsel for the ANA. "An audit provision today should allow review of records at the holding company level and throughout the holding company's operating units. Audit provisions that cover only the AOR [agency of record] are not adequate. That is the only way true transparency can be achieved."

4 Contract governance. Advertisers should implement strong, disciplined internal processes to deliver contracts that ensure strict accountability, compliance with effective management principles, rigorous process governance, and significant senior management oversight. Given the scale and importance of the advertising investment, internal governance of advertisers' budgets and contracts with media agencies — including affiliated and related parties — should be a corporate priority.

5 Data and technology. Advertisers should take ownership of data and exert control over the media technology used on their behalf. In today's multichannel environment, advertisers must have a data management strategy that affords them control and oversight of all their channels, but the K2 Intelligence report revealed that media transparency was notably lacking within agency trading desks, where opaque trading may be common. An advertiser's data management strategy should cover media planning data, partner/supplier selection and implementation, data ownership and control, measurement of results, and programmatic trading.

6 Advertiser responsibilities. Advertisers are responsible for more active stewardship of their media investments and fair compensation of their agency partners. "The blame [for the use of non-transparent business practices by some agencies] is all around," says Jose Lozano, CEO at the Houston, Texas-based agency The Company of Others. "If agencies were more fairly compensated and valued for their work and ideas, there would be no need to find alternative streams of income. While that does not absolve them of responsibility, it does explain why these practices became so common. Additionally, brands' complacency and lack of knowledge about their own agency's compensation models left them vulnerable. As for agencies, the blame they face is due to a corruption of morals. In an effort to offset losses, some agencies lost sight of what's important and stopped acting as stewards for their clients."

7 Code of conduct. Advertisers and media agencies should establish a culture of trust in their relationships via a specific code of conduct. While a strong contractual agreement is critically important, it can only go so far toward building a culture of trust between advertiser and agency. The contract must be supported by a code of conduct between the advertiser and the AOR, and they must work together to ensure its provisions are upheld across all entities, relationships, and activities. The code of conduct should be signed by both parties and be included as a schedule in the master services agreement.

— M.J.M.

right now — and some in very senior positions — who are upset about this ethically, and they came forward to me,” he says. Mandel, who is chairman and CEO at Dogsled Enterprises and a former chairman of Mediacom, says he suffered a lot of attacks after making his presentation, and he feels personally vindicated by the findings of the K2 report. “That said, I’m also professionally saddened that it is as extensive a problem as it is. I know there are an awful lot of people at the agencies who just want to be able to do their jobs professionally and move their clients’ business forward, and they have had their hands tied.”

Some agencies are proactively addressing this issue on their own. For example, The Company of Others, a full-service strategic marketing firm based in Houston, Texas, posted a media transparency pledge on its website following the release of the K2 report. CEO Jose Lozano, noting that The Company of Others already exercised transparent media procurement practices prior to the report, says, “We plan on helping to provide resources for both marketers and agencies alike in an effort to increase goodwill and better communication between the two sides.” He also counsels that the most important thing brands can do to improve transparency in their agency relationships is to take a more active role in them. “By that I mean that brands should better educate themselves about emerging technologies and marketing media. They should consider hiring talent that is knowledgeable and experienced in all areas of marketing,” he says.

Duggan says one particular hire all marketers should consider is a chief media officer, either in title or function, who would take responsibility for the internal media management and governance processes that deliver performance, media accountability, and transparency

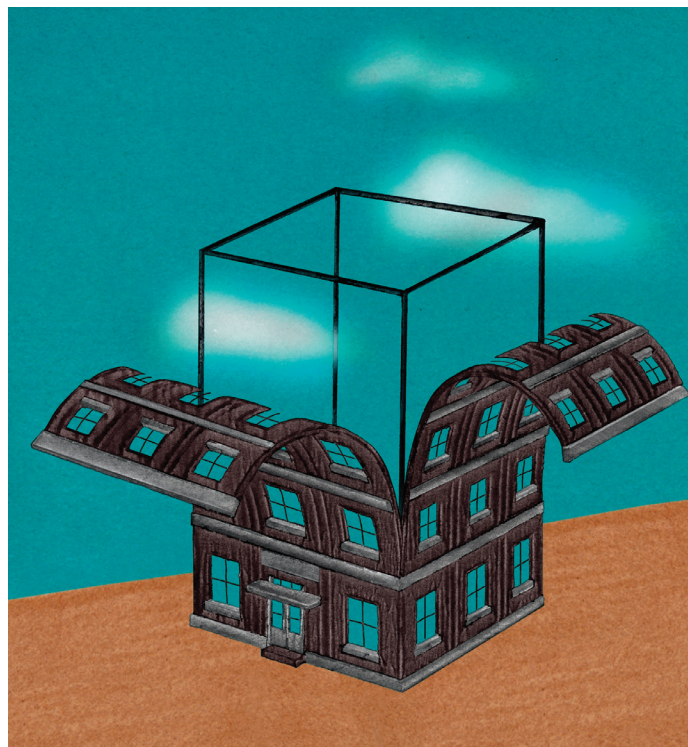
throughout the client/agency relationship. “Media is the single largest marketing expenditure — and most important marketing investment — at most companies these days. Advertisers must assume greater internal stewardship of their media investments,” he says. “They need to ‘lean in’ and be more active overseers of their media spending and take a hands-on role in all media-related decisions. It makes sense to assign that authority and responsibility to a qualified chief media officer, who should drive the media strategy, partner with external agencies, and work with third-party suppliers to optimize the media mix and maximize ROI.”

Duggan’s suggestion is in line with the framework laid out in “Media Transparency: Prescriptions, Principles, and Processes for Advertisers.” (In conjunction with that report, the ANA has also developed a Master Media Planning & Buying Services Agreement template; see “Get It In Writing” on page 7.)

The framework consists of three pillars:

- Advertisers should establish overarching media agency management principles that can be easily understood and executed.
- Advertisers should establish primacy over the client/agency relationship, and they should regularly reevaluate and upgrade internal processes and practices.
- Advertisers and agencies should have a Uniform Code of Conduct to guide the relationship and engender trust.

The report recommends specific strategies advertisers should adopt to promote greater transparency and certainty in their relationships with media



agencies and to boost their ability to take greater control of their media spend — specifically, their ability to follow the money. (See “Strategic Platforms for Advertisers” on page 8.) “Marketers are responsible to make the very best decisions possible for the benefit of their brands and their business entities, but they can’t do that living in an opaque world,” Liodice says. Continued acceptance of media agencies’ use of the non-transparent business practices detailed in the K2 report means that marketers’ decisions will be sub-optimized, as will the theoretical return on their investment in their media assets, he adds.

Marketers’ adoption of the seven strategic platforms detailed in “Media Transparency: Prescriptions, Principles, and Processes for Advertisers” can go a long way toward reducing or eliminating the potential conflicts within the media practices identified in the K2 Intelligence report. The end result would be “an elevated level of transparency and a stronger foundation for trust between advertisers and their agencies,” Liodice says. “Ultimately, that would benefit both parties.” 