

April 2019

# POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

## Media Transparency: An Update on the Status of the FBI/DOJ Investigation, Recovery Efforts and Best Practices Going Forward

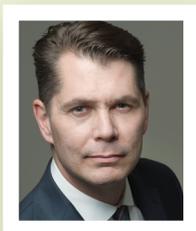
The number of issues and areas of inquiry resulting from the revelations set forth in the ANA/K2 Report continue to mount. As originally detailed in the Fall of last year, the FBI is actively investigating certain media buying agencies for alleged non-transparent practices and looking to the advertisers potentially defrauded to assist with its investigation. Just last week, AdAge published an article noting that the FBI has an "unredacted version" of the K2 report including names of all 41 previously unidentified sources. Moreover, certain agencies are affirmatively trying to cover their tracks and/or to revise their existing contracts to either permit the questionable conduct going forward or to limit the audit rights of their advertiser clients.

**The evidence shows media suppliers paying undisclosed rebates to media buying agencies in amounts ranging from 1.67% to 20% of aggregate media spending.**

Benesch attorneys are working closely with the forensic investigators at K2 Intelligence and auditors at FirmDecisions to assist clients with investigating possible wrongdoing by their (current or former) media buying agencies. These efforts range from helping clients navigate the potential pitfalls involved in cooperating with the active FBI investigation and ensuring that they fulfill their duties to shareholders, to securing recoveries from the agencies where appropriate. Given that non-transparent conduct can often amount to a substantial percentage of a company's overall media spend, these claims can easily stretch in to the seven- and eight-figure range.

Given the complexity of the issues involved and the increasing number of moving parts, we thought it would be helpful to provide this comprehensive update regarding the ANA/K2 Report, the FBI investigation, investigative and recovery efforts, as well as the industry's response and best practices to consider going forward. We hope that you find this information to be a valuable resource as you consider how best to investigate your company's agency relationships and practices. Please feel free to contact us at (312) 212-4954 or [dalmeida@beneschlaw.com](mailto:dalmeida@beneschlaw.com) with any questions or comments.

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## IN THE MEDIA

### **Benesch's Retail Hospitality & Consumer Products Group**

**DAVID ALMEIDA** published "[Do You Know Where Your Ad Dollars Are Going](#)" in *Modern Restaurant Management*.

**DAVID ALMEIDA** and **MARK EISEN** published "[Text-message marketing could prompt class action lawsuits](#)" in *Marijuana Venture Journal*.

# FBI Investigation Ramping Up as Advertisers Seek Recovery for Agency Misconduct

## Media Agency Fraud “Pervasive” According to K2 Study Commissioned by The Ana

On June 7, 2016, the Association of National Advertisers (ANA) released the results of a 7-month investigation conducted by K2 Intelligence into long-suspected systemic fraudulent and unethical conduct within the media-buying ecosystem. The K2 report examined commercial arrangements between media agencies and media owners, and confirmed industry rumors of illicit payments and kickbacks tied to spending by the agencies’ advertising clients, concluding that “non-transparent business practices, including cash rebates to media agencies, were found to be *pervasive* in a sample of the U.S. media ad buying ecosystem.”

According to the ANA, “senior executives across the agency ecosystem were aware of, and mandated, some non-transparent business practices. Contracts for rebates and other non-transparent business practices were negotiated and sometimes signed by high-level agency executives.” Even more disturbing, “K2 Intelligence found evidence of potentially problematic agency conduct concealed by principal transactions; as a principal, an agency (or its holding company or associated company) purchases media on its own behalf and later resells it to a client after a markup.” According to a subsequent *Wall Street Journal* report, these principal transactions were fueled by the rise of digital trading desks, and saw markups ranging “from approximately 30% to 90%.”

Not surprisingly, following the release of the report, the agencies and their holding companies have publicly denied K2’s findings, though they have offered little in the way of evidence in support of their denials. Their actions, however, tell a far different story. According to a *Business Insider* article on January 24, 2017, the agencies

have no choice but to settle when presented with evidence of their non-transparent (and often illegal) practices:

- “Media-buying agencies in the US are paying their clients secret multi-million dollar settlements rather than show them all of their contracts and service agreements with media owners.”
- “Multiple sources with knowledge of the matter suggested there have been at least 20 cases where either a settlement has been paid or where there are ongoing negotiations about an imminent resolution.”
- “The settlement amounts have ranged from the low seven figures to the high eight figures, but below the materiality threshold at which agency holding companies would have to disclose them in their annual reports. Some of these settlements have been in cash, while others have taken the form of an agreement to significantly discount the client’s fees the following year.”

## Department of Justice Investigating Non-transparent Practices

On September 27, 2018, the *Wall Street Journal* reported that “[f]ederal prosecutors in Manhattan have opened an investigation into media-buying practices in the advertising industry and have begun issuing subpoenas as part of the probe.”<sup>[1]</sup> The ANA has subsequently confirmed the investigation’s existence and noted that the FBI reached out seeking its cooperation. Further to that effort, the ANA advised its members to cooperate with the FBI if requested to do so, and to report any evidence of wrongdoing or non-transparent practices to the FBI. Just last week, an article published in AdAge reported that there have been “several key developments in the investigation, including that a grand jury has been impaneled and that the U.S. attorney has accumulated enough evidence to convince the

jury of probable cause to subpoena a client’s [the advertisers] records.”

The expanding FBI investigation and the possibility of shareholder class actions arising from advertisers’ years-long failure to properly audit their media agencies create a real risk that advertisers will be forced to confront their agencies’ non-transparent practices whether they want to or not. Put simply, even those companies that would have preferred to look the other way and may soon find themselves responding to DOJ subpoenas, civil discovery requests, or strike suits claiming corporate mismanagement.

## Has Your Company Been Defrauded?

K2 found that all of the major agencies had engaged in some form of the fraudulent practices identified. If corroborated by the evidence, your company may have strong claims to recover for breach of contract, breach of fiduciary duty and other common-law claims.

Our lawyers have been advising clients on their recovery rights since the K2 Intelligence report was released. We have worked with K2 Intelligence, FirmDecisions and other well-respected independent experts to investigate and to document potential claims against the media agencies. Additionally, these efforts—whether they result in recoveries or not—have the added benefit of helping our clients obtain greater insight and clarity into media buying practices generally so that they will be more informed media purchasers going forward.

# Retail and Consumer Fraud Quarterly: Media Fraud & Transparency

## Key Findings

A report published by the Association of National Advertisers shook up the advertising industry in 2016 when it revealed potentially fraudulent practices by agencies in the media buying landscape. Since then, the industry has been uneasy, with levels of trust falling to all-time lows and relationships between agencies and advertisers faltering. The landscape is evolving rapidly, and recent regulatory investigations have the potential to disturb the industry further.

Development	Summary	Implications
<b>FBI investigation into ad-buying practices</b>	The FBI is investigating non-transparent ad-buying practices such as rebates, bonuses and discounts. No one has been accused or charged with any crimes at this stage, though subpoenas have been issued to several ad agencies.	The investigation adds teeth to the ANA's allegations that agencies have been padding the bottom line with suspect practices. It's driving advertisers to put more work up for bidding, bring work in-house, and assess and reconfigure contracts – all of which threatens already stressed margins for agencies.
<b>Trust at an all time low, demands for transparency heighten</b>	With the ANA report and FBI investigation pointing to suspect behavior, advertisers are expressing distrust in agency relationships and pressing for more transparency.	The lack of trust threatens long-standing relationships, and is being leveraged as a strategic growth opportunity for companies positioning themselves as transparency leaders. The market is shifting to adapt to demands for transparency with new and emerging standards, joint efforts to address quality and new business models or pricing. Technologies such as blockchain are also being touted as a potential solution. At the same time, digital giants such as Facebook and Google stand to gain as the distrust creates an opportunity for them to cut into agency's media-buying
<b>New business models, pricing structures emerge</b>	Forward-looking companies are providing more transparent buying models and giving clients more control over the advertising process.	Agencies are adopting business models to operate more like technology companies by leveraging data and positioning themselves as ethical providers in the media buying landscape. Pricing models such as software-as-service fees are competing against traditional fee models. Other companies are also tapping into the opportunity presented by unease in the landscape – helping to navigate the ecosystem and advising CMOs.
<b>Advertisers increase scrutiny of agency contracts, take work in-house</b>	Brands are putting more accounts up for review and increasingly questioning agency practices, while reducing the number of agencies on their rosters.	Although most advertisers say agencies are still relevant as service providers, they are also increasingly building out their in-house capabilities, being more explicit about agency compensation in contracts, and leveraging audit rights more proactively.

## Media Fraud & Transparency

The advertising landscape is undergoing a period of turbulence and change as agencies face headwinds on several fronts. Deteriorating trust between agencies and marketers is creating unease in the market as a result of emerging fraud issues related to ad buying and contract bidding processes, adding additional pressure to agencies' already stressed bottom lines. Leading agency holding groups are struggling to fuel growth as advertisers respond to these concerns by moving media operations in-house and transitioning away from agency retention models toward a fixed fee project billing model.

These developments are forcing players throughout the advertising value chain to reconsider their value and how that value is positioned to prospective buyers. Agencies are responding with new business models and pricing structures, heightened transparency and quality initiatives. With trust levels at an all-time low, transparency is more important than ever as brands insist for more visibility in ad placement and advertising spend, and consumers turn to brands with positive images and demand more clarity in how their data is being used.

### Regulatory Response

#### FBI Investigation

In September 2018, the FBI opened an investigation into non-transparent ad-buying practices. The agency has started issuing subpoenas to companies such as Havas, the ad company owned by media conglomerate Vivendi, and subsidiaries of WPP, Omnicom, Publicis, Interpublic and MDC Partners. The subpoenas follow interviews with members of the ad business about ad-buying practices, prompted by a 2016 report by the Association of National Advertisers and corporate investigations firm K2 Intelligence that identified "pervasive" nontransparent practices in the industry. The report cited ways in which ad companies use the buying power of their advertiser clients for their own benefit, including several suspect practices,

such as agencies receiving cash rebates from media sellers for reaching spending thresholds but not returning those funds to clients. Media rebates, bonuses and discounts are common practices in other jurisdictions such as Europe but aren't typically part of deals in the U.S. and are barred under federal antitrust laws.

The FBI and the United States Attorney's Office for the Southern District of New York have asked the ANA to cooperate in their "criminal investigation into media buying practices." ANA chief executive officer Bob Liodice said the association won't play a central coordinating role or be a conduit between marketers and the FBI but would provide advice to companies that wish to cooperate. The investigation creates risks for holding companies, as analysts estimate media-buying activity accounts for a large portion of profit growth for ad companies – and some have gone so far as to raise concerns about the very survival of agencies without rebates. Although no one has been accused or charged with any crimes or criminal behavior to date, agencies that engaged in ad-buying practices may be exposed to liability for federal crimes such as fraud, conspiracy and racketeering. The FBI has said it is a "long-term, industry-wide investigation." The outcomes of the investigation are expected to be felt in the coming six months to a year.

While Pivotal Research senior analyst Brian Wieser said the practices likely aren't as pervasive as they were prior to the ANA's report in 2016 as the report prompted a lot of "contract scrubbing," McKinsey published a report claiming rebates and non-transparent incentives are still commonplace. The McKinsey report suggests rebates are lowest for traditional media, where they are typically up to 5%, higher for out-of-home-advertising, and up to 15% for digital media, where they can reach up to 35% when accounting for both cash and noncash agency volume bonuses. McKinsey contends that "in the face of advertisers' push for more transparency, some agencies have continued former practices

and others have figured out how to continue receiving the equivalent of rebates, but under a different name and structure." Current and former marketers and media buyers have also said hidden fees are still common, and raised suspicions about similar tactics being used with ad tech. Another concern is the stakes network agencies hold in ad tech companies.

However, ANA Chief Bob Liodice criticized McKinsey's assertion that "not much has changed" in the industry since the K2 report. Liodice contends that "a great deal" has changed in the industry, as clients have updated media agency contracts based on an ANA template published in July 2016. The template includes a requirement that revenue earned by media agencies and agency-related parties only be fees and commissions laid out in the contract, unless explicitly agreed upon by the advertiser. It requires that all financial and other benefits be completely transparent and returned to the advertiser unless otherwise agreed upon. Liodice further said "clients have been increasingly taking back control of their media investments via greater supervision of their agencies and by moving certain types of work in-house." Advertisers are more actively looking at where an agency's impartiality may be compromised, demanding upfront whether an agency might have a vested interest in a vendor.

The ANA is urging advertisers to review their contracts and assess whether they may have been victimized as the FBI reportedly told its counsel that "merely raising a hand saying you have been defrauded will not benefit its efforts," and it is instead seeking meaningful cooperation from companies that have conducted an internal investigation to determine if there is evidence of fraud. Companies with a significant measure of media spend may have substantial compensable damages as the figures in the ANA report suggests that companies may have been defrauded to the tune of between 1.67% and 20% percent of advertising budget

The FBI investigation also follows a probe by the DOJ into whether ad agencies inappropriately directed commercial product business to in-house production units instead of independent companies by rigging the contract bidding process. The investigation included allegations that agencies urged independent firms to inflate their prices to ensure in-house groups won contracts. Notably, an original draft of the K2 report purportedly included allegations of bid-rigging in postproduction business as well, though it was left out of the final version. It also comes on the heels over another DOJ probe disclosed in July 2018 into whether television station owners violated antitrust law and inflated local television advertising prices. These developments also parallel heightened attention to digital advertising fraud, signaling regulators' clear interest in the advertising space. These investigations collectively show is that something is amiss in the industry and is driving advertisers to demand change.

### How the advertising supply chain is responding

The investigation is compounding competitive threats agencies are facing from in-housing, consultancies entering the space with a roster of Fortune 100 clients, start-ups with venture capital funding, and platforms such as Google and Facebook. Agencies are grappling with the reality of a changing media landscape in which dominant market share is no longer sufficient to secure the best price for media buys. With margins tightening, agencies are under pressure to prove their value and evolve their business models to meet changing client demands. Transparency has strong influence over trust issues of advertiser-agency relationships and current efforts to adapt are centred squarely on building a culture of trust and code of conduct.

### Adopting industry standards for transparency

Industry standards are emerging from trade groups like the Interactive Advertising Bureau (IAB) and Trustworthy Accountability Group (TAG). The IAB Tech Lab collaborated with ANA's Data Marketing & Analytics (DMA) division, the Coalition for Innovative Media Measurement, and Advertising Research Foundation to develop standards to improve transparency in the data market. The joint initiative created a Data Transparency Label – a “nutritional label” equivalent for audience segment data sets that discloses source, collection, segmentation criteria, recency and cleansing specifics. The initiative is soliciting feedback on how the label can be used and accessed. It is also creating a centralized database to store the label information and a compliance program to govern disclosure, certification and validation

The label is comprised of:

- Information on the data solution provider and distributor;
- A snapshot of the audience segment, including both the provider's branded audience segment name and a description of the applicable geographic coverage;
- A description of how the segment was constructed; and
- Source information such as where the original data components were sourced and data collection techniques.

Data Transparency Facts	
Data Distributor Name: <b>Data Company</b>	
Data Distributor Contact: <a href="mailto:DataSolutionTeam@data.com">DataSolutionTeam@data.com</a>	
Data Provider Name: <b>Leasing Company</b>	
Data Provider Contact: <a href="mailto:DataAccounts@leasingco.com">DataAccounts@leasingco.com</a>	
Audience Snapshot	
<b>Branded Name</b>	Auto Intenders – Six Months
<b>Standard Name</b>	Auto Intenders
Audience Description	
Households likely in the market to purchase a new vehicle in the next six months	
Geographies	
USA	
Audience Construction	
<b>Audience Count</b>	6,500,000
Precision Level	Households
Activation ID(s)	Cookies
Audience Expansion	
<b>Cross-Device Expansion</b>	Yes
<b>Last Refresh Date</b>	02-Jan-2018
<b>Event Lookback Window</b>	60 Days
Data Source	
Source ID Description	
Dealer-reported names and postal codes of individuals who requested test drives	
<b>Source ID Contribution</b>	1,130,000
Precision Level	Individual
ID Key	Name and Postal
Source Event	
Inclusion Method	Observed
Seed Size (if modeled)	-
<b>Source Refresh Frequency</b>	Quarterly
<b>Event Lookback Window</b>	180 Days
This Data Transparency Label has been developed by members of ANA's Council for Data Integrity and IAB Tech Lab's Data Transparency Working Group, with the support of CIMM, The ARF and IAB's Data Center of Excellence. For more information, please visit <a href="http://datalabel.org">datalabel.org</a> .	

“Client-side marketers and fundraisers have been demanding better standards around data quality and integrity. We felt it was important to corral several industry-wide initiatives into one industry standard to enhance efficiency and to improve the toolset that client-side marketers and fundraisers use to make important decisions about data segments,” said Tom Benton, ANA Group EVP, DMA Division. The label aligns

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## Media Fraud & Transparency

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with the IAB's proposed Data Transparency Standards, which sets minimum expectations for data sellers about the information buyers need to make informed decisions and would see the introduction of ID-level labeling requirements for data sellers. The framework includes an open API to structure and communication information among stakeholders in the supply chain.

The IAB developed a Gold Standard to improve transparency and reduce fraud by applying Display Advertising Standards Group Brand Safety Principles, adopting the Authorized Digital Sellers (ads.txt) initiative – which is designed to increase transparency in the programmatic space by providing a flexible, secure method that publishers and distributors can use to publicly declare the companies they authorize to sell their digital inventory – and improving the user experience through the Coalition for Better Advertising standards and adherence to the Lean principles. Verified brands are certified to confirm their commitment to improving the user experience and reducing ad fraud.

Several media agencies have secured – or are in the process of securing – the certification, including Publicis Media and Group M's digital programmatic services arm. Guardian US teamed up with Google and MightyHive to test issues of programmatic ad fraud and the effectiveness of ads.txt. The results showed that when buying without ads.txt, inventory sales were reported by unauthorized exchanges claiming to sell the Guardian US inventory, though the money for the sales didn't reach Guardian US. With ads.txt, on the other hand, there were no discrepancies in revenue and all inventory was bought through Guardian US authorized exchanges.

Elsewhere, the U.S.'s Trustworthy Accountability Group (TAG) and the U.K.'s Joint Industry Committee for Web Standards (JICWEBS) are undertaking a joint initiative under which approved companies in the U.K. will be able to use a "Certified Against Fraud" stamp from January 1, 2019. The program has been in use in the

U.S. since 2016. The initiative is meant to help address ad fraud as a result of companies buying advertising programmatically via automated systems, which involved numerous online processes between ad exchanges and publishers and creates the risk of ads being "clicked" by bots instead of humans. The World Federation of Advertisers predicts such ad fraud could cost businesses \$140 billion by 2025. Mike Zaneis, president and CEO of TAG, said the joint initiative would help reduce the number of fake clicks. He cited statistics suggesting that companies in the U.S. using TAG-certified channels have experienced an 83% decline in fraud compared to the broader industry average.

Media ad exchanges Sovrn, Rubicon Project, OpenX, PubMatic, SpotX, and Telaria issued a joint open letter committing to upholding the market principles on transparency, efficiency and fair-market values, which serve as a starting point for TAG compliance and accountability certifications. The letter commits to complete fee transparency with no hidden fees and clear fees arrangements, as well as a fully auditable supply chain.

### **Leveraging the need for transparency as competitive opportunity**

The perceived distrust and lack of transparency in the industry is being leveraged as a strategic growth opportunity. Consultancies, for instance, have acquired smaller independent agencies with marketing specialists, moving into media buying themselves, while smaller, independent media agencies are securing business by making a pitch based on "integrity and transparency." Close, trusted relationships are more important than ever – and valuable to clients as they deliver stronger performance. New business models are emerging to tap into the opportunity to improve relationships by providing more transparent buying models and giving clients more control over the advertising process.

Agencies are running more like technology companies than traditional buying shops, with earnings becoming increasingly dependent not

on data ownership but on how a company uses its data. "Clients are not cutting spend — marketing spend as a share of our revenue has stayed relatively constant over the last five years — but they are shifting it to broader partnerships," said WPP CEO Mark Read. Agencies are satisfying client demand for more control by using data to provide custom planning and campaign management. GroupM's Essence, for instance, focuses on the value of advertising by applying a data-driven, scientific approach to all media channels at the individual level. The company is measuring impressions and interactions to prove its value and establish a foundational level of trust in the agency-client relationship. "Essence is potentially the media agency of the future, but the issue is whether clients understand the long-term benefits of that model," said Read.

lotec is positioning itself as a solution for marketers navigating the "wild west" of the media buying landscape. It is setting ethical standards to overhaul the buying process so marketers make more informed decisions, keep clients up-to-date about where ads appear and why, and independently logging conversions, clicks and impressions. It bases its business model on adhering to a set of ethical principles. Havas developed an online portal that allows clients to view their ad spend in real time and shows the ROI for each channel, and other agencies are itemizing their costs so clients can see what they are buying.

Companies are also tapping into the complexity of the current ecosystem as a strategic opportunity. Ebiquity, for instance, has positioned itself as an advisor to help CMOs navigate the industry. Since the 2016 report, the company has seen a major increase in business as marketers hire it to look into media spending and investigate media agencies. "The way we see the market taking shape is that in the C-suite, everyone has an adviser," said chief strategy officer Christian Polman. "The CEO has the McKinseys, the CFOs have the Goldman Sachs, CTOs have the Accentures. And our view is that the CMO is

an open field, where a lot of people are trying to be advisers to the CMO.” Since agencies aren’t independent when it comes to marketing optimization, Ebiquity is increasing its pitch management, working with clients to select agency partners. It also helps clients make clearer contracts, creating new compensation and improvement outcome agreements and helps with media measurement and marketing performance optimization.

New pricing models are also emerging to provide clients with more transparency in media spend transactions. Viant’s demand-side platform Adelphic introduced a software-as-service fee model. Instead of charging a percentage of media spend, using a pricing model from media buying agencies, it will change an “all-you-can-eat” monthly subscription price of \$3,000 per log-in, with a 12-month minimum. All vendors in the process, from data providers to ad exchanges, are billed directly to the advertiser. Under traditional pricing models, advertisers typically pay the DSP an additional monthly amount based on metrics such as overall CPMs, with the fees for targeting data, inventory, verification services and other vendors lumped into the overall charge. This monthly amount, separate from the DSP fee, is almost as if the DSP is a publisher itself, charging for its impressions, which creates suspicions about what vendors’ charges actually are and whether there may be kickbacks between DSPs and vendors, explains Viant CEO Tim Vanderhook.

### Joint initiatives and strategic alliances

Key players in the media and tech side of the market have [formed](#) joint initiatives and commitments to address quality issues. Tim Cadogan, cofounder and CEO of OpenX, an independent ad exchange and supply-side platform (SSP), [says](#) companies are making significant investments in quality-focused technology and implementing enforcement policies for quality standards. “To quantify what companies committed to quality are doing, we have invested over \$100 million in quality

measures over the last few years, including \$25 million in 2018.”

Media agency holding companies and media groups have increased the range and diversity of investments and strategic partnerships in the media supply chain, including by allying with ad fraud prevention companies. Omicom Media Group MENA, for instance, joined forces with ad fraud prevention company TrafficGuard to give its agencies access to TrafficGuard’s ad fraud mitigation solution for six months.

### How brands are responding

In response to the emerging issues with media buying practices and ad fraud, brands are putting more accounts up for review and increasingly questioning agencies about whether tech chosen is influenced by vested interests. They are demanding more quality, implementing performance-based compensation and more control of the [advertising supply chain](#), including by taking more ownership of customer data. Large advertisers are leveraging their big budgets as a tool to [demand reform](#) in the industry.

Almost three-quarters (74%) of major multinational brands are reassessing their agency arrangements, according to the World Federation of Advertisers (WFA) and The Observatory International, with nearly 60% expressing a desire to reduce the number of agencies on their roster. Respondents cited three primary agency models, the most common being multiple agencies managed by the marketing department, which accounted for 81%, followed by an integrated lead agency (44%) and a network agency with specialisms from the same holding company (39%). The majority (82%) said agencies are still relevant as service providers, but indicated they may need to evolve and become more agile to remain relevant.

### Reviewing contracts and changing performance metrics

Advertisers are putting more business up for review and adjusting contracts with suppliers as they consider how to ensure advertising is measured against meaningful business outcomes, rather than budgets being lost to service fees. They are embedding transparency in contracts to ensure they receive the full value of any rebates or agency volume bonuses, including cash payments and any free advertising space agencies receive, while balancing the desire for transparency with cost considerations. Clients have also updated media agency contracts to make explicit that revenue earned by media agency and agency-related parties must only come from fees and commissions described in the contract unless the advertiser agrees. Many clients have also started to include more comprehensive audit rights in their contracts with agencies .

Procurement is also playing an increasingly important role in driving transparency. As the supply chain has become more complex, procurement has started to play a bigger role in decision-making, with CFOs taking on the task of helping marketers keep an eye on where budgets are being spent. Marketing procurement helps balance the need for good relationships with agencies and financial accountability.

By making agency compensation expectations more explicit, the goal is to ensure agencies are compensated fairly while motivating them to achieve outcomes that generate value using performance incentives tied to outcomes that create mutual value. Standards for marketing performance are evolving, from measuring the quality of an ad placement to assessing the quality of consumer engagement. The field of pitch consultants is growing as the market shifts toward performance-based remuneration and experiments with alternative ways to pay agencies, rather than traditional commission-based remuneration models like price guarantees.

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## Media Fraud & Transparency

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### Shifting to an in-house model

Demanding more efficiency and control over consumer data, many brands are taking media operations in-house. Concerns about ad fraud, return on investment and lack of perceived value as a result of a complex ad supply chain are driving the trend toward in-house, particularly for programmatic. In a recent Forrester survey, 64% of respondents said they used in-house agencies in 2018 – an increase of 52% compared to 2008. ANA similarly finds that the number of marketers with in-house agencies has climbed markedly. The report shows that 78% of ANA members had an in-house agency in 2018, up notably from the 53% who reported having one in 2013 and 42% in 2008. Notably, nearly half (44%) said the in-house agency was established in the past five years as market developments such as the ANA study heighten the appeal of taking work in-house and advertisers look not only for cost efficiencies but tighter control of the creative process.

The ANA study also signals a shift of some work away from external agencies, though Forrester finds that 85% still outsource work. Over the past three years, 70% of ANA members said they transitioned some established business that used to be handled by external agencies to their in-house agencies. Workloads for those in-house agencies are growing as they increasingly take on content marketing, creative strategy, data and marketing analytics, media strategy and programmatic media. Importantly, the ANA report suggests this trend will continue going forward as respondents indicate high levels of satisfaction with their in-house agencies.

However, questions remain about how successful this strategy will be and whether companies have the budget to support the strategy long-term and stakeholders within the company buy into the model. Avi Dan, who has worked with agencies such as Havas and WPP's Saatchi and Y&R, suggests the in-housing trend is mostly noise. There's certain work that doesn't make sense to push outside and give to agencies. But I haven't

seen one brand-building campaign that came from an in-house agency."

### Being proactive with audit rights

Advertisers are starting to act more proactively exercise audit rights, which allow for regular financial compliance reviews to ensure agency performance adheres to contract terms. These audit rights are being paired with internal processes for contract governance and oversight. According to McKinsey, even trusted advertisers are leveraging audit rights to ensure their agency relationships are honest. Since the K2 report, the number of advertisers performing financial compliance audits has increased. An executive at a leading third-party auditing firm reportedly told McKinsey that his business has increased threefold since 2015.

The ANA has called for audits amid the FBI investigation – pressing advertisers to review media buying contracts for indications of fraud. According to Forrester, agencies are hesitant to accept client audits of past work and brand safety guidelines but a reluctance to be open about operations creates an impression of non-transparency.

### Looking forward – Market continues to evolve

#### Implications for digital giants

Companies like Facebook and Google stand to benefit from the FBI's investigation into advertising agencies as it opens the door for them to make inroads into agency's media-buying. These companies have already started to directly approach brands seeking digital advertising, using the investigation to signal to potential clients that the middle men may be taking an unreasonable share. This may put pressure on the already tightening margins of ad agencies as media-buying is an important revenue segment, accounting for upwards of 30% of profits.

Tempering this potential shift is the inherent risk in dealing directly with these digital companies. Facebook, for instance, has been accused of

misleading advertisers by suggesting it had a larger audience size in U.S. cities and states than it actually did. However, as one agency executive put it: "No matter how much data is leaked out of Facebook, the spend continues to flow into them. The people, the audience are there, so it's very hard not to use them. We're between a rock and a hard place if we're totally strict with them."

### Increasing Importance of transparency

The importance of transparency to future growth among agencies cannot be overstated. The ANA report, FBI investigation and digital advertising fraud have created an environment of mistrust between agencies and advertisers. Going forward, the industry will continue to grapple with how to create an environment of trust, with transparency becoming increasingly important to businesses. Advertisers will continue to demand confidence in investment and transparency from downstream partners. Unilever's CMO Keith Weed has called for action to rebuild trust in the industry and said the company would prioritize working with partners seeking to improve transparency, signaling ongoing scrutiny in the industry of agency relationships. "Ensuring transparency requires a long-term effort and will demand ongoing attention and management, though there can also be early wins that can fund future activities and maintain momentum," McKinsey writes. According to McKinsey, CMOs have suggested a group of advertisers could join forces in a coalition to define a vision for a more transparent future toward which the industry needs to move.

Amid these changing market dynamics, agencies cannot maintain growth with the status quo and a failure to adopt more transparent practices could put agencies at a disadvantage. Agencies are being advised that they need to shift toward this new reality, adjusting to – or being preemptive about – changes such as a recent bans on gifts. "Anything less than the correct path forward could not just hinder consumer trust, but impact bottom lines," explains Megan Clarcken, President of Nielsen's Watch Business. "The media

business is now driven less by relationships and more by defined solutions to really specific challenges,” argues Rob Gregory, president of Influencer marketing company Whosay. “I tell my sales team that if they think expensive gifts or entertainment beyond what is reasonable is necessary, then they probably haven’t delivered our value proposition correctly.”

Some industry members caution, however, that there are limits to this transparency push. “We’re in danger of talking about transparency as a one-size-fits-all solution to everything that’s wrong in advertising. There are so many variables to the issue. For example, does it make sense for a small advertiser to try and build a transparent ad tech stack if they don’t have the budget or the data to make that worthwhile?,” one agency executive said.

#### Technological tools and transparency

The need for transparency and trust extends beyond the relationship between advertisers and agencies as well, as data management is becoming increasingly important and privacy has come to the forefront of concerns. Jed Dederick, VP of Business Development at The Trade Desk, explains that trusted and reputable data is paramount for the media industry, especially advertisers trying to deliver pertinent ads to consumers. Transparency concerns are driving interest in blockchain technology as a means to validate transactions, improve efficiency, improve the safety and security of data and lower the costs of transactions.

Proponents claim that blockchain has the ability to provide a verifiable, immutable ledger to improve trust and transparency in media and advertising processes. As IBM explains, “Blockchain will not only ensure trust and transparency, it can

help advertisers of all sizes reduce transaction costs, increase efficiency, simplify contracts and improve invoice processing.” Use cases for blockchain in the industry include selling TV ad inventory, preventing fraud in ad spending, white listing authorized sellers of inventor, campaign reconciliation, smart contracts and the validation of advertising assets. However, some industry watchers caution that blockchain is merely a buzzword with limited applications. An early application in the ad tech space is to offer margin or fee transparency among intermediaries in the supply chain for billing and reconciliation purposes. Going forward, the use case for the technology will become more clear.

Recent uses include:

- On the buy-side, Truth Agency, a blockchain startup founded by U.K.-based The Marketing Group, is leveraging blockchain to audit ad transactions. Once a contract and data is stored on the blockchain, the company processes each transaction from each supplier based on the rules written in the contract and publishes an audited version onto the blockchain, flagging any transactions that can’t be verified through the data it has.
- Unilever is working with IBM on a blockchain project to the industry to improve transparency and prevent fraud. The first phase of the program will use smart contracts that validate the agreed figure to identify and clear discrepancies. IBM is also working with global ad software company Mediaocean to use blockchain to bring transparency to “the entire lifecycle of an advertiser’s media dollar flow.”
- Blockchain initiatives are also emerging on the sell-side to an effort to address fake traffic, bots and domain spoofing.

- Among efforts to bring smart contracts to the industry, TV-TWO, a player in the digital TV space, is using blockchain for a Smart TV app that allows consumers to watch free, personalized video steams overseen by a learning algorithm. Brands can use a campaign management tool to book desired advertising spots using TV-TWO’s tokens. The company is using smart contracts to management the payments within the ecosystem, which publish all the transactions that takes place regarding any single ad video – from advertisers to viewers and TV-TWO – on the Ethereum blockchain.

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*As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.*

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