4A's MSA Guidance

Guidance Related to the ANA Master Media Buying Services Agreement Template Version 3.0

June 2024

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Introduction

The 4A's, along with and on behalf of its member Agencies, appreciate the efforts of the Association of National Advertisers ("ANA") and its members in providing the "*ANA Version 3.0 template of the Master Media Buying Services Agreement*" ("V3.0").

During 2022, the ANA offered the 4A's the opportunity to provide the ANA with feedback regarding the 4A's members' experiences negotiating the ANA V2.0 template of the Master Media Buying Services Agreement ("V2.0") with their Advertiser clients. 4A's members' overall feedback was that V2.0 is complex and one-sided, and as a result, it required extensive discussion and negotiation with Advertisers. The one-sided nature of the ANA template of the Master Media Buying Services Agreement was even acknowledged by the ANA's external counsel[1].

The 4A's also highlighted the top ten points where small changes would result in V3.0 being easier and less costly to negotiate and administer than V2.0 for both Advertisers and Agencies. While the ANA incorporated a certain number of points into V3.0, some of which are acknowledged in this guidance, most of the points raised were not addressed, and V3.0 introduced several new problematic provisions on which no feedback was sought from 4A's members. As a result, V3.0 remains a complex and one-sided document that is difficult and costly to administer, and that often requires extensive and costly negotiations each time it is used.

None of the ANA Master Media Buying Services Agreement templates are recognized by 4A's members as industry standard documents.

4A's members acknowledge that it was the ANA's intent that ANA templates of the Master Media Buying Services Agreement would require the Agency and Advertiser to have detailed discussions on the many important topics that are included in the templates and agree that these conversations are an important part of the contract negotiation process.

This guidance is based on the significant experience and learnings that 4A's members have obtained when negotiating all the versions of the ANA Master Media Buying Services Agreement. This guidance document outlines the priority challenges, comments, and possible solutions that Agencies will likely raise during contract discussions. Ultimately this is an attempt to ease the negotiation process, shorten the timeframe in which an agreement is finalized and lower the cost of getting to an agreement that is more balanced and has a fairer allocation of risk between Agencies and Advertisers. Capitalized terms used in this guidance refer to the defined terms in V3.0.

It should be noted that many 4A's members have developed their own template contracts which address the same concepts as those covered by V3.0 while also reflecting the Agency's own internal processes and ways of working. The 4A's recommend that Agencies and Advertisers discuss the types of engagements where it may be appropriate to leverage the Agency's template for a more streamlined contracting process.

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[1] #MediaSnack Podcast Season 1, Episode 34 (September 2019), #MediaSnack Meets: Doug Wood, Advertising Lawyer: *"The agency's not going to agree to all of this. I mean, for example, we wrote the template, the media buying template contract for the ANA. I've said many times, if I ever hired an agency and they just looked at it and said this is fine and signed, I wouldn't trust that agency as far as I could throw them because there are issues in that contract that are there that are certainly one-sided to the brand by purpose so that the discussion is had…"*

V3.0 notes that it "is a form for U.S. advertisers to use when contracting with media buying agencies in the United States"; however, 4A's members emphasized that ANA Master Media Buying Services Agreement template terms are often proposed by Advertisers for international / multi-market agreements. This guidance document will note some instances where specific V3.0 terms should not apply to markets outside the USA or if a term can be retained, how it might be amended. 4A's members note there are additional situations where V3.0 might not be appropriate to apply globally.

V3.0 also notes:

- *"There is no obligation on ANA members to use the Template. ANA members should independently decide what media planning and buying terms and conditions work best for them. Each member is free to negotiate whatever terms and conditions such member deems appropriate. As with any template, this Template should be modified to the needs of your organization and will require bespoke modifications."*; and
- *"The suggested terms in the Template are intended as a starting point and potential guide only and are not intended to represent the only methodology by which the contractual relationship between an advertiser and its media buying agency can be addressed".*

The same principles apply to this guidance. There is no obligation on 4A's members to use this guidance and 4A's members and their clients should independently decide what media planning and buying services terms and conditions work for them.

Summary Guidance

Detailed Guidance Section	V3.0 Section	4A's Members' Concern	4A's Members' Recommendation
1. Liability for Supply Chain, Third Parties, and additional affiliates	3.3 and 3.7 and Schedule 10.	1. Agency is responsible for parties (i.e. Related Parties and Vendors) that are outside its reasonable control. 2. Excessive Vendor contracting requirements that it will not be reasonable or commercially feasible for the Agency to implement. 3. Advertiser payment of media placements should align to terms agreed with Vendors.	1. Agency Group definition should only include Agency Affiliates under common control with the Agency that are involved in performing the Agreement. Related Parties definition to be modified to those parties in which the Agency has an agreed material ownership interest. 2. Advertiser's expectation of the Agency relating to Vendors should align with Vendor's expectations and Agency's agreements with Vendors. 3. The Agency should not be responsible for Vendors that are outside its reasonable control.
2. Obligations of Holding Company	Schedules 2 and 3.	The requirement for a Holding Company entity, that may be too far removed from the management of the Agreement, to sign a separate Acknowledgement and Agreement and provide an annual certification.	Given the obligations on the Agency in the Agreement, these documents are not necessary but if required by the Advertiser should be signed by an entity in the Agency network that is more closely connected to the management of the Agency's compliance with the Agreement. Any separate agreement should be reasonable and subject to customary liability provisions.
3. Data Ownership & Usage	1, 25	The definitions of Advertiser Data and Transaction Data are too broad and include huge volumes of data. Some data may not be in the Agency's possession, the Agency may not have permission from third parties to share the data with the Advertiser, and there may be a cost of storage relating to Transaction Data.	These definitions should acknowledge what data is available to the Agency, the cost of storage and the rights of the Agency and third parties.
4. Reporting	7.3, 7.5, 9.4.7, 9.5, 10.1, 10.4, 12.4, 15, 27.4 and Schedule 12.	There are a significant number of reporting requirements.	Reporting is an Agency service to be provided if covered by the agreed scope and fees. The Agency and the Advertiser should review what reports are useful to the Advertiser and at what frequency to ensure optimal use of Agency team resources and avoid unnecessary increased costs to the Advertiser.
5. Conflict of Interest	2.5.	The definition is open to interpretation, includes items that may not be actual conflicts of interest and may be complex to administer.	Make the definition clearer by deleting open ended terms and including a precise list of relevant and actual conflicts of interest. Remove any subjective terms to make the definition more objective.
6. Agent / Principal Status & Sequential Liability	3.6.	1. There may be instances where the Agency contracts with certain Vendors in the Agency's own name as a principal. 2. Sequential liability applies to all payments, not just undisputed payments. 3. Outside the USA, Agency agent status is not the accepted practice, and in most territories sequential liability does not apply.	1. The Agreement should contemplate that the Agency may be contracting with certain Vendors in the Agency's own name as a principal. 2. Where the Advertiser has not paid the Agency, the Advertiser will be liable to Vendors for all amounts, not just "undisputed amounts". 3. The Agreement should acknowledge that outside the USA, whether the Agency contracts with Vendors as an agent or in its own name as a principal is determined by local law or custom and that sequential liability does not apply.
7. Rebates & Incentives	7.1 to 7.7.	The definition of Rebates and Incentives does not acknowledge several practical considerations.	Contrived Services should be linked to the Advertiser's qualifying spend as the other parts of the definition are, and "opportunities" should be deleted as an 'opportunity' by its nature is non-divisible. The Agency's duty to return Rebates and Incentives should only apply to Rebates and Incentives actually received from Vendors. The definition should acknowledge that it does not include (i) agency commission / income that are not rebates and may be subject to separate terms, and (ii) specific non-client transactions or trading arrangements such as Value Pots in the UK.

Detailed Guidance Section	V3.0 Section	4A's Members' Concern	4A's Members' Recommendation
8. Early Payment Discounts & Direct Debit Discounts	7.8.	1. The Agency being denied the opportunity of Early Payment Discounts if declined by the Advertiser. 2. Inclusion of Direct Debit Discounts, a practice in Germany, in a USA agreement may be confusing to Advertisers.	1. When the Advertiser declines the opportunity of an Early Payment Discount or fails to pay the Agency by the early payment deadline, the Agency should be permitted to pursue the opportunity and retain the Early Payment Discount. 2. Decide whether Direct Debit Discount provisions should be included in a USA agreement and if included, acknowledge in discussions that it may not be relevant.
9. Non-Transparent Services	9.	The extensive and prescriptive requirements and provisions stating the Advertiser is not required to pay for Non-Transparent Services and that they should be treated as transparent services are unreasonable.	The Advertiser and the Agency should discuss the requirements for the Advertiser to approve Non-Transparent Services. The provisions stating that the Advertiser is not required to pay for Non-Transparent Services and that they should be treated as transparent services should be removed.
10. Unbilled Costs	10.2.	The Agency's ability to invoice the Advertiser is limited to 12 months or the statutory period (if longer).	None for V3.0 but where an Advertiser proposes V2.0 terms that limit the Advertiser's liability to the Agency to 12 months, the Agency should amend this to 12 months or the statutory period (if longer) as noted in V3.0.
11. Relationship; Exclusivity	11.	1. The Advertiser is not providing any exclusivity commitment while asking the Agency to provide an exclusivity commitment which restricts the Agency's ability to maintain and develop its industry vertical expertise. 2. The restriction on staff working for competitors for 12 months after ceasing to provide services to the Advertiser is unreasonable. 3. Disclosure of the existence of the Agency's relationship with competitors may be subject to confidentiality obligations to those clients.	1. Exclusivity provisions take varying forms depending on the commercial discussions. Agencies will likely insist that (i) if applicable, there should be a precise and reasonable list of actual competitors, (ii) only those key roles within the Agencies providing Services to the Advertiser will be captured by the exclusivity obligations; and (iii) that these obligations should not apply to some Agency functions that service all clients. 2. The 12 month restriction applying to Agency staff should be removed or significantly reduced. 3. Disclosure should be subject to the Agency's confidentiality obligations to its other clients.
12. Taxes	17.4.	1. The Agency and Advertiser have legal obligations with respect to taxes which should not be varied by the Agreement e.g. Advertiser's payment being subject to it not disputing the tax and Agency notification of New Taxes. 2. In an international context, the Agreement does not address the existence of cross border withholding taxes.	1. Reference to payment not being disputed should be deleted. 2. New Taxes will be added to Agency's invoices but will not be subject to a separate notification process. 3. Where withholding taxes are applied, the Advertiser should gross up the payment to the Agency so the Agency can meet its payment obligations to Vendors.
13. Payment terms, late payment & late invoicing	17.1.1, 17.2, 17.5.3, 17.5.5 and 18.2.	1. Payment and invoicing terms that require the Agency to finance the Advertiser's marketing spend. 2. Third-Party Costs are omitted from the late payment provisions, there is a lower interest rate for Advertiser versus the interest payable by Agency in the audit section, and the Agency waives its right to interest if the Advertiser pays after written notification. 3. Late invoicing provisions extinguishing the Advertiser's liability and leaving the Agency with a liability to Vendors.	1. Payment and invoicing terms should not require the Agency to finance the Advertiser's marketing spend, but rather the Advertiser should ensure the Agency has funds in hand to pay third-party costs in a timely manner. 2. Third-Party Costs should be added, and interest rates aligned. 3. Late invoicing provisions should not apply to Third-Party Costs.
14. Third-Party Costs Additional Terms	18.3.3.	Returning interest earned on Advertiser funds is not a widely accepted practice in the USA and in an international context is not an accepted practice.	If return of interest is agreed in the USA, the interest rate should be the actual rate, not a notional rate, and interest should be calculated after allowing an agreed period for the Agency to flow through the Advertiser's payments to Vendors. A more favorable alternative is for the Advertiser and the Agency to optimize payment terms to align with Vendor payment terms to minimize the period for which the Agency holds the Advertiser funds.

Detailed Guidance Section	V3.0 Section	4A's Members' Concern	4A's Members' Recommendation
15. Foreign Currency & Third-Party Costs	18.4.	Local currency invoicing is preferred and where invoicing and payment are in different currencies the Agency should not be benefitting or bearing the cost of FX gains or losses.	The Advertiser should be responsible for FX gains or losses using the transaction's actual, not notional, rates of exchange.
16. Record Keeping, Audit & Access to Records	19.	1. The proposed compliance audit firm should be independent, free of conflicts of interest and professionally accredited. 2. The definition of Records does not acknowledge that there are categories of records that should not be subject to audit. 3. The length of record retention, period subject to audit, and frequency of audits are not reasonable. Remote audits are more resource intensive, prone to delays and for the Agency's most confidential records, not appropriate.	1. The definition of a compliance auditor should be an independent CPA firm or where the Agency permits, a mutually agreed independent specialist firm. Auditors should not be competitors to the Agency or performing cost consulting services for the Advertiser or employed on a contingency basis. 2. The definition of Records should relate to the Services and exclude records relating to the Agency's other clients and records unrelated to the Services provided to the Advertiser. 3. Record retention should be for an agreed number of years. Period subject to audit and frequency should be reasonable and encourage regular and timely audits, e.g., covering the prior 2 years and undertaken no more than annually. Remote audits should be subject to Agency consent and will not be permitted for the Agency's most confidential records.
17. Limitation of Liability	23.	Customary Agency liability caps and exclusions are missing.	Appropriate liability caps / carve outs for liability to be discussed and added.
18. Indemnification	23.	The indemnity provisions do not reflect the industry standard for media services. For example, they include provisions that are one-sided in the Advertiser's favor and they do not include certain customary indemnity obligations from the Advertiser.	1. Agency indemnities should be for gross negligence and certain agreed (key) provisions, and the indemnity position should be more mutual. 2. Standard indemnity obligations of the Advertiser should be added. 3. An Advertiser should protect the Agency from costs associated with claims, subpoenas or investigations involving the Advertiser.
19. Insurance and Risk Management & credit insurance	24.2.	1. The Agency's disclosure of its risk management protocol could undermine its effectiveness. 2. Provisions relating to the reduction or removal of the Agency's credit insurance to cover non-payment are missing.	1. The Agency will confirm it has a risk management protocol in place and on request provide a high-level summary. 2. Customary credit insurance provisions should be added to the Agreement.
20. Intellectual Property & Related issues	25.	An Advertiser should not own the Agency's existing IP and the Agency is unable to transfer IP in third-party rights that it does not own.	1. The grant of IP rights and representation as to original creation are subject to third-party rights and clarification of the Agency's existing IP. Any license grant to the Agency's existing IP should be reasonable and only as necessary for the Advertiser to use the Deliverables. 2. Ownership only applies to final and fully paid-for Deliverables.
21. Reports on revenues and profits	Schedule 12, Section 5.	The request for disclosure of the Agency and Affiliates profits is unreasonable	Disclosure of profit should be limited to where there is an agreed profit in a fee methodology.
22. Artificial Intelligence	33.	Advertiser's approval for any use of AI, as opposed to generative AI by Agencies in final Deliverables specifically commissioned for publication, only serves to overcomplicate the contractual requirements when there is no practical benefit in doing so.	Agencies should disclose the use of generative AI used in final Deliverables specifically commissioned for publication.

Detailed Guidance

1. Liability for the Supply Chain, Third-Parties and Additional Affiliates

Most agencies are willing to be responsible for their employees and the performance of Services by those subcontractors engaged and selected by the agencies who participate in performing the work of the Agency under the Agreement and will be transparent about potential "conflicts of interest" in its supply chain. It is not reasonable, however, for the Agency to be responsible for participants in the media supply chain outside of its reasonable control, such as the broader group of entities defined by the ANA as "*Related Parties*" or third-party "*Vendors*".

The ANA acknowledges in V3.0 that "*Vendors*" are not "*Subcontractors*" of the Agency. Nonetheless, there are multiple provisions that require Agencies to guarantee the performance of Vendors. In addition, V3.0 includes extensive Vendor contracting requirements and oversight responsibilities for Vendors[2] that will not be reasonable or commercially feasible for Agencies to implement in many instances. In practice, and particularly for offline media vendors, major digital suppliers and data / technology vendors, the Vendor will insist on their standard terms which do not align with V3.0 and will not agree to any revisions by Agencies (regardless of the size of the Agency or the Advertiser). These provisions will need to be refined to appropriately allocate obligations and risks among Vendor, Advertiser, and Agency.

Further, both Agency and Advertiser industry bodies recognize the current limitations of programmatic media supply chain transparency and the critical importance of all parties in the supply chain working collaboratively to bring about necessary improvements[3]. Recognizing the current status and acknowledging that this is not the sole responsibility of the Agency, the Agreement should note that payment, reimbursement, and other obligations[4] will be subject to the terms agreed between the Agency and the applicable Vendor. For illustration and particularly relevant to markets outside the USA, the Agency's ability to use AV Tools will be subject to whether they are available in all markets, their capability, and the acceptance by Vendors of such tools on their platforms/websites and as the basis of payment. Accordingly, most 4A's members recommend that many of these obligations be removed from the Agreement and placed in a Scope of Work. It should further be noted that fraudulent impression and viewability standards are not aligned globally or across all media, and fraud tolerances and viewability targets should be considered at market and media channel level to ensure achievability.

V3.0 contains defined terms that broaden the obligations of the Agency as well as, where applicable, the Agency's Holding Company. The use of the defined terms (Agency Group; Related Party) conflates the roles and responsibilities of the Agency (and its Affiliates) providing services to the Advertiser with those outside of the Advertiser/Agency relationship in a manner that is neither consistent with industry practice nor practical or reasonable for the operational execution or enforcement of the Agreement.

Specifically, various obligations apply to the "*Agency Group*," defined in V3.0 as (1) the Agency and its Affiliates (including the Holding Company), (2) "*Related Parties*" (including Vendors with whom the

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[2] V3.0, Sections 3.3 and 3.7.

[3] For example, "The ANA Programmatic Media Supply Chain Transparency Study December 2023".

[4] V3.0, Schedule 10.

Agency or its Affiliates have a financial or otherwise beneficial relationship as well as their affiliates) and (3) "*Subcontractors*" (including OOH agencies or other specialist agencies, which are not clearly defined). The Agency Group's obligations relate, for example, to conflicts of interest and self-interest, Rebates and Incentives, audit rights, and transaction data. V3.0 requires the Agency to indemnify the Advertiser for the actions of the Agency Group. Clearly, these "*Agency Group*" obligations conflict with the general principle and industry position, as supported elsewhere in V3.0, that Vendors are not the Agency's Subcontractors and the Agency should not, therefore, be responsible for them.

Many 4A's members recommend revising the defined terms related to parties associated with the Agency as follows, provided the definitions will always need to reflect and be appropriate to the structure of the relevant Agency network:

a. Limit the definition of "*Agency Group*" to include only the Agency providing services/the operating entity executing the contract, and those Agency Affiliates under common control with the Agency that are also providing services to the Advertiser.

b. "*Related Parties*" should only be included in the "*Agency Group*" definition if restricted to entities that provide services under the Agreement or receive Rebates & Incentives and in which the Agency or any Agency Affiliate has a material financial interest, for example, greater than an agreed material ownership percentage.

4A's members generally understand that the intent of the breadth of the ANA's defined terms is to support full transparency. However, the result of including overly broad concepts is that the contracting Agency becomes responsible for third parties beyond its reasonable control and that have no connection to the services provided to the Advertiser. This unfairly burdens the Agency with compliance and risk expenses that serve no one and inflates costs for both Agencies and Advertisers.

2. Obligations of the Holding Company

V3.0 includes expanded obligations on the Agency's Holding Company, as evidenced in the updated Holding Company Acknowledgement and Agreement[5] and the Holding Company and Agency Annual Financial Compliance Certification[6].

V3.0 and earlier templates include extensive provisions that cover the broader Agency network, for example, provisions relating to Rebates & Incentives and audit, and 4A's members accept the scope of this coverage in many cases. However, the requirement for the Holding Company to sign additional documents serves to complicate the contract structure by requiring the Agency to involve members of its network that are not involved in the provision of the services or operationally responsible for the Agency's compliance with the Agreement and do not have any meaningful understanding of the Agreement. Consequently, if an Agency agrees to sign these documents, the Agency may request that these documents be signed by personnel of the relevant Agency network member who both understands the Agreement and has operational responsibility for the Agency's compliance with the Agreement.

If an Agency accepts that another member of the Agency network will sign an Acknowledgement and Agreement, then as it is a separate and standalone agreement, the signing entity will likely ask to add customary liability provisions, for example, the Acknowledgement and Agreement may reference that it is subject to the limitation of liability section of the Agency Agreement with the Advertiser.

[5] V3.0, Schedule 2.

[6] V3.0, Schedule 3.

3. Data Ownership & Usage

The definition of Advertiser Data[7] includes Transaction Data[8]. Both definitions are excessively broad and would include incredibly large volumes of data collected while providing the Services, whether such data is (i) on the Advertiser's websites or third-party websites (e.g., Facebook, Google) or (ii) collected by the Agency and Agency Affiliates or by third parties. The breadth of the definitions may make it impossible for an Agency to comply with the terms and conditions of the Agreement and may create potential issues under applicable privacy laws.

V3.0 states as between the Agency and the Advertiser, the Advertiser shall own all rights, title, and interest (including all Intellectual Property rights)[9] in Advertiser Data, but this does not recognize that under Vendor terms Agencies may be unable to guarantee the Advertiser's ownership of data collected by or on the websites of third parties or through third-party services. Moreover, there are several provisions requiring the Agency to procure access to Transaction Data, including by contract, which does not acknowledge the challenges associated with trying to force these provisions on all Vendors in the digital supply chain. As we have noted in Section 1, these current limitations can only be overcome by all parties in the supply chain working collaboratively together to bring about the necessary improvements, which should not be the sole responsibility of the Agency. 4A's members acknowledge V3.0's insistence on ownership of Advertiser Data but most recommend a focus on access and usage rights and restrictions is often a more helpful framework to address the Advertiser's interests.

While these definitions impose significant obligations on the Agency, they also do not give any consideration to what data is relevant and of value to the Advertiser or to good data management principles such as data minimization or data cost management.

Most 4A's members recommend:

a. The Advertiser and Agency should align on what data:

   i. is relevant and of value to the Advertiser's media objectives and, for example, its capacity to provide insights for targeting and optimizing campaigns.

   ii. is subject to third-party rights.

   iii. should be made available to the Advertiser, limited to what is necessary for the Agency to provide the services to the Advertiser.

b. These definitions should only:

   i. include data that is in the Agency's possession. As an example, the definition of "*Transaction Data*" makes specific mention of "raw data" which may not always be available to the Agency.

   ii. apply to data that the Agency has a right to share with the Advertiser, with appropriate limitations to protect Agency and third-party intellectual property rights and other rights. This will help avoid any conflict with Vendor contractual requirements that prohibit the Agency from sharing data. Where the Advertiser wishes to obtain data that the Agency is not permitted under its own license to share, the Advertiser may consider whether it wishes to secure a direct license from the Vendor.

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[7] V3.0, Section 1.

[8] V3.0, Schedule 4.

[9] V3.0, Section 25.1.

c. Consideration should be given to:

i. the value of requiring the Agency to store huge volumes of Transaction Data and making it available to the Advertiser for long periods of time, potentially at a cost to the Advertiser, as some of it could be of little value and it may be expensive to store.

ii. any special Vendor requirements for obtaining Transaction Data, for example, certain Vendors will only send Transaction Data to specific platforms which may incur additional costs.

iii. allowing the Agency to use certain Transaction Data for benchmarking, statistics, metrics and trend analysis provided such data is non-personal data and cannot identify the Advertiser or an individual.

Overall, 4A's members note an improvement in V3.0 versus V2.0, in that V3.0 no longer includes the provision in V2.0's audit section stating that the Advertiser owns all rights in the Agency's Records except where exclusively belonging to the Agency, effectively proposing a position that the Agency would not own its financial records that it is legally obliged to maintain. However, V3.0 proposes that "*Media Placement invoices*" and "*media pricing*" should form part of the Advertiser's Data. Media invoices are the Agency's financial records, which it must retain to comply with its own legal obligations – these cannot and should not belong to any Advertiser. Media pricing does not automatically belong to the Advertiser; ownership will depend on the applicable arrangements among the Advertiser, the Agency and/or Vendors and such pricing is confidential to all parties.

4. Reporting

4A's members note the significant number of reporting requirements in V3.0. This includes the reporting listed in Schedule 12 (Section 16) and additional reporting requirements throughout V3.0 including with respect to Rebates and Incentives, Non-Transparent Services, Unbilled Costs, Staff allocations, Contact Reports, post termination reporting[10], and multiple reports included in the template Scope of Work (Schedule 1).

Most 4A's members recommend that Agencies and Advertisers agree on what reports will be useful to the Advertiser and at what frequency to ensure the Advertiser receives relevant information at reasonable intervals to ensure optimal use of Agency resources that the Advertiser is paying for.

[10] Rebates and Incentives are in Section 7.3 and 7.5, Non-Transparent Services are in Section 9.4.7 and 9.5, Unbilled Costs are in Sections 10.1 and 10.4, Staff allocations is in Section 12.4, Contact Reports is in Section 15, and post termination reporting is in Section 27.4.

5. Conflict of Interest[11]

The Agency / Advertiser relationship should be grounded by the principle that an Agency will act in the best interests of an Advertiser when performing the Services as the Advertiser's agent. This includes being transparent concerning interests that are a conflict with respect to the provision of the Agency's Services to the Advertiser.

The V3.0 definition is overbroad and not tailored to identify actual conflicts of interest that could compromise the impartiality of Agencies. It is also complex to administer. Most 4A's members recommend the following changes:

a. Make the definition clearer by deleting open-ended terms such as "*including*" and replacing those terms with more precise terms such as "*namely*" or "*which are*".

b. Make the definition more objective by deleting terms that are open to interpretation such as "*might*" happen or in the "*opinion of Advertiser*".

c. Ensure the list is limited to actual conflicts of interest. For example: (i) a subsidiary of a large Agency group may not be aware of all "*financial interests or investments*" of its Affiliates or Associates and, accordingly, can neither be unduly influenced by, nor report to Advertiser with respect to, such interests or investments; (ii) in some cases, such as the negotiation of volume discounts, the Agency may be acting on behalf of its client base as a whole (rather than in the best interest of any single Advertiser); such activity ultimately benefits the Advertiser and should be encouraged rather than prohibited as a conflict.

d. Determine what the Advertiser considers to be an actual conflict of interest and remove those which are not. For example: i) the inclusion of "*Dual Rate Cards*" as a predetermined conflict does not recognize that other Agency clients may have other confidential preferred rates due to, for example, their level of spend, or that several 4A's members have businesses providing "*Non Transparent Services*" with their own rate cards; and ii) it should be acknowledged that the Agency may have clients, for example media planning and buying clients, who are Vendors and that the transactions with these clients are unrelated to the Services provided to the Advertiser. Moreover, elsewhere in the Agreement there may be an acknowledgement of the existence of these types of circumstances.

e. Remove references to "*Related Parties*" which are in many cases outside the control of the Agency Group and whose conflicts of interest the Agency would not be in a position to know or limit.

[11] V3.0, Section 2.5.

6. Agent/Principal Status & Sequential Liability[12]

V3.0 notes[13] market practice in the USA is that media agencies (i.e., the Agency) are contractually authorized to enter into contracts with Vendors as agent on behalf of a disclosed principal, the Advertiser. This includes the authority to bind the Advertiser to Vendor contracts, including payment liability. Making the provision conditional as suggested by Section 3.6 of V3.0 by qualifying the obligation that amounts owed must be "undisputed" is unnecessarily confusing. That limitation should be deleted. Any disputes over amounts owed, including processes for resolution of those issues, whether due to agency or vendor issues, should be separately addressed and should not undermine sequential liability. Some Agencies note that there may be instances where the Agency contracts with Vendors in its own name as a principal, for example due to Vendor expectations, and the Agreement should acknowledge where this is the case.

Sequential liability applies when the Advertiser has made payment to the Agency and the Agency then becomes liable to the Vendor to make that payment. Not all Vendors accept sequential liability, and V3.0[14] accounts for this by requiring the Agency to notify the Advertiser where Vendors do not accept it. Some Agencies may find this notification requirement impractical and may wish to modify the language to clarify that the Agency may, in its discretion, notify the Advertiser in writing when a Vendor refuses to accept sequential liability. It is also the case that some Vendors dispute the Agency's agent status because they want the ability to hold both the Advertiser and the Agency liable for payment.

Outside of the USA, whether the Agency contracts with Vendors as an agent or (relevant to most markets) in its own name as principal is determined by local law or custom and sequential liability is generally not a concept that is applied. Where the Agreement covers markets outside the USA (and where Vendors otherwise expect the Agency to contract as principal), the Agreement should acknowledge that the Agency will contract with Vendors in its own name as a principal.

7. Rebates & Incentives[15]

Rebates and Incentives vary by country and Agency. Some Agencies in the USA may negotiate Rebates and Incentives with Vendors in limited circumstances while other Agencies do not. In other countries, 4A's members acknowledge that Rebates and Incentives may be used more broadly by Agencies to extract additional value from Vendors and the treatment of Rebates and Incentives will depend on local law or market practice and the commercial arrangement that the Agency and the Advertiser have agreed.

If all or a part of any Rebates and Incentives is retained by the Agency as an agreed form of payment for Services, this should be noted in the Agreement. Where the agreed commercial arrangement is that Rebates and Incentives will be returned to the Advertiser and it is agreed that the ANA's definition and language are included in the Agreement, 4A's members may raise several points to ensure that the language does not reach beyond its intended purpose. Regarding the definition of Rebates and Incentives[16]:

a. The inclusion of "*opportunities*" is unclear because an opportunity by its nature is non-divisible. This term is a new addition to V3.0 and should be deleted.

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[12] V3.0, Section 3.6.

[13] V3.0, Section 3.1.

[14] V3.0, Section 3.6.

[15] V3.0, Sections 7.1 to 7.7.

[16] V3.0, Section 1.

b. Many 4A's members consider the term "*Contrived Service Agreements*" to be somewhat inflammatory. 4A's members should determine if they are aligned with the underlying concept of "*Contrived Service Agreements*" being included in the definition, and in any case, it should be linked to Advertiser spend, as the long list of other terms in the definition all are. Contrary to the ANA footnote 7 stating that the "*Rebates and Incentives*" definition "*ultimately remains the same in its overall meaning*" as V2.0, this absence of an explicit link to Advertising spend is a notable change.

c. Where Rebates and Incentives are in respect of the traded volume across all or multiple clients of the Agency Group, the Advertiser's share should be calculated based on the Advertiser's qualifying spend with Vendors to avoid, for example, the Advertiser double dipping (or expecting to be able to do so) when their spend is counted only under their own direct Rebate and Incentive arrangement. Where the Agency's entitlement to a Rebate and Incentive is calculated for each Advertiser according to each Advertiser's spend, including where the Advertiser's entitlement is measured against a sliding scale related to the value of their spend, the Advertiser should only be entitled to the Rebate and Incentive resulting from their qualifying spend.

d. To avoid any ambiguity and the unintended consequence of capturing the Agency's income or value streams that are not Rebates and Incentives, some Agencies will seek to expressly exclude specific categories of transactions from the definition of Rebates and Incentives to align with the Agency's trading or operational or other practices including, as examples:

   i. income that may be related to client spend but is retained by the Agency network, as a remuneration mechanism. To aid transparency a list of what these are and where they exist, typically in markets outside the USA, could be included in a schedule to the Agreement, for example, German Direct Debit Discounts.

   ii. Benefits arising from principal / non-client transactions or trading arrangements, such as: (i) remuneration for services provided to the Agency's clients, who are also Vendors, (ii) arrangements in respect of Non-Transparent Services, and (iii) where applicable, Value Pots in specified markets, such as the UK, which are not allocated to Advertisers on a pro-rata basis.

8. Early Payment Discounts & Direct Debit Discounts[17]

Regarding Early Payment Discounts, most 4A's members are generally aligned with the language but disagree with the ANA's comment in footnote 14 that "*Some Advertisers take the position that the Agency should not be able to take advantage of these opportunities, even if the Advertiser turns them down.*" This is not accepted practice and Section 7.8.1 should be amended accordingly to permit the Agency to pursue the opportunity and retain the Early Payment Discount.

Many 4A's members are unclear about the new addition in V3.0 relating to Direct Debit Discounts, with some 4A's members noting they are aware that Direct Debit Discounts are a market practice in Germany but not in the USA. Most 4A's members are not concerned with retaining the language as it is not relevant to the USA in practice but note its inclusion may be confusing for USA Advertisers. Overall, 4A's members recommend the reference to Direct Debit Discounts be removed if the USA is the only territory under the Agreement because if it existed it would be captured by the definition of Rebates and Incentives. Direct Debit Discounts can be added later if a territory is added to the Agreement where Direct Debit Discounts are relevant because the Agency will likely request the addition of any specific requirements to enable the Advertiser to qualify for Direct Debit Discounts.

[17] V3.0, Section 7.8.

9. Non-Transparent Services[18]

The term "*Non-Transparent Services*" is used in the ANA Agreement to refer to when the Agency sells goods or services, and as the ANA points out and as the Advertiser acknowledges in the Agreement, does not give full visibility of the underlying components contributing to the overall price / cost of the solution to the Advertiser. V3.0 acknowledges this includes Inventory Media and each Agency's specific proprietary solutions. Agencies will likely want to add their own terms describing their solutions to the Agreement.

Many Agencies have made significant investments in technology and infrastructure to provide their solutions. We recommend that Advertisers ask the Agency to demonstrate the respective solutions and explain the cost and / or performance and / or other advantages for the Advertiser before the Advertiser decides to dismiss Non-Transparent Services, to avoid inadvertently dismissing them out of hand and losing potential benefits.

The Advertiser and the Agency should discuss the requirements for the Advertiser to approve Non-Transparent Services. However, most 4A's members fundamentally disagree with the new and unreasonable provisions that the Advertiser should not be required to pay for purchases that do not precisely follow V3.0's extensive and prescriptive requirements and that such circumstances mean those purchases should be treated as transparent services/purchases. This provision should be removed. It is unreasonable to force the Agency to reveal highly commercially sensitive and proprietary information which could also place the Agency in breach of confidentiality provisions in its agreements with its underlying suppliers. The Advertiser's obligations to pay for media it received the benefit of should not change and an alternative remedy can be negotiated by the parties if necessary.

10. Unbilled Costs[19]

Unbilled Costs, noted in Section 10.2 of V3.0, represents a liability to Vendors and is neither Advertiser nor Agency income. V2.0 limited the Agency's ability to invoice an Advertiser for a Vendor invoice received "*within a period of twelve (12) months from the date the monies for Unbilled Media were passed back to Advertiser*". This is unreasonable because the liability to the Vendor is only extinguished at the end of the statutory period and the limitation to 12 months effectively meant the Agency, when contracting in its own name as a principal, was left with a payment liability to the Vendor through no fault of the Agency. 4A's members welcome V3.0 amending this language to "*within a period of [twelve (12) months] or such other legally required statutory period within the Territory (if longer) from the date the monies for Unbilled Costs were passed back to Advertiser*". If an Advertiser proposes V2.0 terms, Many 4A's members recommend that they are amended to the position in V3.0.

[18] V3.0, Section 9.

[19] V3.0, Section 10.

11. Relationship; Exclusivity[20]

The Agency's appointment is noted as non-exclusive with no commitment from the Advertiser, whereas the Agency must make a commitment to the Advertiser regarding not working for competitors. 4A's members recognize that managing client conflict as a means of protecting the Advertiser's confidential information is important for Advertisers. Often, Agencies already have well-established procedures in place to protect the Advertiser's confidential information. Agencies ask Advertisers to recognize that non-compete obligations restrict the Agency's ability to maintain and develop its industry vertical expertise, which often Advertisers expect Agencies to have, and may reduce the Agency's ability to grow its business and retain high performing talent through growth opportunities.

4A's members may have the following observations where V3.0 provisions are proposed by an Advertiser:

a. Regarding, the requirement for the Agency to disclose "*the existence of any contracts or business relationships that Agency and/or Agency Affiliates have*" with competitors. Agencies may request to amend the language to narrow the notification requirement to: (i) include just competitors that it provides similar services to; and ii) exclude those Agency Affiliates (including other parts of the Holding Company network) that do not provide services to the Advertiser under the Agreement. Disclosure should be subject to the Agency's confidentiality obligations to its other clients.

b. Where applicable, there should be a precise and reasonable list of actual competitors named in Schedule 7. Applying a non-compete restriction to named industry sectors should be avoided because it creates uncertainty, and it is likely to be overly broad and capture other advertisers that are not competitors.

c. Regarding, "*Restricted Staff*" not working for competitors until after "*[twelve (12) months]*" after ceasing to provide Services to the Advertiser, Agencies will wish to remove or significantly reduce this period as it unduly hampers the Agency's ability to reallocate personnel in a manner that best suits their expertise. The restriction should be subject to applicable laws, because in some jurisdictions this restriction is not permissible.

d. Regarding, "*For the Term of this Agreement, Agency shall not accept new assignments from any Person that markets or sells Competing or Antithetical Products or Services*" this may be considered unreasonable without the Advertiser providing similar exclusivity or other commitments in return. If the Agency agrees to this type of language, Agencies recommend that the Agreement should clarify that the Advertiser's consent should not be unreasonably withheld or delayed, further noting that, for example, it would be unreasonable for the Advertiser to withhold consent where the Agency can demonstrate it has internal firewall arrangements in place or where the Agency has not performed material services for the Advertiser for a substantial period of time (despite the Agreement being in force). Moreover, Agencies may recommend that instead of a competitive restriction applying to the whole Agency, that the restrictions apply only to those key roles that are identified in the Agreement or that restrictions do not apply but firewalls are implemented, such as physical separation of the Agency's client team servicing the Advertiser from client teams servicing the Advertiser's competitors, either by separate secure areas or separate floors in the same building.

e. Regarding "no overlap of teams or Associates", Agencies recognize that Associates in the Agency's client service team should not overlap but Agency structures often mean that certain functions within the Agency group or back-office functions (e.g., finance and legal) are intended to be scaled and service all Agency clients. Most 4A's members recommend that the Agreement clarifies that these group or back-office functions are excluded from non-compete obligations.

[20] V3.0, Section 11.

12. Taxes[21]

Section 17.4.1 of V3.0 notes that Transaction Tax is payable by the Advertiser unless it is disputed by the Advertiser. The Agency is legally required to charge appropriate Transaction Taxes and the Advertiser is legally required to pay them, it is not a matter of whether the Advertiser accepts this or not, so the reference to this payment being "disputed" by the Advertiser should be removed. Further, regarding the obligation on the Agency to notify the Advertiser if it is aware the Advertiser could obtain refunds of Transactions Taxes paid, this is a task for the Advertiser and their tax advisers and should also be removed.

Section 17.4.2 notes that the Agency should notify the Advertiser of New Taxes prior to commencement of Services. As legally required, New Taxes will be noted on Agency invoices and not subject to a separate notification process. 4A's members agree with the ANA footnote 19 which recommends that Advertisers should consult with their tax counsel.

For international Agreements, where the provision of Services involves any cross-border transactions where payments by the Advertiser are subject to withholding or other similar taxes, the Agency will likely wish to add a requirement to the Agreement that such payments are increased so the net amount received by the Agency is equal to the amount that it would have received if the withholding tax had not been withheld. This is primarily to ensure that the Agency is in receipt of full funds so it can meet its payment obligations, on behalf of the Advertiser, to Vendors since any withholding from media costs may be a substantial number that the Agency cannot be expected to bear.

13. Payment Terms. Late Payment & Late Invoicing

V3.0 references payment terms for Fees in Section 17.1.1, for Expenses in Section 17.2 and for Third-Party Costs in Section 18.2, with the agreed number of days to be added by the Agency and the Advertiser.

4A's members will expect that payment terms (particularly in relation to Third-Party Costs) are cash neutral, meaning that the Agency is not funding payments to Vendors in advance of receiving funds from the Advertiser. The 4A's have written extensively about the need for fair payment terms including in its Guidance "***The Ripple Effect of Extending Payment Terms***".

When the Advertiser fails to make payment when due, noted in Section 17.5.3, 4A's members may have the following comments regarding late payment:

a. Contractual late payment implications should include Third-Party Costs, currently missing, in addition to Fees and Expenses, as this is likely to be the highest value item owed to the Agency.

b. There is a disparity between the interest rate due from the Advertiser to the Agency under this Section, versus the interest due from the Agency to the Advertiser relating to audit findings in 19.7.2. If included, they should be the same.

c. The Agency waiving its right to accrued interest because the Advertiser pays within 5 days of written notification, is unreasonable and should be deleted because it has the effect of extinguishing interest that is due to the Agency to compensate it for the late payment.

Late invoicing is noted in Section 17.5.5 with the Agency waiving its right to invoice the Advertiser after "*more than [twelve][(12)]*" months. This limitation is unreasonable as its effect is to extinguish the Advertiser's liability to pay the Agency, but it does not extinguish the Agency's liability to pay the Vendor. Any time limitation should mirror the statutory period in the territory.

[21] V3.0, Section 17.4.

14. Third-Party Costs Additional Terms[22]

Returning interest on Advertiser funds is not widely accepted by 4A's members, and it is not a practice outside of the USA. If the concept is agreed in the USA, the Agency should return actual interest received, not a notional rate, and interest should be calculated after allowing the Agency an agreed period to flow through the Advertiser's payment to Vendors. A more favorable alternative for the Advertiser, as it would optimize the Advertiser's payment terms, is for the Agency and Advertiser to work together to minimize the Agency's holding of Advertiser funds.

15. Foreign Currency & Third-Party Costs[23]

4A's members prefer to invoice and be paid by Advertisers in the appropriate local currency to avoid exposure to foreign exchange (FX) risk. Where it is agreed with an Advertiser that invoicing and payment will be done in another currency, for example for international transactions, then the Agency is likely to expect to be in an FX neutral position, meaning that the Advertiser is responsible for any FX gains or losses and any related bank charges. It is appropriate to use the actual rate of currency exchange for any transaction, not a notional Wall Street Journal Rate as noted in V3.0.

16. Record Keeping, Audit & Access to Records[24]

While most 4A's members agree with the principle of audit rights, they will want to clarify each type of evaluation and who will undertake it, identify what records will be reviewed; and align on when and how the audit will be undertaken. For example:

a. Type of Auditor

V3.0 references the different "*Compliance Audit, Performance Audit, and other audits and evaluations*", all undertaken by any external third-party chosen by the Advertiser. While 4A's members acknowledge that Advertisers want flexibility in choice of auditor, a compliance audit report may result in a liability for the Agency, and it is reasonable that the Agency would expect any compliance audit firm to be independent, free of conflicts of interest, and professionally accredited. For many 4A's members this means that the compliance audit firm should be an independent Certified Public Accounting (CPA) firm or where permitted by the Agency, a mutually agreed independent specialist compliance audit firm. 4A's members welcome the addition to V3.0 acknowledging that an Auditor should not be employed on a contingency basis.

Many 4A's members have serious reservations with an Advertiser's proposed use of any non-certified specialist compliance audit firm. This is because the audit firm has no obligation to maintain professional standards, objectivity, and impartiality, which are fundamental requirements for a compliance audit.

Additionally, the audit firm should be independent and free of conflicts of interest which could affect its impartiality, for example, it provides services competitive to the Agency or provides cost consulting or other consulting or marketing services to Advertisers. The 4A's have previously issued "***Client Audit Guidance***" which outlines these concerns in more detail.

[22] V3.0, Section 18.3.3.

[23] V3.0, Section 18.4.

[24] V3.0, section 19.

b. Records subject to audit

4A's members acknowledge that a Compliance Audit (primarily designed to verify the Agency's compliance with its financial obligations) will require access to many records relating to the Services. However, the requirement for audited materials goes beyond what an Agency can reasonably provide, including the records of Vendors and Related Parties and providing access to tools and technology.

Many 4A's members recommend that Agencies exclude the following from Records: (i) records relating to their other clients, just as they would not disclose the Advertiser's records to another client's auditor; (ii) records that are unrelated to the Services provided to the Advertiser including principal trading arrangements and / or non-client transactions; and (iii) employment records including payroll records where salaries are not relevant to the agreed fee methodology.

c. Audit process

i. Length of record retention should be for an agreed period. The period subject to audit, notice period, and frequency should be reasonable.

ii. In the spirit of an efficient audit and acknowledging Agency staff turnover and archiving policies, audits should be done regularly and in a timely manner (e.g., for the prior 2 years) and allow sufficient time for the Agency to prepare for the audit.

iii. Whether an audit is done remotely should be determined by the Agency as remote audits are often more resource intensive for the Agency, prone to significant delays, and in some markets not possible. It is also not reasonable to expect an Agency to disclose its most confidential records (e.g., Rebates and Incentives and personal information such as actual employee salaries used in an agreed fee methodology) other than in a secure (most likely on-site) environment.

iv. The Agency should be able to review and comment on the Compliance Auditor's draft report. Once the report is finalized, the Agency should provide "*Agency Comments*" to the Auditor for inclusion in the final report. The final report should always be provided to the Agency.

v. Auditors should not be given log in access to the Agency's or third-parties' tools. Such access is often in violation of Agency's license terms with third parties and creates additional risks for the Agency related to systems penetration and confidentiality of Agency, Client, and third-party information.

17. Limitation of Liability[25]

Most 4A's members have concerns with limitation of liability provisions that expose the Agency to uncapped unlimited liability. Parties entering commercial contracts generally have a practice of capping their damages to address proper allocation of risk. The parties will discuss what are reasonable caps and what carve outs are appropriate for the commercial transaction. In many cases, it's appropriate for carve outs to be subject to a higher cap rather than no cap, which is acknowledged in V3.0's footnote 23.

V3.0 includes a "*consequential damages*" waiver (with several exceptions) but does not include an actual monetary cap on liability. Many 4A's members recommend that a reasonable mutual cap on liability and where appropriate an increased (super) cap on carve outs be added. Typically, the "*base cap*" is one times annual fees on the relevant scope.

[25] V3.0, Section 23.

18. Indemnification[26]

Amendments to the indemnification provisions are required to reflect the industry standard for media services more closely:

a. Broad indemnity obligations relating to any Agency negligence or breach of the Agreement should be narrowed to the more customary "*gross negligence*" standard and to breach of certain (agreed) key provisions / representations and warranties.

b. The provision should be more mutual, which is appropriate given the substantial roles of both parties. For example, it does not seem appropriate for the Advertiser to indemnify only for "*gross negligence*" when the Agency is required to indemnify for simple negligence.

c. An unqualified obligation for the Agency to indemnify for all claims related to Section 32 (Data Protection and Security) and/or any violation of Applicable Law may be objectionable to many 4A's members, without corresponding language in the Advertiser indemnity and acknowledgment of the shared risks around personal data processing and compliance with Applicable Laws.

d. Certain standard indemnity obligations of the Advertiser are missing and should be added. While different 4A's members will have different requirements, Agencies will often ask to include requirements for the Advertiser to provide an indemnity for (i) the nature or use of the Advertiser's products or services, as well as Advertiser's properties (e.g., digital, mobile, etc.), specifications and instructions, (ii) information approved for publication by the Advertiser, and (iii) risks or restrictions (including restrictions related to the use by the Advertiser of third-party materials) which the Agency has brought to the Advertiser's attention where the Advertiser decides to proceed.

e. Advertisers should be open to considering the need to protect the Agency from costs and expenses it incurs in connection with any subpoena, discovery demand, or other directive being served upon the Agency relating to litigation, proceedings, subpoenas, and/or investigations involving the Advertiser or its products or services. This is particularly important in heavily regulated or litigious industries.

19. Insurance and Risk Management[27] & Credit Insurance

4A's members note the requirement in V3.0 to provide the Advertiser with its risk management protocol for approval. These documents are by their nature highly confidential and the mere disclosure to third parties, such as Advertisers, risks the effectiveness of the risk management protocol itself. It is also unreasonable and completely impractical for an Agency to seek approval from possibly hundreds of individual Advertisers about how it implements its own risk management systems. It is reasonable for the Advertiser to ask the Agency to confirm it has a risk management protocol in place and on request for the Agency to provide a summary.

Where the Agency may be liable for payments to Vendors for purchases on behalf of Advertisers, it is normal practice for an Agency to obtain credit insurance for its client base to cover the risk of non-payment from Advertisers for what are effectively pass-through costs. It is also normal that if the credit insurer reduces or removes credit insurance for an Advertiser, the Agency (and Vendors) will want to discuss how to mitigate its risk with the relevant Advertiser. Consequently, an Agency may request credit

[26] V3.0, Section 23.

[27] V3.0, Section 24.2.

insurance provisions be added to the Agreement. The UK Advertiser and Agency industry bodies, ISBA and IPA respectively, issued a joint "***Guidance note on UK media trading scenarios and risks***" which explains this in more detail. Despite the USA being a predominantly "*agency*" market, credit insurance is important for USA media agencies, particularly to protect against scenarios where a Vendor disputes the Agency's agent status or challenges sequential liability and to protect against non-payment of fees.

20. Intellectual Property[28] & Related Issues

Most Agencies will need to clarify that the grant of rights to intellectual property and the representation as to original creation are subject to third-party rights and would add certain clarifications on the scope of the Agency's existing intellectual property and its intellectual property infringement representations. Further, many Agencies would also propose that certain ownership provisions would only apply to final and fully paid-for Deliverables and work product.

Advertisers work with Agencies to benefit from the specialized and proprietary knowledge, expertise, strategies, platforms, processes, data, and more that Agencies have developed. As a result, Agencies will expect to clarify the definitions of Deliverables and Agency Information to ensure that Agency proprietary information (or other Agency intellectual property) that is leveraged and iterated in the course of servicing an Advertiser does not become a Deliverable owned by that Advertiser. This is particularly true for media agencies since they are less focused on creating traditional deliverables for Advertisers and often use proprietary technology and know-how (or improvements or enhancements thereof) or concepts that are broadly applicable and reusable, for the benefit of all Advertisers. For example, if an Agency employee creates a novel and protectable process to deliver services to her Advertiser client, that process should not become the Advertiser's property merely because she supports that Advertiser. Where an Agency incorporates its existing intellectual property into a Deliverable, it should ensure that any license grant to such is limited to only the extent necessary for the Advertiser to use the Deliverable and cannot be extracted and used apart from the Deliverable, and in no event in a manner that would compete with Agency.

21. Reports on Revenues & Profits[29]

The disclosure of Agency and Affiliates profits is only relevant in the context of a specified fee being based on a methodology which includes an agreed profit margin, in all other circumstances, such as commission or fixed fee arrangements, it is not reasonable to expect the Agency to disclose profits.

[28] V3.0, Section 25.

[29] V3.0, Schedule 12, Section 5.

22. Artificial Intelligence[30]

V3.0 states that the "*Agency shall disclose to Advertiser the use of any artificial intelligence (AI) in the provision of Services prior to use of such AI and obtain Advertiser's [Legal Department's approval] prior to any such use.*"

AI has been used as a standard way of working by media agencies for many years to improve efficiency, targeting precision, and overall campaign effectiveness, all for the benefit of Advertisers. AI algorithms analyze vast amounts of data, including user behavior, demographics, and online trends, to predict and optimize the placement of ads across various channels. Automated bidding systems powered by AI algorithms enable real-time decision-making, adjusting bid prices based on factors such as user engagement and conversion likelihood. To suggest that the Agency should disclose and obtain the Advertiser's approval for any such use serves only to unnecessarily complicate the contractual requirements when there is no practical benefit for the Advertiser in doing so.

4A's members suggest that the AI clause included in V3.0 be amended to address the use of generative AI by Agencies for the automatic generation of images, videos, text, and music to be included in final Deliverables that are specifically commissioned for publication. Agencies recommend that the text should be revised as follows "*Agency shall obtain Advertiser's approval for the use of any generative artificial intelligence in final Deliverables intended for publication (as set forth in a SOW).*" Agencies will want the Advertiser to accept any third-party terms applicable to the use of (approved) generative AI tools and to accept the current legal risks involved in using AI-created Deliverables.

AI provisions in Agency agreements with Advertisers is an evolving area and the 4A's expect to provide their members with further guidance on this topic.

[30] V3.0, Section 33.