

# Media Rebates/Incentives Require Full Transparency

The industry practice of media companies providing rebates/incentives to agencies for referring or influencing client spending towards that media company, and then the agencies not reimbursing those funds to the client, has long been acknowledged as a common practice outside the United States. However, a recent ANA/Reed Smith survey confirms that this practice also exists in the U.S. Details and implications for advertisers follow.

## Background

From late May to mid-June 2012, ANA members were surveyed to uncover:

- Awareness among advertisers of media companies providing incentives to agencies for referring client spending towards that media company.
- The specific media involved.
- Whether clients have language in their media agency contracts that addresses incentives.
- Whether clients conduct periodic audits to ensure that undisclosed rebate/incentive activity is not occurring with their agency.

One hundred eighty-eight members responded to the survey.

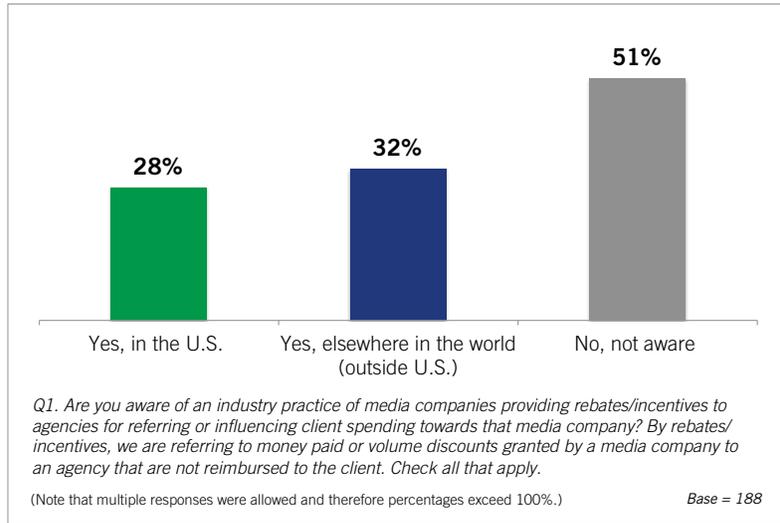
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## Key Findings

### Awareness of Rebates/Incentives

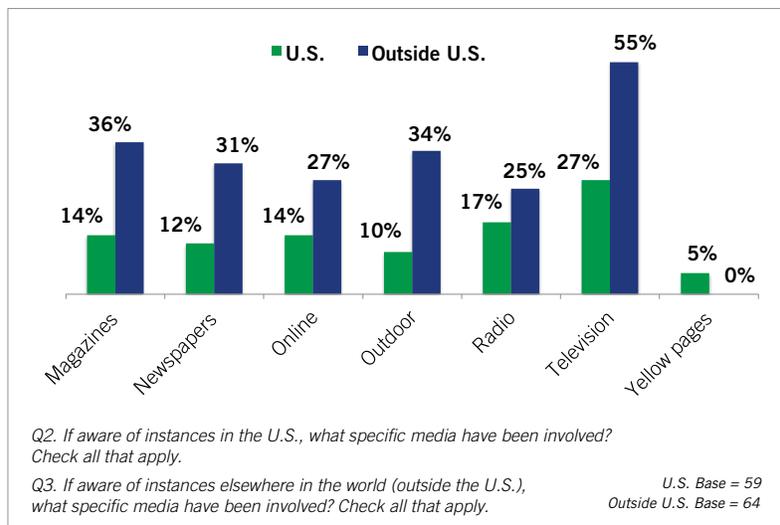
Awareness of the industry practice of media companies providing rebates/incentives to agencies for referring or influencing client spending towards that media company, for the U.S. and then elsewhere in the world, is 28% and 32%, respectively. By rebates/incentives we are referring to money paid or volume discounts granted by a media company to an agency that are not reimbursed to the client.



### Media Where Incentives Are Most Likely

In the U.S., television and radio were identified as the media where such incentives are most likely to take place. But all media identified in the survey — magazines, newspapers, online, outdoor, radio, television, and yellow pages — is believed to have some level of incentive activity.

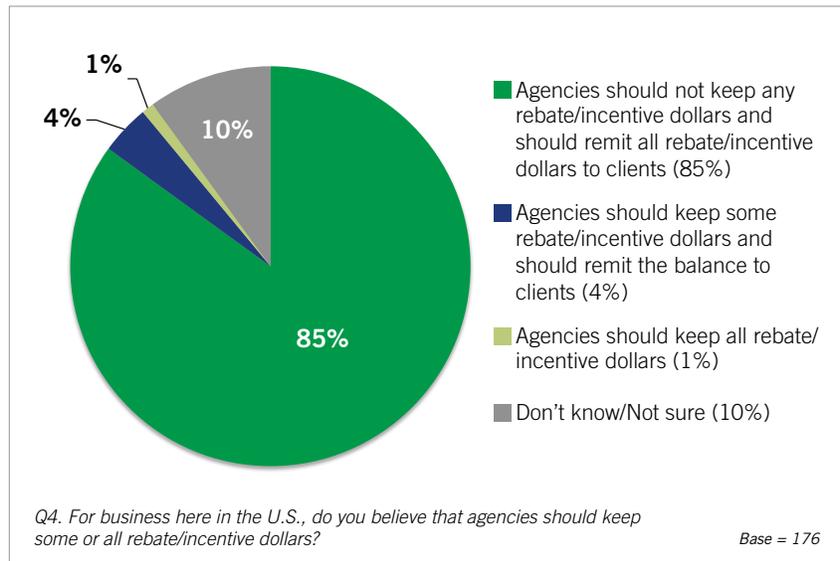
Outside the U.S., the level of incentive activity was higher for almost all media surveyed.



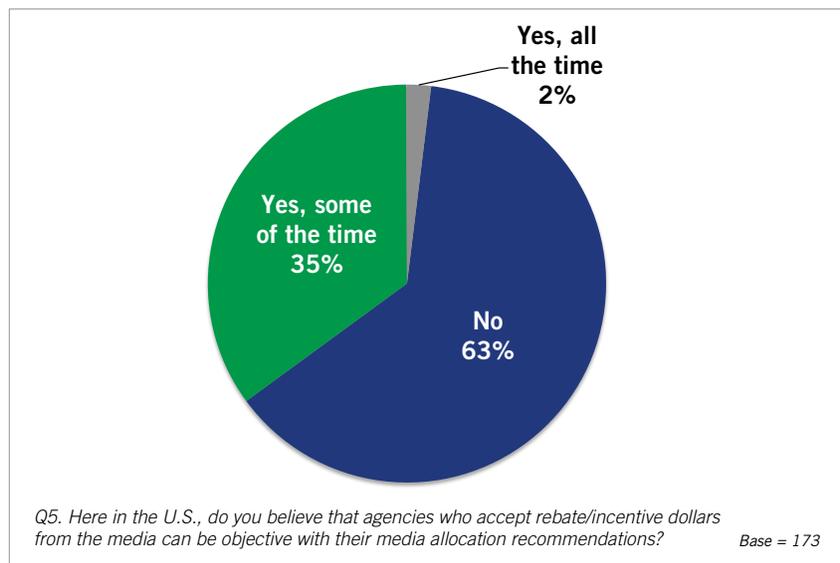
Meanwhile, a good percentage of respondents are aware of the practice but unaware of specific media — 54% for U.S. activity and 33% for activity outside the U.S.

## Marketers Believe Agencies Should Not Keep Rebate/Incentive Dollars, and Doing So Damages Objectivity

For business here in the U.S., respondents overwhelmingly believe that agencies should not keep rebate/incentive dollars.

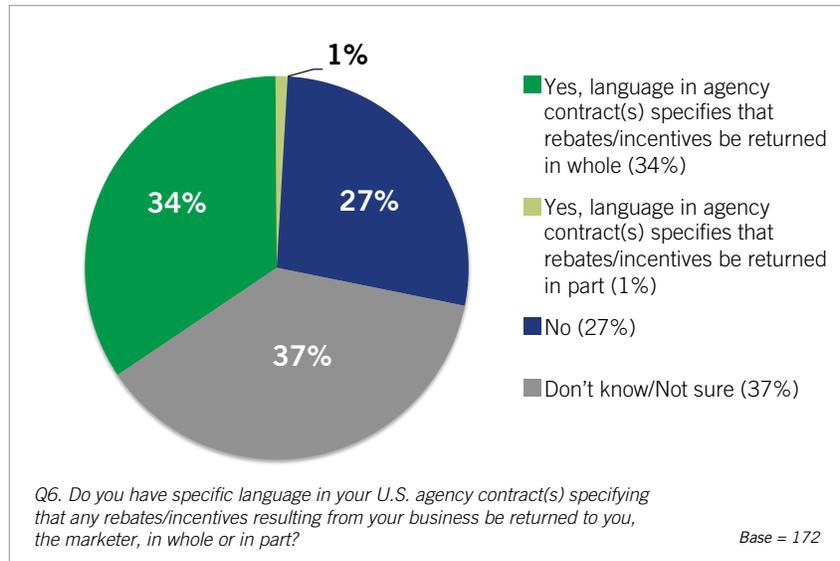


The majority of respondents also believe that agencies who accept rebate/incentive dollars from the media here in the U.S. may not be objective with their media allocation recommendations.



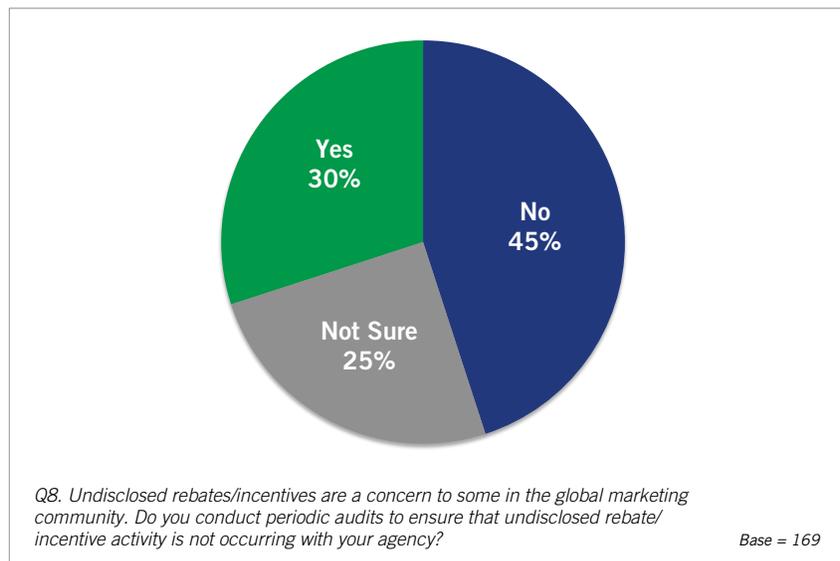
## Contract Language

Thirty-four percent of respondents identified having specific language in their U.S. agency contract(s) stating that any rebates/incentives resulting from their business be returned to them in whole. One percent have language specifying that rebates/incentives be returned in part. Almost 40% don't know or are not sure if their agency contracts have such language.

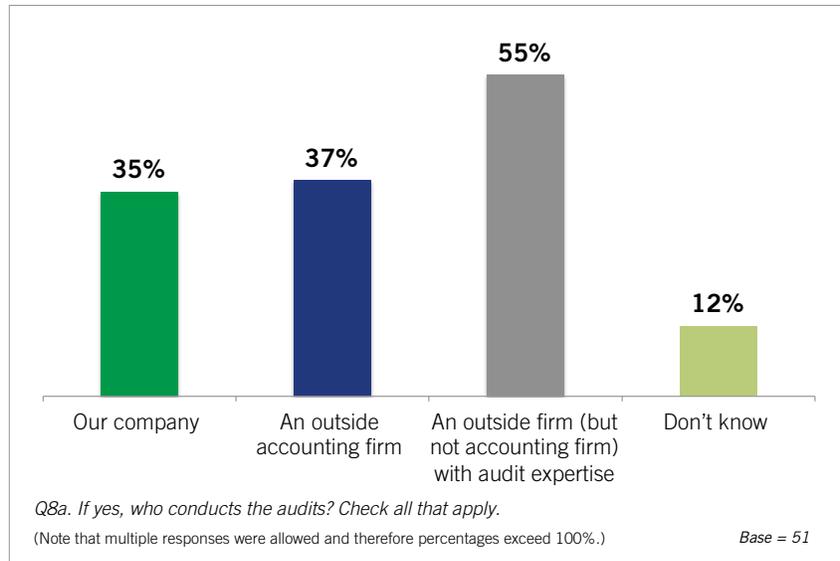


## Auditing

Thirty percent of respondents report that they conduct periodic audits to ensure that undisclosed rebate/incentive activity is not occurring with their agency.

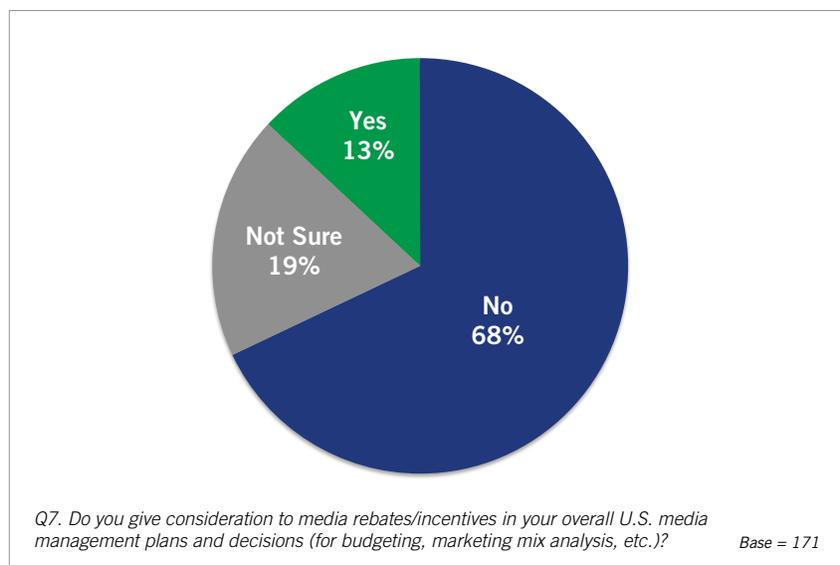


Among those respondents that conduct audits, a number of resources are used.



### Consideration of Media Rebates/Incentives in Overall U.S. Media Management Plans

For the majority of respondents, media rebates/incentives are not top of mind. Few (13%) give consideration to media rebates/incentives in their overall U.S. media management plans and decisions (for budgeting, marketing mix analysis, etc.).



## WFA Survey

It is interesting to note that the WFA (World Federation of Advertisers) recently released results of their own survey on global media rebates. The WFA, based in Europe, is the only global organization representing the common interests of marketers and is a “sister” association of ANA. Key findings of that research:

- Rebates on media spending are common throughout the world outside the U.S.
- Marketers frequently use rebates to get free media space or cash, or to reduce their compensation payments to media agencies.
- Many marketers believe that rebate amounts are higher than what media agencies are passing on to them.
- Rebates are most often provided for online, followed by TV, print, and outdoor.
- Asia-Pacific is the region where there is a significant lack of transparency in how the rebate process is conducted, and a greater likelihood that agencies do not properly credit their clients with the savings. China was identified as the country with the highest level of rebate activity in the region.
- In Europe, respondents identified Greece and Turkey as the markets with the highest level of rebates.
- In Latin America, Brazil has the highest rebate activity.

According to the WFA, rebates themselves aren’t the problem, and it’s a commonly accepted way of doing business in many parts of the world. The problem arises when agencies receive rebates but don’t properly credit clients, and instead keep the rebates themselves.

Further, the WFA Media Charter states: “Advertisers expect to benefit entirely from all the volume/frequency discounts earned by themselves directly and from any share of such discounts earned by their agencies according to the individual merit of their business.”

## Implications

Marketers need to be aware of this issue of media incentives/rebates and know that the practice isn’t limited to faraway places like China and Brazil — it is happening here in the U.S.

Barring any up-front agreement to the contrary, best practices suggest that (1) the entire benefit of media incentives/rebates belongs to the marketer, and agencies need to be completely transparent regarding any incentives/rebates received; (2) marketers should have clear language in their agency contracts specifying how whatever form of rebate made on their business will be handled or allocated; and (3) marketers should consider periodic audits to ensure that unauthorized incentives/rebate activity is not occurring.

Contractual language should also be at both the agency and holding company levels to address “global” advertising arrangements and ensure the fair share allocation of total agency incentives/rebates, and outline the process to reallocate those dollars to a specific client.

## Auditing is Advised

Marketers are also advised to consider periodic audits to test that unauthorized incentive/rebate activity is not occurring. A third-party auditor will employ procedures to confirm whether rebates, if indeed paid, have been properly passed back to the marketer. An auditor qualified to audit the agency’s general ledger and media accounts could employ specific auditing procedures in order to identify any media rebates. This audit may well go beyond ensuring that the billing from agency to client matches the billing from the media company to the agency. Simply matching the client billing to the vendor invoice might not uncover media rebates, as often rebates are passed back on separate credit invoices to the agency, and may not be identified to a specific client. This type of audit is typically referred to as a “media financial” audit, rather than a “media buying performance” audit. An objective of the latter is to improve media performance going forward.

## Suggested Contract Language

An example of suggested contract language provided by Reed Smith follows. Any language actually adopted by a marketer should be reviewed by its own legal counsel.

**Discounts:** All media costs worldwide, whether received by Agency or on Agency's behalf by any Agency affiliate, subsidiary or parent (collectively, the "Agency"), will be billed and paid (to the extent that Agency has received payment from Advertiser) in such a manner as to assure that Advertiser will achieve available discounts (volume or otherwise), rebates, promotional consideration or similar credits applicable to purchases made by Agency on behalf of Advertiser and actually received by Agency (the "Discounts"). Where Agency receives any such Discounts based upon the total media purchased by Agency for all or a combination of Agency's clients including Advertiser, Advertiser shall be entitled to its pro-rata share of such Discounts based upon the share of applicable media purchased by Advertiser net of any incremental administration charges agreed to in a SOW. Agency will give Advertiser the benefit of any Discounts, whether based upon volume, timing of payment, or otherwise, actually received by Agency from Media Vendors, in each case, to the extent that Agency has received funds from Advertiser that have qualified to receive such Discounts. In the event that any Media Vendor offers a prompt payment Discount, Agency shall advise Advertiser of the available discount in writing and if Advertiser elects to take advantage of such prompt payment Discount, Agency shall submit an invoice to Advertiser in sufficient time to allow payment in time to obtain such prompt payment Discount, unless failure to do so is caused by reasons beyond Agency's control. Upon payment by Advertiser to Agency, Agency shall promptly pay the amount due to the Media Vendor in accordance with such party's payment procedures, and shall not use the funds for any other purpose. If Agency fails to meet applicable deadlines (other than as a result of a force majeure event) despite timely payment by Advertiser, Agency shall afford Advertiser the amount of the Discount that would have accrued had Agency paid on a timely basis. Agency shall provide Advertiser with a list of all Discounts obtained.

**Record Retention:** Agency shall maintain at no additional cost to Advertiser, in reasonably accessible locations, all records pertaining to services rendered by Agency to Advertiser pursuant to this Agreement including, but not limited to, media efficiency, fees paid and expenses incurred in connection with the Media Services provided to Advertiser under this Agreement. Without limiting the foregoing and in the absence of any contrary indication from Advertiser, retention period shall be four (4) years from the creation of such records or such longer period as required by applicable law. Such records referenced above may be inspected, audited and copied by Advertiser, its representatives at Advertiser's expense either (a) at the locations at which they are located, or (b) at one central location, in each case upon the delivery of advance notice of at least sixty (60) days during normal business hours, but not more than once per calendar year.

## About the ANA

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Founded in 1910, the ANA (Association of National Advertisers) leads the marketing community by providing its members with insights, collaboration, and advocacy. ANA's membership includes 450 companies with 10,000 brands that collectively spend over \$250 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote, and protect all advertisers and marketers. For more information, visit [www.ana.net](http://www.ana.net).

## About Reed Smith

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Reed Smith is a global law firm with nearly 1,700 lawyers in 23 offices throughout the United States, Europe, Asia and the Middle East, and has represented the advertising, marketing, promotion, and entertainment industries for more than 50 years. The firm's worldwide presence, together with its membership in the Global Advertising Lawyers Alliance, provides access to an extensive network of counsel throughout the world, allowing clients to obtain the advice they need in locales where they need it. Practice areas include truth-in-advertising, e-commerce, intellectual property, celebrity endorsements, collective bargaining agreements with performing unions, film and television production, distribution and financing, sweepstakes, contests, promotions, event management, sponsorships, ambush marketing, product placement and integration, licensing, labeling, packaging, defamation, invasion of privacy, viral marketing, contracts, mergers and acquisitions and joint ventures. For more information, visit [www.reedsmith.com](http://www.reedsmith.com).

## Appendix I

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### Representative Verbatim Comments from ANA/Reed Smith Survey

- “This is a dark and murky area of our business that needs greater transparency and protective language in all contracts.”
- “Media transparency is a huge issue.”
- “The rebate practices and the new business of agency trading desks are eroding the client-agent relationship. I expect to see some agencies begin to compete, and win business based on transparency and trust.”
- “Media placement costs are pass-through expenses. Via our master service agreements, we do not allow up charges of any type.”
- “If this practice of rebates paid to agencies by media companies is going on, it is wrong in two ways: (1) it's the client's money and (2) it is influencing the decision on what is best for your business.”
- “I am appalled by this practice. We ‘partner’ and trust in our media agencies to deliver the absolute best plans, and need them to have our best interest in mind. If I find that our media agency is taking incentives or rebates, they will no longer be buying media for us.”
- “In this age of transparency and accountability it is hard to see how any agency could justify this behavior.”
- “Our contracts include language requiring agencies to return any incentive/rebates they've achieved as a result of our business.”
- “To utilize my spend to get a rebate or incentive that will go towards the agency's bottom line seems to take away the unbiased selection of a media company and perhaps the agency not resulting in the best interest of my company.”
- “Our contracts include language requiring agencies to return any incentive/rebates they've achieved as a result of our business. So, if the amount of business we are doing with the agency contributes to 30% of the total necessary to qualify them for a rebate/incentive, we expect the 30% rebate/incentive the agency receives to be given back to our company.”
- “Managing this effectively means asking the questions. You must stay on top of this and not abdicate responsibility for your advertising plan.”

## Appendix II

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### Survey Cover Note

Subject: Urgent ANA Survey: Rebates/Incentives Paid by Media Companies to Agencies

Dear Member,

You are getting this email because you are an ANA member with media or financial management expertise or an ANA member rep. We would appreciate your perspective on a very important issue: rebates/incentives paid by media companies to agencies.

ANA, in partnership with our outside legal counsel Reed Smith, is conducting research on the topic of rebates/incentives paid by media companies to agencies for referring or influencing client spending towards that media company. By rebates/incentives, we are referring to money paid or volume discounts granted by a media company to an agency that are not reimbursed to the client.

To be clear, we are not referring to media lunches, tickets given by media companies to agencies for sporting events or concerts, or even trips given by media companies to agencies. Rather, we are referring to monetary payments or volume discounts from a media company to an agency that are not reimbursed to the client.

The link below will take you to a brief survey (about 12 questions):

All responses will be kept confidential and we will only share the aggregate results. The more input, the richer the data. Whether you are aware of the practice of media rebates/incentives or not, your response would be greatly appreciated. The survey should literally only take two to three minutes.

Thank you for your participation!

### Complete Survey

**Q1.** Are you aware of an industry practice of media companies providing rebates/incentives to agencies for referring or influencing client spending towards that media company? By rebates/incentives, we are referring to money paid or volume discounts granted by a media company to an agency that are not reimbursed to the client. Check all that apply.

- Yes, in the U.S,
- Yes, elsewhere in the world (outside U.S.)
- No, not aware

**Q2.** If aware of instances in the U.S., what specific media have been involved? Check all that apply.

- |                                     |  |
|-------------------------------------|--|
| <input type="checkbox"/> Magazines  | <input type="checkbox"/> Television  |
| <input type="checkbox"/> Newspapers | <input type="checkbox"/> Yellow Pages  |
| <input type="checkbox"/> Online     | <input type="checkbox"/> Other _____   |
| <input type="checkbox"/> Outdoor    | <input type="checkbox"/> I am aware of the practice but unaware of the specific media. |
| <input type="checkbox"/> Radio      |  |

Q3. If aware of instances elsewhere in the world (outside the U.S.), what specific media have been involved? Check all that apply.

- |                                     |  |
|-------------------------------------|--|
| <input type="checkbox"/> Magazines  | <input type="checkbox"/> Television  |
| <input type="checkbox"/> Newspapers | <input type="checkbox"/> Yellow Pages  |
| <input type="checkbox"/> Online     | <input type="checkbox"/> Other _____   |
| <input type="checkbox"/> Outdoor    | <input type="checkbox"/> I am aware of the practice but unaware of the specific media. |
| <input type="checkbox"/> Radio      |  |

Q4. For business here in the U.S., do you believe that agencies should keep some or all rebate/incentive dollars?

- Yes, agencies should keep all rebate/incentive dollars.
- Yes, agencies should keep some rebate/incentive dollars and remit the balance to clients.
- No, agencies should not keep any rebate/incentive dollars and remit all rebate/incentive dollars to clients.
- Don't know/Not sure

Q4a. Why do you believe that here in the U.S., agencies should keep **all** rebate/incentive dollars?

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Q4b. Why do you believe that here in the U.S., agencies should keep **some** rebate/incentive dollars?

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Q5. Here in the U.S., do you believe that agencies who accept rebate/incentive dollars from the media can be objective with their media allocation recommendations?

- Yes, all the time
- Yes, some of the time
- No

Q6. Do you have specific language in your U.S. agency contract(s) specifying that any rebates/incentives resulting from your business be returned to you, the marketer, in whole or in part?

- Yes, language in agency contract(s) specifies that rebates/incentives be returned in whole.
- Yes, language in agency contract(s) specifies that rebates/incentives be returned in part.
- No
- Don't know/Not sure

Q7. Do you give consideration to media rebates/incentives in your overall U.S. media management plans and decisions (for budgeting, marketing mix analysis, etc.)?

- Yes
- No
- Don't know/Not sure

Q8. Undisclosed rebates/incentives are a concern to some in the global marketing community. Do you conduct periodic audits to ensure that undisclosed rebate/incentive activity is not occurring with your agency?

- Yes
- No
- Don't know/Not sure

Q8a. If yes, who conducts the audits? Check all that apply.

- Our company
- An outside accounting firm
- An outside firm (but not accounting firm) with audit expertise
- Don't know

Q9. Do you have any other comments on this matter? (open-ended)

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Q10. Would it be OK for ANA to contact you to speak one-on-one on this matter? Of course, your confidentiality would be completely respected.

- Yes (and then write in your name) \_\_\_\_\_
- No, thanks

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July 2012