



THOUGHT LEADERSHIP
Sharing Marketing Excellence

State Commercial Production Incentives

Principles for Fair Business Practices

Background

Many states offer financial incentives to shoot commercials in their states. Although such incentives originated more than ten years ago, recently they have expanded to additional states and have become increasingly attractive to production companies and marketers.

In 2012 ANA published guidance to members on this issue via the white paper “The Found Money of State Commercial Production Incentives” (www.ana.net/productionincentives). At that time, ANA and AICP (Association of Independent Commercial Producers) were at odds regarding who should benefit from the incentive money, with AICP stating it should be the production company and ANA asserting it belongs exclusively to the marketer.

Since that time, ANA and AICP have engaged in productive discussions on state commercial production incentives. While there is not consensus on all issues, ANA believes that these discussions have stimulated meaningful dialogue between marketers, their agencies, and production companies and that has helped to advance the awareness, knowledge and use of state commercial production incentives.

ANA still firmly believes that the advertiser is the owner of state commercial production incentive dollars. The advertiser is the financier and the copyright owner of the production and therefore should have 100 percent authority over the disposition of any funds collected.

In order to help marketers navigate the complexities of state commercial production incentives, the ANA Production Management Committee has developed the following Principles for Fair Business Practices.

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Principles for Fair Business Practices

1. Transparency is critical.

- If the marketer is interested in considering a state commercial production incentive job, that should be disclosed to the agency and production company prior to a request for bids.
- If an agency recommends consideration of a production incentive job, rationale should be fully explained to the marketer and disclosure given to the production company, also prior to the request for bids. In these cases, bids may be requested from both incentive and non-incentive states to make a quality/cost-benefit analysis.
- If the production company recommends shooting in a state which offers incentives, there should be full disclosure to the marketer before the job is awarded — that includes cases where neither marketer nor agency had suggested consideration of a production incentive state.
- Neither agencies nor production companies should apply for state commercial production incentives unless the marketer has given approval in advance in writing, ideally in the contract between the agency (as agent for the marketer) and production company.

With transparency comes trust and that is critical in the relationship between the marketer and production company.

2. Additional lead time is sometimes required for jobs where production incentives will be pursued, given the need to meet the criteria to qualify for the incentives. This is especially true for applicants who are utilizing state commercial production incentives for the first time. In almost all states, filing must occur before shooting starts and any money is spent.

3. A state commercial production incentive job must be filed via a single application, complete with all possible qualifying components included. This should be clearly planned and discussed as soon as possible before and during the bidding stages to ensure full cooperation and agreement to terms with the production company. Note that there may be cases where qualifying expenditures for the same production are made directly by both the production company (e.g., production and sometimes post-production expenses) and the advertiser (e.g., agency compensation, talent session fees, talent travel, residual fees for up to two years, celebrity talent and travel, marketing and agency travel, music production and licensing, animation, production consultant fees, post-production and effects). If two applications are filed, both may be voided per individual state regulation.

4. Depending on the type of expenditure, qualification for the incentive, and the state in which the commercial was filmed, an advertiser, production company, agency or third-party entity can file/administer the process and application. This should be decided and agreed to on a case-by-case basis. There are some states that specifically require that a production company is the only entity allowed to file. Also, in instances where production costs qualify and are the only applicable expenses, it may make sense for the production company to file and administer the application. In states where costs that qualify are outside the control of the production company and are deemed to be confidential or proprietary to the marketer (such as agency compensation, agency travel, talent session and residual fees, celebrity talent, music and post-production), the marketer may want to handle the filing or use a third-party administrator. In certain cases, per state law, only the production company can file the application. That is currently the case in Florida.

5. In cases where the marketer is handling the filing and engages a third party to facilitate that, the marketer assumes responsibility for the actions and conduct of the third party and, as such, should provide the production company with an indemnification/confidentiality agreement (also referred to as a nondisclosure agreement/NDA). This agreement should: (1) warrant that the third party is in fact a third party with no other interest, involvement, or activity in the production unless agreed to in advance; (2) clearly limit the usage of all information disclosed in the filing of the application; (3) hold the production company harmless from any damages caused by third-party misuse or mishandling of information; (4) warrant that all information contained in the filing is truthful and accurately represents all parties' roles in the production and complies with state laws and regulations; and (5) warrant that the third party is bound by confidentiality and shall not discuss line item details with either the marketer, agency or production company. The decision to use an outside expert to manage the state production incentive process should be at the sole discretion of the marketer. In addition, the marketer should be clearly aware of its compensation arrangements with the third party.

6. When the marketer is filing, the production company should be incentivized to follow state guidelines and maximize the qualified spend and rebate. That specific compensation, taking into consideration the type of rebate and qualification for the rebate, is negotiable between the marketer and production company. Alternatively, a bookkeeping fee may also be added to the bid to cover the production company's administration costs related to preparing all applicable and necessary documentation and should be detailed as an additional cost above and beyond the contract price.
7. Contracts should address state commercial production incentives. In the production contract between the agency and production company, any terms of the incentive, including production company compensation, should be clearly defined. Contracts between marketers and their agencies should state that the marketer is the owner of state commercial production incentive dollars.
8. Many marketers have written production guidelines that outline expectations and processes for production. Marketers who participate in state commercial production incentives should factor these into their production guidelines, bidding specifications and agency production contracts.
9. Consider cost-plus, rather than firm bid production contracts, for state commercial production incentive jobs. Tax incentive filing requires full disclosure of all out-of-pocket costs by the production company. A cost-plus approach also requires full disclosure, so it may be the most beneficial route to achieving a production incentive partnership between all parties. Although this is not right for every job, it may be a good option to consider.
10. This is a long-term process. Have patience. In many cases it can take between 18 and 24 months to receive rebate checks. As a result, marketers may benefit from centralizing the responsibility for state commercial production incentives. Such centralization could consist of an internal point person and/or an external partner, perhaps a production consultant or other third party. It is more difficult to use a production company as a centralized resource given: (1) the long-term nature of the process; (2) the fact that most marketers work with multiple (and sometimes many) production companies; and (3) the ability to aggregate multiple projects to qualify for an incentive.
11. If a marketer is not interested in assuming responsibility for filing as well as long-term oversight of the incentive process, consideration should be given to a mutually beneficial compensation arrangement with the production company. For example, the marketer could ask for an immediate upfront discount to the production in exchange for the production company assuming all future benefit of the incentive (and handling the filing).
12. Every project is different. Fairness, good judgment and transparency are key practices that should be followed by all parties when considering state commercial production incentive jobs.



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