



DEPARTMENT OF JUSTICE

Antitrust Division

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Jonathan R. Yarowsky, Esq.
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2550 M Street, N.W.
Washington, D.C. 20037-1350

Dear Mr. Yarowsky:

This letter responds to your request, on behalf of your client, Media Rating Council (“MRC”), for a business review letter from the Department of Justice (“the Department”) pursuant to our Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department’s current antitrust enforcement intentions with respect to MRC’s proposed change to its procedures for auditing and accrediting replacements for certain audience measurement products (“AMPs”). AMPs, which are designed and sold by rating services, measure the size and demographics of an audience for a particular medium. Those AMPs that are widely used and form the basis for setting the financial value of advertising are referred to as Currency AMPs. The proposed change in procedures would encourage but not require rating services to disclose certain data, submit to an independent audit, and obtain accreditation prior to commercialization of a replacement product for a MRC-accredited Currency AMP.

MRC’s Organizational Structure and Mission. Based on your representations and the information you have provided to us, we understand that MRC is a non-profit industry association with a diverse membership consisting of buyers and sellers of advertising, including television and radio broadcasters, cable-casters, print organizations, Internet organizations, advertising agencies, and industry trade associations. Membership in MRC is not available to ratings services. As users of AMPs, MRC’s members have a common interest in the accuracy and reliability of such products.

MRC’s Current Audit and Accreditation Procedures. MRC has evaluated and accredited various AMPs since 1964. It is the only organization that provides this service to the marketplace. MRC’s mission is to maintain industry confidence in audience and media research by ensuring that AMPs are valid, reliable and effective. To carry out its mission, MRC establishes minimum standards for the evaluation and accreditation of AMPs.

It is our understanding that the accreditation process is divided into two stages: an audit phase and the accreditation decision. The purpose of the audit stage, which consumes the

majority of the expense associated with the accreditation process,¹ is to assess the methodology utilized by an AMP to measure an audience's size, demographics, and other characteristics. During the audit stage, the rating service applies for accreditation, discloses its product's methodology as well as the data supporting the methodology ("impact data"), consults with an independent auditor to set the scope of the audit,² and submits to an independent audit by a certified public accounting firm. The independent auditor prepares a report that is given to the MRC Audit Committee³ which reviews it and makes a recommendation on accreditation to the MRC Board of Directors.⁴

During the second stage, MRC makes its accreditation decisions via a vote by the MRC Board of Directors on the Audit Committee's recommendation. You have represented that each of MRC's 101 members has a seat on the Board of Directors and that the maximum number of votes any one commonly-owned block of member companies can have is five.⁵ You have further indicated that a majority vote of the members is required for accreditation.

Importance of Accreditation to Commercial Success of a Replacement Currency AMP. You have represented that MRC accreditation is not critical to the success of an AMP and that only five rating services provide MRC-accredited Currency AMPs today. MRC's members can and do use AMPs that are unaccredited. There are Currency AMPs that are not MRC accredited as well as other measurement products for each medium that are widely utilized despite their lack of accreditation. Accreditation may be even less critical to commercial success where a rating service chooses to replace its Currency AMP because of the wide use of its existing product.

MRC's Proposed Rule Change and Representations Regarding the Change. You propose to add the following language to MRC's Voluntary Code of Conduct ("VCOC"):

¹You have represented that, although the costs and times can vary depending on the complexity of the methodology under review, the average audit costs between \$100,000 and \$200,000 and usually takes three to six months to complete. An audit of a simplistic AMP can cost as little as \$35,000 and take only a few months, whereas an audit of a product with a more sophisticated methodology, involving complex data gathering processes, can cost over \$1 million and take well over six months.

²The scope of the audit depends not only on the methodological approach of the rating service, but also on MRC's Minimum Standards. See MRC's November 2, 2006 submission. These minimum standards vary depending on the audience attribute, e.g., audience size, demographics, and on the medium in which the attributes are being measured, e.g., television, newspapers, or a website.

³The Audit Committee consists of MRC members who have an interest in the relevant industry sector, such as television, radio, print, the Internet or out-of-home. There is no limit to the number of MRC members who can participate on the Committee.

⁴If the Audit Committee recommends against accreditation and requests continued review of the AMP, then the auditor, MRC staff, and the rating service work together to address the AMP's compliance with MRC standards. This process can take considerable time, depending on the number of issues in the audit report. Once these issues are resolved, the Audit Committee then reviews the revised audit report, prepares its recommendation on accreditation and submits the recommendation for a vote by the MRC Board of Directors. If a measurement product is denied accreditation, it is always free to seek accreditation again at a later date. See MRC's September 7, 2007 submission.

⁵See MRC Member Voting Controls, provided in MRC's May 24, 2007 submission.

The MRC prefers that a Participating Measurement Service seeking to replace an accredited currency measurement product with a new currency measurement product (both products provided by the same Participating Measurement Service) uses best efforts to obtain accreditation of the new product prior to its commercialization. At a minimum, disclosure of impact data as required by MRC Minimum Standards, completion of an MRC audit and MRC committee review prior to commercialization of a replacement currency product is required by the Code.⁶

You have represented that, with the exception of this provision, MRC's draft VCOC memorializes MRC's practices and procedures used since 1964 for auditing and accrediting AMPs. It is our understanding that MRC will vote to ratify the VCOC, including the provision that is the subject of this letter, upon completion of the Department's business review process. In keeping with the Department's business review procedures, this letter does not apply to any of MRC's ongoing practices.

On its face, and as confirmed by you, the above-quoted language would apply only to rating services that propose a new AMP to replace their own existing Currency AMP. Further, although the language of the new provision presented above might appear to mandate completion of the audit prior to the commercialization of a replacement for a Currency AMP, you represent that participation in MRC's audit and accreditation process, including compliance with the proposed language, is entirely voluntary and may be undertaken by a rating service at any time, including after a replacement of a Currency AMP has been commercialized. You further represent that: (a) if such accreditation is not sought prior to commercialization there would be no repercussions on the already accredited product or on the proposed replacement AMP if accreditation is sought at some later time; (b) a rating service that does not seek accreditation prior to commercialization but does so at some later point need not withdraw the product from the market at any point prior to or during the audit and accreditation process; and (c) the proposed change would encourage but not require a rating service to keep its already accredited Currency AMP on the market until the new Currency AMP has been accredited by the MRC.

Evaluation of the Effect of the Rule Change on Replacements for Currency AMPs. In general, MRC's audit and accreditation process appears to provide rating services and their users, including MRC members, with a useful mechanism for increasing confidence in AMPs. Completion of an audit means that an independent third party has reviewed the methodology of an AMP to ensure that it is valid, accurate and effective. By accrediting those AMPs whose methodology appears to be valid, MRC is providing valuable, unbiased information to the marketplace. Such transparency increases user confidence in the accuracy and reliability of AMPs, thereby enhancing their value as audience measurement tools.

MRC appears to have legitimate reasons for encouraging rating services that propose new AMPs to replace ones that are widely relied upon in calculating the price of advertising to undergo an audit prior to commercializing such products. MRC's members understandably wish to reduce the confusion and uncertainty among users (buyers and sellers of advertising) that a rating service's unilateral decision to replace a Currency AMP with an unknown and untested one might cause. Reducing this uncertainty may smooth the transition from one Currency AMP to its replacement.

⁶VCOC § 2.2.A.3.

Although these concerns appear legitimate, the Department has not considered whether they would justify the adoption of a mandatory requirement that proposed replacements of Currency AMPs be audited pre-commercialization as a pre-condition for their use by MRC members, or that such AMPs could never qualify for MRC accreditation unless audited prior to commercialization. Here, as discussed above, MRC's members will remain free to use unaccredited Currency AMP products, and MRC accreditation does not appear to be critical to the success of a rating service's replacement for its Currency AMP. In addition, to the extent a rating service wished to seek MRC accreditation after commercializing a replacement of a Currency AMP, you have represented that it would not suffer prejudice by virtue of having commercialized its product prior to securing accreditation.

In light of these circumstances, MRC's proposal to encourage completion of an audit prior to commercialization seems unlikely to discourage competition among rating services to introduce new or innovative AMPs. The proposed rule would not apply at all to rating services seeking to introduce entirely new AMPs. And to the extent a rating service offering an existing Currency AMP wished to introduce an innovative replacement, it would have the option of doing so with or without having received prior MRC accreditation. Such a rating service might well conclude that shifting the timing of the audit to occur prior to commercialization would have commercial advantages. Even if it viewed the burdens of a pre-commercialization audit (in terms of delayed revenues and/or actual cost of the audit) as too great, a rating service would not be deterred from making product improvements simply to avoid an audit, given the options of seeking accreditation following commercialization or not seeking accreditation at all.

The Department's Current Antitrust Enforcement Intention. For the foregoing reasons, the Department does not believe that MRC's proposed provision regarding a precommercialization audit of replacements for Currency AMPs warrants antitrust concern. Therefore, the Department has no present intention to take antitrust enforcement action against the conduct that you have described. This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and representations that you have presented to us. In accordance with its normal practice, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within thirty days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Yours sincerely,

A handwritten signature in black ink that reads "Thomas O. Barnett". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas O. Barnett