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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 15-58-A
AGENDA ITEM
For meeting of October 29, 2015
SUBMITTED LATE

October 28, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: AO 2015-10 (21st Century Fox) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on October 29, 2015.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-10

2

3 Ki P. Hong, Esq.

DRAFT A

4 Charles M. Ricciardelli, Esq.

5 Skadden, Arps, Slate, Meagher & Flom

6 1440 New York Ave. N.W.

7 Washington, DC 20005-2111

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9 Dear Messrs. Hong and Ricciardelli:

10 We are responding to your advisory opinion request on behalf of 21st Century Fox
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the
12 “Act”), and Commission regulations to communications televised on certain cable and satellite
13 networks. You ask how to calculate the number of persons who can receive a communication
14 for purposes of determining whether it is an electioneering communication in a presidential
15 primary election. Specifically, you ask whether the calculation must include all of a cable or
16 satellite provider’s customers in the relevant states, or only the customers in those states who
17 subscribe to a cable or satellite package that allows them to view the communication. The
18 Commission concludes that customers who cannot receive a communication because they do not
19 subscribe to a cable or satellite package that carries the network on which the communication is
20 distributed may be excluded from the calculation of the number of persons who can receive the
21 communication.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 September 11, 2015.

25 21st Century Fox owns and operates a number of regional sports networks (“RSNs”) in
26 the United States. The RSNs televise sporting events to viewers within certain states and regions
27 via cable and satellite providers. Cable and satellite customers outside of a given RSN’s region

1 can subscribe to that RSN by purchasing a supplemental package through their cable or satellite
2 provider. A supplemental package provides access to RSNs from all over the country, allowing
3 a subscriber to view certain sporting events televised on any RSN, not just on a single RSN
4 chosen by the subscriber. Individuals cannot view an RSN from outside of their own region
5 without purchasing a supplemental package. The requestor intends to sell advertising time
6 during RSN productions for campaign-related communications, some of which would refer to
7 clearly identified presidential candidates.

8 ***Question Presented***

9 *In calculating how many persons can receive a communication referring to a presidential*
10 *candidate for purposes of determining whether it is an electioneering communication, are the*
11 *only persons outside of an RSN's local market that must be counted those that have access to the*
12 *network on which the communication is televised?*

13 ***Legal Analysis and Conclusion***

14 Yes, in calculating how many persons can receive a communication referring to a
15 presidential candidate for the purposes of determining whether it is an electioneering
16 communication, the only persons outside an RSN's local market that must be counted are those
17 that have access to the network on which the communication is televised.

18 The Act and Commission regulations define an "electioneering communication" as any
19 broadcast, cable, or satellite communication that refers to a clearly identified federal candidate
20 and is "publicly distributed." 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29(a). With
21 respect to candidates for President in a primary election, a communication is "publicly
22 distributed" if it is "aired, broadcast, cablecast or otherwise disseminated for a fee through the
23 facilities of a television station, radio station, cable television system, or satellite system" and

1 can be received by 50,000 or more persons in a state where a primary election is being held
2 within 30 days. 11 C.F.R. § 100.29(b)(3).

3 The regulation provides that “cable or satellite viewership is determined by multiplying
4 the number of subscribers within a . . . State, or a part thereof, as appropriate, by the current
5 national average household size, as determined by the Bureau of the Census.” *Id.*
6 § 100.29(b)(7)(ii). However, the regulation also accounts for the possibility that some cable or
7 satellite customers might not actually be able to view a given communication because not all
8 cable and satellite systems carry all networks. Specifically, a determination under section
9 100.29(b)(7)(ii) that a communication can be received by 50,000 or more persons “create[s] a
10 rebuttable presumption that may be overcome by demonstrating that . . . one or more cable or
11 satellite systems did not carry the network on which the communication was publicly distributed
12 at the time the communication was publicly distributed” and that “applying the formula to the
13 remaining cable and satellite systems results in a determination that the cable network or systems
14 upon which the communication was publicly distributed could not be received by 50,000 persons
15 or more.” *Id.* § 100.29(b)(7)(iii). In other words, if a cable or satellite system does not carry the
16 particular network on which the communication is distributed, the customers of that cable or
17 satellite system are not actually capable of receiving the communication and therefore need not
18 be counted for purposes of determining whether the communication is an electioneering
19 communication.

20 For the same reasons, the Commission concludes that the rebuttable presumption
21 established by section 100.29(b)(7)(ii) can be overcome by a showing that fewer than 50,000
22 persons in presidential primary states can receive a communication because it is carried on a
23 network that fewer than 50,000 people in those states receive. When a cable or satellite system

1 distributes a communication on a particular RSN, customers outside that RSN's local market
2 who do not subscribe to a supplemental package cannot view that RSN, and so they cannot
3 actually receive the communication. Because the definition of an electioneering communication
4 turns on whether the communication "can be received" by the requisite number of people, any
5 cable or satellite subscribers whom the provider can affirmatively demonstrate are unable to
6 receive the communication need not be counted for purposes of determining whether the 50,000-
7 person threshold is met. In such a case, the rebuttable presumption created by the application of
8 section 100.29(b)(7)(ii) can be overcome in a manner analogous to that prescribed in section
9 100.29(b)(7)(iii): by demonstrating (1) that some cable or satellite customers in the relevant
10 states do not subscribe to the supplemental package and thus cannot view the RSN on which the
11 communication was distributed; and (2) that applying the formula to the remaining customers in
12 those states results in a determination that the RSN on which the communication was publicly
13 distributed could not be received by 50,000 persons or more in states within 30 days of a
14 presidential primary election. If these criteria are met, the communication is not "publicly
15 distributed" within the meaning of 11 C.F.R. § 100.29(b)(3)(ii)(A).

16 This response constitutes an advisory opinion concerning the application of the Act and
17 Commission regulations to the specific transaction or activity set forth in your request. *See*
18 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
19 assumptions presented, and such facts or assumptions are material to a conclusion presented in
20 this advisory opinion, then the requestor may not rely on that conclusion as support for its
21 proposed activity. Any person involved in any specific transaction or activity which is
22 indistinguishable in all its material aspects from the transaction or activity with respect to which
23 this advisory opinion is rendered may rely on this advisory opinion. *See id.* § 30108(c)(1)(B).

1 Please note that the analysis or conclusions in this advisory opinion may be affected by
2 subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
4 on the Commission's website.

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On behalf of the Commission,

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Ann M. Ravel

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Chair

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