

**SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP**

1440 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000  
FAX: (202) 393-5760  
www.skadden.com

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DIRECT DIAL  
(202) 371-7017  
EMAIL ADDRESS  
KI.HONG@SKADDEN.COM

September 11, 2015

Daniel A. Petalas  
Acting General Counsel  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

RE: Advisory Opinion Request – 21<sup>st</sup> Century Fox

Dear Mr. Petalas:

On behalf of 21<sup>st</sup> Century Fox ("Fox"), we seek an Advisory Opinion regarding the appropriate method of calculating whether or not certain communications can be received by 50,000 or more persons for purposes of determining if such communications are electioneering communications as defined by the Federal Election Campaign Act of 1971, as amended (the "Act") and Federal Election Commission ("FEC" or the "Commission") regulations.

**BACKGROUND**

Fox owns and operates a number of regional sports networks (each an "RSN") in the United States which televise various scholastic and professional sporting events within certain states and regions. In addition to being transmitted via cable systems within those states and regions, certain of these RSN productions are also available to individuals outside of those areas ("out-of-market") who choose to purchase special sports packages through a cable or satellite service to which they subscribe (a "Supplemental Package"). Supplemental Packages do not simply retransmit one particular RSN chosen by a purchaser, but rather they provide access to multiple RSNs from all over the country, allowing a purchaser to view certain sporting events televised on any out-of-market RSN. Without purchasing a Supplemental Package, individuals are not able to view an out-of-market RSN. For example, a subscriber to the satellite television service DirecTV may choose to purchase, as a Supplemental Package for an additional price, DirecTV's MLB Extra Innings service allowing the individual to watch baseball games that are outside of his or her local market and therefore otherwise unavailable. These Supplemental Packages are available through satellite and cable providers, as well as via the Internet, and are targeted at a small segment of the population, including avid sports fans and fans who have moved out of their home team's market.

A number of advertising agencies have expressed an interest in purchasing time during RSN productions in order to air campaign-related advertisements. Certain of these ads would clearly refer to a presidential candidate and, accordingly, would qualify as an electioneering communication if they could be received by 50,000 or more persons in a state that is within 30 days of holding its primary election. 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. As a result, these agencies have requested that Fox certify that the advertisements will not be able to be received by 50,000 or more persons in any state that is within 30 days of holding its primary election to ensure that their clients are in compliance with the Act and its regulations regarding the reporting of electioneering communications.

### QUESTION PRESENTED

Fox is seeking an Advisory Opinion from the Commission confirming that, with respect to a communication televised on an RSN, the only persons outside of that RSN's local market that must be counted for purposes of the 50,000 person threshold in 11 C.F.R. § 100.29(b)(3)(ii)(A) are those within households that have purchased a Supplemental Package providing access to such RSN, rather than those within all households that subscribe to a cable or satellite television service provider, such as DirecTV, that offers a Supplemental Package for purchase. In other words, we request that the Commission confirm that Fox need not count out-of-market persons in households that subscribe to a cable or satellite television service provider but do not purchase a Supplemental Package.

### DISCUSSION

A broadcast, cable, or satellite communication clearly referencing a candidate for nomination for President or Vice President is considered an electioneering communication if it is publicly distributed (1) within 60 days of the general election, (2) within 30 days before a convention until its conclusion or (3) in a state where a primary election is being held within 30 days. 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. Under FEC regulations, "publicly distributed" is defined to mean, in relevant part, that the communication can be received by 50,000 or more people in a state within 30 days of holding its primary. 11 C.F.R. § 100.29(b)(3)(ii)(A). Persons who make an electioneering communication aggregating in excess of \$10,000 during a calendar year are required to file reports with the Commission disclosing certain information about themselves and the communication. *See* 52 U.S.C. § 30104(f); 11 C.F.R. § 104.20(b).

FEC regulations provide a mechanism for estimating whether 50,000 or more persons in a particular state can receive a communication over a cable television network, such as an RSN, for purposes of the definition of "electioneering communication." The calculation described in the regulations requires multiplying the number of cable and satellite subscribers in the state by the national average household size as determined by the Bureau of Census. 11 C.F.R. § 100.29(b)(7)(ii). If the result of that calculation is 50,000 persons or more, there is a rebuttable presumption that the threshold is met. However, if it is possible to demonstrate that one or more cable or satellite systems do not carry the network in question, those systems may be eliminated from the calculation to show that fewer than 50,000 people can receive the communication. 11 C.F.R. § 100.29(b)(7)(iii). This provision operates to allow a person making a communication to

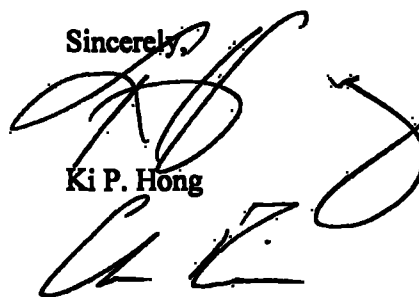
exclude from the threshold calculation those persons who are demonstrably unable to view the communication.

With respect to RSNs, while a satellite or cable system may carry the Supplemental Package as an option available for purchase, if a subscriber does not exercise that option and thus does not purchase the Supplemental Package, his or her household cannot view any RSN that is outside its local market. Accordingly, for purposes of the threshold calculation, any household that chooses not to purchase a Supplemental Package is indistinguishable from a household with a cable or satellite system that does not carry an applicable network, in that such households will not be able to view any content on any out-of-market RSN, including any advertisement. As a result, in calculating the number of persons in a state that is outside of an RSN's local market, there is no need to include cable or satellite subscribers that have not purchased a Supplemental Package. Indeed, persons in such households simply cannot receive the communication and, therefore, under the plain language of 11 C.F.R. § 100.29(b)(3)(ii)(A) should not be counted. Moreover, such households should be excluded from any calculation by operation of 11 C.F.R. § 100.29(b)(7)(iii) as the cable and satellite systems effectively do not "carry" an RSN for any household that does not purchase a Supplemental Package. If such households and persons were included in the calculation, this could create the unintended consequence whereby advertisements communicated via an RSN distributed by a Supplemental Package could be impacted by the electioneering communication rules for the entirety of the primary election season, regardless of whether the RSN's home market is within thirty days of a primary at the time of the communication.

Accordingly, we respectfully urge the Commission to confirm that, with respect to a communication televised on an RSN, the only persons outside of that RSN's local market that must be counted for purposes of the 50,000 person threshold in 11 C.F.R. § 100.29(b)(3)(ii)(A) are those within households that have purchased a Supplemental Package providing access to such RSN.

Please let us know if you have any questions regarding this request.

Sincerely,



Ki P. Hong



Charles M. Ricciardelli

cc: Joanna Waldstreicher