



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 30, 2015

CERTIFIED MAIL
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ADVISORY OPINION 2015-10

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Washington, DC 20005-2111

Dear Messrs. Hong and Ricciardelli:

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

Background

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

21st Century Fox owns and operates a number of regional sports networks (“RSNs”) in the United States. The RSNs televise sporting events to viewers within certain states and regions via cable and satellite providers. Cable and satellite customers outside of a given RSN’s region can subscribe to that RSN by purchasing a supplemental package through their cable or satellite provider. A supplemental package provides access to RSNs from all over the country, allowing a subscriber to view certain sporting events televised on any RSN, not just on a single RSN chosen by the subscriber. Individuals cannot view an RSN from outside of their own region

without purchasing a supplemental package. The requestor intends to sell advertising time during RSN productions for campaign-related communications, some of which would refer to clearly identified presidential candidates.

Question Presented

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

Legal Analysis and Conclusion

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

The Act and Commission regulations define an "electioneering communication" as any broadcast, cable, or satellite communication that refers to a clearly identified federal candidate and is "publicly distributed." 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29(a). With respect to candidates for President in a primary election, a communication is "publicly distributed" if it is "aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system" and can be received by 50,000 or more persons in a state where a primary election is being held within 30 days. 11 C.F.R. § 100.29(b)(3).

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

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

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See id.* § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,



Ann M. Ravel
Chair