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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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December 2, 2005

## AGENDA ITEM

For Meeting of: 12-08-05

**SUBMITTED LATE**

### MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RC*  
Acting Staff Director

FROM: Lawrence H. Norton *LH*  
General Counsel

Rosemary C. Smith *RS*  
Associate General Counsel

Mai T. Dinh *MD*  
Assistant General Counsel

Daniel K. Abramson *DA*  
Law Clerk

Subject: Draft AO 2005-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 8, 2005.

Attachment

1 ADVISORY OPINION 2005-19

2

3 Mr. Emil Franzl

4 Inside Track Productions

5 P.O. Box 2128

6 Tucson, AZ 85702

7

8 Dear Mr. Franzl:

**DRAFT**

9           We are responding to your advisory opinion request concerning the application of  
10 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission  
11 regulations to "The Inside Track," a weekly radio program that you produce and air in  
12 Tucson, Arizona. The Commission concludes that any discussion and interviewing of  
13 Federal candidates on "The Inside Track" program within 30 days of a primary election  
14 or 60 days of a general election is exempt from the prohibition on corporate funding of  
15 electioneering communications under the press exemption in the Act and Commission  
16 regulations. Moreover, any costs incurred in the production and broadcast of The Inside  
17 Track are similarly exempt from the Act's prohibitions on corporate contributions and  
18 expenditures under the press exemption.

19 ***Background***

20           The facts presented in this advisory opinion are based on your letter received on  
21 October 13, 2005, and phone conversations that occurred on October 18, 2005 and  
22 November 15, 2005.

23           You are the host of the radio talk show "The Inside Track," which is broadcast on  
24 KJLL in Tucson, Arizona. KJLL broadcasts to virtually the entire metropolitan area of  
25 Tucson, reaching a potential audience of approximately 400,000 people, including at least  
26 50,000 people in both Arizona's Seventh and Eighth Congressional Districts. You also  
27 operate a for-profit corporation, Paradigm Shift Productions, which purchases airtime on

1 KJLL in order to air The Inside Track. Paradigm Shift Productions then sells advertising  
2 on the program to recoup the costs of the airtime.

3 Neither Paradigm Shift Productions nor KJLL is in any way owned or controlled  
4 by any political party, political committee, or candidate. In addition, you are not an  
5 officer or employee of any political party or political committee. Finally, you are not  
6 currently a candidate for Federal office.

7 Politics is the major focus of discussion on The Inside Track. As a result,  
8 throughout 2006 the program will include discussions of candidates for the United States  
9 Senate and House of Representatives, interviews with these candidates, and comments  
10 and questions from callers that mention these candidates. You have stated that the  
11 candidates you will discuss and interview include those running for Senate in Arizona  
12 and for the House of Representatives in Arizona's Seventh and Eight Congressional  
13 Districts. These activities would occur within 30 days of the Arizona primary election on  
14 September 12, 2006 or 60 days of the November 7, 2006 general election.

15 ***Question Presented***

16 *May Paradigm Shift Productions produce The Inside Track and purchase airtime*  
17 *to broadcast it within 30 days of a primary election or 60 days of a general election if the*  
18 *program mentions or clearly identifies a Federal candidate?*

19 ***Legal Analysis and Conclusions***

20 The Commission concludes that Paradigm Shift Productions may produce The  
21 Inside Track and purchase airtime to broadcast it within 30 days of a primary election or  
22 60 days of a general election if the program mentions or clearly identifies a Federal  
23 candidate because the proposed activities fall within the press exemptions to the

1 prohibition on corporate funding of electioneering communications and the definitions of  
2 “contribution” and “expenditure.”<sup>1</sup>

3 **I. Electioneering Communications**

4 The Act and Commission regulations define an “electioneering communication”  
5 as any broadcast, cable, or satellite communication that refers to a clearly identified  
6 candidate for Federal office; is publicly distributed for a fee<sup>2</sup> within 60 days before a  
7 general, special or runoff election for the office sought by the candidate, or within 30  
8 days before a primary or preference election for the office sought by the candidate; and in  
9 the case of a candidate for the U.S. Senate or House of Representatives, is targeted to the  
10 relevant electorate. *See* 2 U.S.C. 434(f)(3) and 11 CFR 100.29(a). A communication is  
11 targeted to the relevant electorate if it can be received by 50,000 or more persons:

12 (1) in the district the candidate seeks to represent, in the case of a candidate for  
13 Representative; or

14 (2) in the State the candidate seeks to represent, in the case of a candidate for  
15 Senator. 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(5).

16 Any broadcast of The Inside Track that refers to a clearly identified candidate for  
17 the Senate in Arizona, or for the House of Representatives in the Seventh or Eighth  
18 Congressional Districts of Arizona during the electioneering communication windows

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<sup>1</sup> While your request specifically addresses the question of communications during the electioneering communications time frames, it also implicates the Act’s prohibitions on corporate contributions and expenditures.

<sup>2</sup> The “for a fee” requirement of the electioneering communications test has been the subject of litigation in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir 2005), petition for rehearing *en banc* denied Oct. 21, 2005. The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court’s ruling that the addition of the “for a fee” requirement violated Congress’s clearly expressed intent under step one of the analysis required by *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). 414 F.3d at 109. The Commission has a pending rulemaking to determine how to amend the electioneering communication regulations to comply with these court opinions. However, the analysis in this advisory opinion is not dependent on the “for a fee” requirement.

1 would satisfy the test for an electioneering communication. It would be publicly  
2 distributed for a fee because it would be broadcast through the facilities of a radio station  
3 and Paradigm Shift Productions would purchase the airtime. 11 CFR 100.29(b)(3)(i).  
4 Because KJLL is capable of reaching more than 50,000 listeners in the State of Arizona,  
5 including in the Seventh and Eighth Congressional Districts of Arizona, the  
6 communication would be targeted to the relevant electorate of Arizona Senatorial  
7 candidates and Seventh and Eighth District House candidates. 11 CFR 100.29(b)(5).

## 8 **II. Electioneering Communications Press Exemption**

9 Corporations are generally prohibited from making or financing electioneering  
10 communications. 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(2)(iii). However, the Act  
11 and Commission regulations provide an exemption for any communication that appears  
12 in a news story, commentary, or editorial distributed through the facilities of any  
13 broadcast, cable, or satellite television or radio station, unless such facilities are owned or  
14 controlled by any political party, political committee, or candidate, in which case  
15 additional limitations apply. 2 U.S.C. 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2). This  
16 exclusion is known as the “press exemption.”

17 The Commission has applied a two-step analysis to determine whether the press  
18 exemption applies. First, the Commission asks whether the entity engaging in the  
19 activity is a press entity as described by the Act and Commission regulations. *See e.g.*  
20 Advisory Opinions 2005-16, 2004-07, 2003-34, 2000-13, and 1998-17. The analysis of  
21 whether an entity is a press entity does not necessarily turn on the presence or absence of  
22 any one particular fact. Second, in determining the scope of the exemption, the  
23 Commission considers: (1) whether the press entity is owned or controlled by a political

1 party, political committee, or candidate; and (2) whether the press entity is acting as a  
2 press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its  
3 “legitimate press function”). *See Reader's Digest Association v. FEC*, 509 F. Supp. 1210,  
4 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-1313  
5 (D.D.C. 1981); Advisory Opinions 2005-16, 2004-07, 2000-13, 1996-48, and 1982-44.

6 Paradigm Shift Productions is in the business of producing on a regular basis a  
7 radio program that disseminates news stories, commentary and/or editorials. It also buys  
8 airtime to broadcast the program and resells some of that airtime for third party  
9 advertisements. Therefore, the Commission concludes that Paradigm Shift Productions is  
10 a press entity.

11 The Commission also concludes that Paradigm Shift Productions would be acting  
12 as a press entity when conducting the proposed activity. Because The Inside Track will  
13 discuss political issues through a radio broadcast, any reference to a clearly identified  
14 Federal candidate during its broadcast would occur “in a news story, commentary, or  
15 editorial.” 11 CFR 100.29(c)(2). *See also* Advisory Opinion 2005-16 (availability of an  
16 entity's activities “to the general public” is a key consideration in determining whether  
17 the press exemption applies). Paradigm Shift Productions was created to produce and  
18 disseminate this radio program, and therefore would be acting in its legitimate press  
19 function when it distributes The Inside Track.<sup>3</sup>

20 Your request specifically identifies three scenarios where The Inside Track would  
21 broadcast a communication that refers to a Federal candidate during the electioneering  
22 communications timeframe: (1) you, as the program host, mention a candidate on the air,

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<sup>3</sup> The Commission also notes that neither Paradigm Shift Productions nor KJLL are owned or controlled by any political party, political committee, or candidate.

1 (2) a candidate is interviewed on the program, and (3) a person calling into the program  
2 mentions a candidate. The Commission concludes that all of these activities during The  
3 Inside Track's broadcast would be legitimate press functions; thus they would come  
4 within the press exemption in the Act and Commission regulations.<sup>4</sup> Therefore,  
5 Paradigm Shift Productions may produce, and purchase airtime for, the program that  
6 mentions or clearly identifies a Federal candidate, including when you mention a  
7 candidate, a candidate is interviewed and when a caller mentions a candidate, without  
8 violating the prohibition on corporate funding of electioneering communications.<sup>5</sup>

### 9 **III. Contributions and Expenditures Press Exemption**

10 For the reasons described above, the proposed activities would not violate the  
11 Act's prohibition on corporate contributions and expenditures. The Act prohibits "any  
12 corporation whatever" from making any contribution or expenditure in connection with a  
13 Federal election. 2 U.S.C. 441b(a). The Act and Commission regulations define the  
14 terms "contribution" and "expenditure" to include any gift of money or "anything of  
15 value" for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A) and  
16 (9)(A); 11 CFR 100.52(a) and 100.111(a). However, there is an exemption for "any cost  
17 incurred in covering or carrying a news story, commentary, or editorial by any  
18 broadcasting station (including a cable television operator, programmer or producer),  
19 newspaper, magazine, or other periodical publication . . . unless the facility is owned or  
20 controlled by any political party, political committee, or candidate[.]" 11 CFR 100.73

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<sup>4</sup> The Commission has previously determined that on-air interviews of candidates are within the press exemption, provided that the broadcaster complies with all applicable requirements of the Communications Act (47 U.S.C. 315(a) and (b)) and Federal Communications Commission regulations. *See* Advisory Opinions 2004-07 and 1987-08.

<sup>5</sup> In the alternative, you ask if changing the financial arrangement between Paradigm Shift Productions and KJLL would permit the activity. Because the Commission has determined that your proposed activities are exempted from the electioneering communications restrictions, this question is moot.

1 and 11 CFR 100.132; *see also* 2 U.S.C. 431(9)(B)(i). As in the electioneering  
2 communication context, this exclusion is also known as the “press exemption.”  
3 According to the House Report on the 1974 amendments to the Act, the press exemption  
4 made plain Congress’s intent that the Act would not “limit or burden in any way the first  
5 amendment freedoms of the press” and would assure “the unfettered right of the  
6 newspapers, TV networks, and other media to cover and comment on political  
7 campaigns.” *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).*

8           This exemption would apply to The Inside Track and Paradigm Shift Productions.  
9 As discussed above, Paradigm Shift Productions is a press entity. Its production of, and  
10 purchasing of airtime for, The Inside Track constitutes “covering or carrying a news  
11 story, commentary, or editorial.” The Commission notes that an entity otherwise eligible  
12 for the press exemption would not lose its eligibility merely because of a lack of  
13 objectivity in a news story, commentary, or editorial, even if the news story, commentary,  
14 or editorial expressly advocates the election or defeat of a clearly identified candidate for  
15 Federal office. *See* First General Counsel's Report, MUR 5449 (CBS Broadcasting, Inc.)  
16 (“Even seemingly biased stories or commentary by a press entity can fall within the  
17 media exemption.”). The proposed activities described in your request would come  
18 within the exemption in 2 U.S.C. 431(9)(B)(i) and would not violate 2 U.S.C. 441b. *See*  
19 *also* 11 CFR 100.73 and 11 CFR 100.132. Therefore, any disbursements made to  
20 produce or broadcast The Inside Track are not prohibited corporate contributions or  
21 expenditures under the Act.

22           This response constitutes an advisory opinion concerning the application of the  
23 Act and Commission regulations to the specific transaction or activity set forth in your



1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity.

5  
6 Sincerely,  
7

8  
9  
10 Scott E. Thomas  
11 Chairman  
12

13  
14  
15 Enclosures: Advisory Opinions 2005-16, 2004-07, 2003-34, 2000-13, 1998-17, 1996-48,  
16 1987-08, and 1982-44