

FEDERAL ELECTION COMMISSION
PUBLIC HEARING ON REPORTING CONTRIBUTIONS
BUNDLED BY LOBBYISTS, REGISTRANTS
AND THE PACs OF LOBBYISTS AND REGISTRANTS

Wednesday, September 17, 2008

999 E Street, N.W.
9th Floor Meeting Room
Washington, D.C.

COMMISSION MEMBERS:

DONALD F. McGAHN II, Chairman

STEVEN T. WALTHER, Vice Chairman

CYNTHIA L. BAUERLY, Commissioner

MATTHEW S. PETERSEN, Commissioner

ELLEN L. WEINTRAUB, Commissioner

CAROLINE C. HUNTER, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

JOHN GIBSON, Chief Compliance Officer

ROSEMARY C. SMITH, Associate General Counsel

AMY L. ROTHSTEIN, Assistant General Counsel

WITNESSES:

TIMOTHY JENKINS, Coalition for Tax Equity

JOSEPH SANDLER, ESQ.

DON SIMON, Counsel to Democracy 21

MARC ELIAS, ESQ.

CRAIG HOLMAN, Public Citizen

PAUL RYAN, Campaign Legal Center

P R O C E E D I N G S

(9:36 a.m.)

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3 CHAIRMAN McGAHN: The special session of the
4 Federal Election Commission for Wednesday, September 17,
5 2008, will please come to order. I'd like to welcome
6 everyone to the Commission's hearing on the proposed rule
7 regarding the disclosure of information about contributions
8 bundled by lobbyists, registrants and their PACs. Today
9 we'll discuss the notice of proposed rulemaking on lobbyists
10 and registrant bundling, which was published in the Federal
11 Register on November 6, 2007.

12 The NPRM explained and sought comment on the
13 proposed rule to implement the provisions of the Honest
14 Leadership and Open Government Act of 2007, regarding the
15 disclosure of information about bundled contributions
16 provided by lobbyists, registrants and their PACs to certain
17 political committees.

18 I'd like to thank all the people who took the time
19 and effort to comment on the proposed rules and in
20 particular, those who appear as witnesses at this hearing,
21 to give us the benefit of their practical experience and

1 expertise on issues raised by the proposed rules.

2 I'd like to describe briefly the format will be
3 used -- that we use today. We expect to have a total of six
4 witnesses, which have been divided into two panels. Each
5 panel will have -- we'll ask for 1.5 hours and there will be
6 a short break between panels.

7 Each witness will have five minutes to make an
8 opening statement. We have a light system at the witness
9 table to help you keep track of your time. The green light
10 will start to flash when you have one minute left. The
11 yellow light will go on when you have 30 seconds left, and
12 the red light means it's time to wrap up your remarks. The
13 balance of the time is reserved for questioning by the
14 Commission.

15 For each panel, we like to have at least one round
16 of questions and a second, if time permits, from the
17 Commissioner's general counsel and the staff director. The
18 format I would -- I prefer is more of a free forum. I
19 don't, particularly in this case where I think the comments
20 have very well -- very much framed up the issues, when we
21 get an issue drilled down, so I'll recognize commissioners

1 as we go. I don't like to do the divided up by
2 commissioner, because once we get on a topic, it's awkward
3 sometimes for witnesses to go back when another commissioner
4 wants to revisit the topic a half hour later.

5 The first panel -- but before we get to the panel,
6 I understand that at least one of my colleagues would like
7 to make an opening statement and after that we'll turn to
8 the first panel, which consists of Don Simon, here on behalf
9 of Democracy 21; Joe Sandler, I believe in his individual
10 capacity, not on behalf of any particular client; and Tim
11 Jenkins, on behalf of the Coalition for Tax Equity.

12 Generally, we follow the alphabet, so Mr. Jenkins
13 would go first. But before, your opening statements, any
14 commissioners would like to make opening statements?

15 Commissioner Weintraub.

16 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
17 I appreciate your indulgence. Well, I'm excited. For most
18 of my career, I worked on issues of government transparency
19 and for most of my tenure here at the FEC, as many people in
20 the room know, I've been an advocate for greater disclosure
21 of the fundraising practice known as bundling, not to ban

1 the practice, just to shed more light on it.

2 The public has the right to know every time an
3 individual gives \$200 to a campaign, and it seems plain to
4 me that the public has the right to know when an individual
5 provides a campaign with tens, if not hundreds of thousands
6 of dollars due to his or her networking abilities and
7 fundraising prowess.

8 Now the rule that we will issue at the end of this
9 process is probably not the rule that I was imagining when I
10 began thinking about this five years ago. For one thing, I
11 envisioned a rule that would require disclosure of all
12 bundlers above a certain level, not just those involved in
13 lobbying.

14 But the bill's advocates in Congress made certain
15 compromises in order to get this provision passed, and
16 without those compromises the bundling disclosure provision
17 probably wouldn't have passed. And without that statutory
18 mandate, we probably wouldn't be here today, because I've
19 been working on this for five years and I've never managed
20 to launch a rulemaking yet until we had that statutory
21 mandate behind us.

1 So I think it's important to note that we're here
2 to implement the statute and I anticipate a lot of
3 discussion at this hearing about the meaning of the precise
4 words adopted in that statute. The result may not be
5 perfect in my eyes or perhaps anybody else's, although maybe
6 for different reasons, but it will advance the goal of
7 transparency. And I'm optimistic that the result will be
8 one that all of us here and the law's advocates in Congress
9 will all be able to be proud of.

10 CHAIRMAN McGAHN: I don't believe there's any
11 other opening statements from the commissioners. We'll turn
12 to the witnesses. Mr. Jenkins.

13 MR. JENKINS: Mr. Chairman, members of the
14 Commission, thank you for the opportunity to testify today
15 on the regulations relating to bundling and the Honest
16 Leadership and Open Government Act of 2007.

17 I am here on behalf of the Coalition for Tax
18 Equity, which is an association that we formed in early
19 1990. It's comprised of corporations and trade associations
20 active in the federal public policy arena. Over the years
21 the coalition has been very involved in the high profile and

1 controversial debates in the areas of the gift rules in the
2 mid-nineties and the various Lobbying Disclosure Act
3 provisions that started in the mid-nineties and were amended
4 in 1998. Most recently we were actively involved with
5 member offices and the leadership with the HLOGA on the gift
6 and LDA provisions.

7 The coalition is a registered lobbying entity, but
8 it has sort of evolved into fundamentally a compliance
9 counsel operation, and throughout the existence what we've
10 advocated for are rules that are clear and concise, that are
11 unambiguous and in harmony with related provisions. And
12 while some of the members may disagree with some of the
13 policies, including some of the provisions in the new ethics
14 rules, the goal and the guiding principle for the coalition
15 is to assure that these provisions are clear and concise and
16 that they're subject to full compliance, and you'll see that
17 these principles underlie what I -- what I put in my written
18 testimony and what I'll talk about today.

19 While there are several areas that you all sought
20 comment on, I want to focus on two provisions today in the
21 limited five-minute time. The first is how you define the

1 scope of designations or other means of recognizing or
2 "giving credit" for purposes of establishing who is a
3 bundler, and that's really first and foremost irrespective
4 of this issue of the threshold. But -- so you sort of have
5 the two tiers and that's the first one. And then the second
6 is how are you going to allocate credit for bundling when
7 you have the very, very common situation of multiple
8 fundraisers involved in a single event?

9 With regard to the first element, how to define a
10 bundler, the Commission proposed rule cites the sort of
11 current conduit rule as one example where you collect and
12 forward earmarked contributions. And then you have the
13 second one, which is sort of more troublesome and we're kind
14 of breaking new ground with it, where an entity does not
15 forward the earmarked contribution, but that entity gets
16 credited with raising the contribution and the proposed rule
17 and the statute talks about records designations or other
18 means of recognizing.

19 As noted in the written testimony, the first item
20 is pretty straight forward and it's already a well-
21 established concept in the whole conduit and intermediary

1 area. I think you could embody that or fold that into the
2 bundling regulations by basically not including the last
3 exception to that definition, which is essentially when you
4 become a designated agent of a candidate committee.

5 The example most often is where you lend your name
6 as a steering committee member to an event and even though
7 you may collect and forward those contributions, under that
8 regulation, you are not an intermediary or a conduit, not
9 required to register and report. What I'm suggesting is you
10 don't change that regulation for that purpose, but you do
11 knock out the exception for purposes of whether somebody's a
12 bundler.

13 So you're on a steering committee. You lend your
14 name to the effort. Regardless of whether you collect and
15 forward those collections, you would be a bundler, again
16 subject to the threshold.

17 The second item is far more complicated and I
18 think potentially the scope of extensive confusion and legal
19 entanglement, and at this level, which is how else do you
20 assign credit? I urge the Commission not to just give
21 instructive examples, which is noted by one of my colleagues

1 here today, but instead to be as prescriptive as possible,
2 to cite to as many examples as you can in the regulations to
3 essentially eliminate ambiguity. And I frankly think it
4 should have established kind of a de facto safe harbor if
5 you're outside the confines of those definitions.

6 So in my testimony I list some examples of what
7 does qualify and I want to move now to this existence of the
8 multiple fundraisers. Your example of three lobbyists who
9 raised \$20,000 with no apparent record or designation, there
10 really is no other conclusion to reach than that none of
11 those people have tripped the thresholds. In the real
12 world, credit is given where credit is earned and the
13 committees do not assign to each of the -- to each of those
14 fundraisers the full amount that is raised.

15 You're a recordkeeping entity. It's about
16 accuracy. In my written testimony, I cite to examples where
17 the record could be incredibly misleading, where you have 20
18 people raising \$5,000 versus this three at 20. So I urge
19 the Commission to, in the absence of designations or other
20 objective criteria, you have multiple fundraisers. I urge
21 the Commission to basically split that up evenly and do the

1 math and if you don't trip the 15,000, you're not a bundler.
2 That 15,000 was there for a reason.

3 I look forward to answering questions on that
4 issue and particularly on the legislative history that's
5 been cited. Thank you.

6 CHAIRMAN McGAHN: Thank you. Mr. Sandler.

7 MR. SANDLER: Thank you, Mr. Chairman and members
8 of the Commission. I appreciate the opportunity to appear
9 today. I'm not a -- I'm with the law firm of Sandler Reiff
10 & Young. I'm not appearing on behalf of any client, but my
11 colleague, Neil Reiff, and I -- is also here -- as
12 practitioners representing candidates and party committees
13 who engage -- are responsible to those clients for advising
14 them with respect to FEC reporting and often preparing their
15 reports.

16 I just want to quickly address three points raised
17 by the NPRM. I'll be happy to answer any questions after
18 that. First with respect to reporting frequency, it appears
19 that there's a consensus among the commenters that -- and
20 the sponsors too, for that matter -- that monthly filers
21 should be required to file quarterly. And the reason is,

1 otherwise you're going to miss a lot of disclosure because
2 for monthly filers, if they were required to file monthly,
3 and that was the covered period, a number of bundlers would
4 not meet the applicable threshold.

5 Second, with respect to the issue of double
6 reporting, we do not believe that the same contribution
7 should be disclosed, a bundled contribution should be
8 disclosed in more than one report, so that if somebody is
9 required to file quarterly, they should also not be required
10 to file a semi-annual report.

11 But we agree with the point made by Mr. Simon and
12 some of the other commenters that the threshold should be
13 applied on a semi-annual basis so that -- and to take an
14 example from Don, that if somebody raised \$20,000 in the
15 first quarter, \$5,000 in the second quarter, they should be
16 required to disclose the \$5,000 in the second quarterly
17 report. They should only be required to file a quarterly
18 report, but they should be required to disclose the \$5,000.
19 We think the Commission has the authority to do that by
20 defining the covered period for purposes of the threshold as
21 a semi-annual period.

1 And then the third point with respect to -- listed
2 employees of registered entities, this is a tricky issue and
3 absolutely have thought about this some more since we
4 submitted our comments more than a year ago. On the one
5 hand, we have the situation, which we didn't really address
6 and contemplate in our comments, where the CEO of a company,
7 a company that has retained an in-house lobbyist and where
8 hires an outside lobbying firm, raises contributions for a
9 candidate or party committee and is credited with that, but
10 in the typical case, the CEO themselves is not going to be
11 an individual -- the listed registered lobbyist because they
12 won't have triggered the 20 percent threshold under the
13 Lobbying Disclosure Act.

14 Nonetheless, we recognize that the intent of the
15 law is clear in that situation, that that -- they raising of
16 that money by the CEO should be disclosed. And so we agree
17 with the concept put forth by the sponsors, and then some of
18 the comments, that when companies really -- the entity
19 that's retained a registered lobbyist has bundled
20 contributions, that that fact should be disclosed.

21 On the other hand, we are talking about a

1 reporting system here. There has to be some objective
2 criteria. There -- of course, every individual who has
3 bundled contributions, when they reported, they have to list
4 their occupation and employer. The mere fact, and the
5 sponsors make this clear, that somebody's employer is a firm
6 that retains lobbyists doesn't mean that they should be --
7 they should be reported.

8 We would encourage the Commission to consider
9 coming up with some kind of objective criteria to determine
10 -- so obviate the need for determining whether somebody's
11 acting as the agent of their employer and having bundled
12 those contributions. Possibly there should be a presumption
13 that senior officers of the company, individuals involved in
14 a government relations division of a company, should be
15 presumed to be acting on behalf of, or acting as agents
16 rather, for their company for purposes of the disclosure.
17 And that's not by any means an exhaustive approach, but
18 there should be some objective criteria rather than leaving
19 it to some sort of case by case investigation.

20 Those are the main points we wanted to make and be
21 happy to answer any questions after Mr. Simon's remarks.

1 CHAIRMAN McGAHN: Thank you. Mr. Simon?

2 MR. SIMON: Thank you. I appreciate the
3 opportunity to testify on behalf of Democracy 21, which was
4 a strong supporter of the Honest Leadership and Open
5 Government Act passed last year.

6 The law is considered one of the most significant
7 ethics reforms enacted since Watergate. HLOGA was enacted
8 in part as a response to the Abramoff scandal and is
9 intended not to restrain the activity of lobbyists, but
10 rather to expose those activities to greater disclosure and
11 public scrutiny.

12 This is particularly the case with regard to how
13 lobbyists use money to buy access and influence. There is
14 not only better disclosure of campaign contributions made by
15 lobbyists themselves, but also for the first time disclosure
16 of other kinds of contributions and disbursements made by
17 lobbyists, for example, to pay the cost of events, to honor
18 members, or funds donated to entities controlled by or named
19 for members.

20 In this vein, one of the most important and long
21 overdue reforms is disclosure of bundling by lobbyists.

1 Bundling, as we all know, is an established practice in
2 Washington and is surely one of the most significant ways in
3 which lobbyists provide help to congressional and
4 presidential candidates.

5 Lobbyists bundle campaign contributions in sums
6 that dwarf federal contribution limits indeed, and this
7 year's presidential campaign, for the first time we saw
8 million dollar bundlers. Candidates give and lobbyists take
9 credit for raising such large sums of money. It's only
10 reasonable for the public to believe that bundling is a
11 technique used by lobbyists to curry favor with federal
12 officials and to influence government decisions.

13 HLOGA does not prohibit bundling nor even regulate
14 it. It simply requires that when done by lobbyists and
15 lobbying organizations, it be disclosed. This is modest
16 reform in its aims and means, but very significant in terms
17 of the public benefit, if properly implemented.

18 Now there is simply no doubt as to what your
19 guidepost could be in writing the implementing regulations.
20 In an unusual statutory provision, Congress took care to
21 tell you not just to write regulations, but how to do it.

1 Section 434(i)(5)(D) instructs that the Commission "shall
2 provide for the broadest possible disclosure of lobbyist
3 bundling that's consistent with the law."

4 This is not legislative history. This is the law
5 itself and it means that in any instance in which you have a
6 choice between two plausible alternatives, you must choose
7 the one which provides for better and broader disclosure.

8 Now members of Congress are in substantial part
9 the ones being regulated here, since the disclosure
10 obligation falls on them, and they have told you that they
11 want the regulations to insist on the broadest possible
12 disclosure. The legislative history here is, however,
13 consistent with this overall mandate and is itself unusually
14 helpful as well, since the principal sponsors of the
15 bundling provision in both houses took care to provide
16 detailed floor statements prior to enactment which
17 specifically address and answer many of the questions raised
18 in the NPRM.

19 Senators Feingold and Obama were the principal
20 Senate sponsors of the separate bundling legislation that
21 was included in HLOGA and Representative Van Holland was the

1 lead author of the bundling language in the House bill. The
2 floor statements by these three lead sponsors provide clear
3 and explicit guidance on a number of the questions before
4 you.

5 For instance, there's no doubt that the sponsors
6 intend that fundraising events hosted by lobbyists fall
7 within the bundling disclosure requirements. Senators
8 Feingold and Obama discuss this at length in their floor
9 colloquy. Nor is there any doubt that the total amount
10 raised at such events should be attributed to each lobbyist
11 co-host.

12 As Senator Feingold said on the colloquy with
13 Senator Obama, "when two or more lobbyists are jointly
14 involved in providing the same bundled contributions, as for
15 instance in the case of a fundraising event co-hosted by two
16 or more lobbyists, then each lobbyist is responsible for and
17 should be treated as providing the total amount raised at
18 the event.

19 So too the statutory touchstone for when
20 fundraising constitutes bundling is whether a candidate
21 gives credit to the lobbyist for raising a certain amount of

1 money received by the candidate. Credit is credit and it
2 doesn't have to be formalized to be real.

3 As Representative Van Holland said in his House
4 floor statement, the credit that is attributed to the
5 lobbyists does not need to be memorialized in writing or
6 captured within a database or any other contribution
7 tracking system to trigger the reporting requirement.

8 The Senate legislative history is consistent with
9 this. Senator Obama said on the floor "the credit doesn't
10 have to be written or recorded because the definition
11 includes other means of recognizing that a certain amount of
12 money has been raised. So if a lobbyist tells a candidate
13 that he has raised a certain amount of money for a campaign,
14 the lobbyist should be credited with that amount of bundling
15 and the bundling must be reported."

16 Now these are just two examples, the treatment of
17 fundraising events and the informal system of credit and
18 contributions, just two examples of areas where the
19 Commission's statutory responsibility is to provide for the
20 broadest possible disclosure. I urge you to keep that
21 statutory standard foremost in your mind as you complete the

1 process of writing these rules. Thank you.

2 CHAIRMAN McGAHN: Thank you. Questions from the
3 Commission? I could go first, pick the issue. So many --
4 so many narrow issues. Let's talk about what it means to
5 credit first.

6 I read a statement of Senator Feingold that says
7 the committee must -- was actually no -- not just be aware
8 that maybe somebody raised money. It seems to me that there
9 could be, and this is a distinction I think Mr. Elias, who's
10 on the second panel, was trying to raise, that there's a
11 difference between crediting and simply keeping track of
12 fundraising. It may be a metaphysical distinction when we
13 get down to the rulemaking. There may not be a difference.
14 But professional fundraisers keep records all the time of
15 who raises what and perhaps who sponsored an event for their
16 fundraising purposes. But that's not necessarily the same
17 as crediting, or is it? That's my question; is it -- what
18 is crediting, what isn't crediting? Mr. Simon can go first.

19 MR. SIMON: To me, and I think again, this is
20 clear in the discussion of this provision by the sponsors,
21 crediting is knowledge. If the member knows that a lobbyist

1 has raised \$100,000 for him, he's gotten that money, then
2 it's not required, as I think is clear in the floor
3 statements I just read.

4 It's not required that the member have some
5 formalized written recordkeeping system. The knowledge by
6 the member of the fact that the lobbyist raised the money is
7 sufficient to trigger the reporting requirement.

8 CHAIRMAN McGAHN: So you see the answer as some
9 knowledge of the member?

10 MR. SIMON: Yeah, I do.

11 CHAIRMAN McGAHN: What if the member doesn't know?

12 MR. SIMON: Well, the member or the committee, and
13 the statute is clear that the credit has to be given by
14 either the member or the committee. So if the fundraising
15 director of the committee knows who's been bringing in
16 contributions, that would -- that would also suffice.

17 CHAIRMAN McGAHN: Same -- does anyone else have
18 any thoughts on whether or not crediting needs to be
19 written?

20 MR. JENKINS: I actually -- I actually agree that
21 where there's a record or designation, and that includes a

1 list that the candidate committee representative might
2 maintain, that that probably meets the statute. And I think
3 if you're a host or a co-host on an event, if you host a
4 fundraiser in your entities, if you're a corporation or an
5 association, at your venue, or in your home if you're a
6 registered lobbyist, in your personal residence, to me that
7 -- that should be credit.

8 I think where the member doesn't know and there is
9 no record or designation and there's no reference on an
10 invitation to somebody who is a host or a steering committee
11 member, that you have to draw the line there. And frankly,
12 I think the issue is less significant if the multiple
13 lobbyist issue is dealt with the way it should be per the
14 statute.

15 That \$15,000 threshold means something and in case
16 I don't get a chance to deal with the legislative history,
17 it's very important that the legislative history I would
18 sort of characterize as a legislative history wish list.
19 Those members' approaches were directly rejected in the
20 final package. The bill that came out of the Senate that
21 was the Obama -- that Obama authored had the lobbyists

1 disclosing on their quarterly reports and it had the word
2 "aggregate" included in the statute.

3 The House side, the same thing for Mr. Van
4 Holland, it was going to be part of an LDA disclosure by the
5 lobbyist. The LDA is an estimating regime and when the
6 final product, which was a comprised sort of conference,
7 behind the scenes conference between the House and the
8 Senate, emerged, it was very, very different. It was an FEC
9 disclosure, which is all about accuracy and transparency,
10 and it was a mandate imposed not on the lobbyist, but on
11 candidates. And it's going to be a schedule to their
12 otherwise accounting disclosure, which is their quarterly
13 reporting.

14 So I really think all these references to the
15 authors, it certainly signals their intent. But their four
16 corners sort of drafting was directly rejected in the final
17 product.

18 MR. SIMON: Could I respond to that? I mean, it's
19 -- one always wants to denigrate the legislative history
20 that doesn't accord with your position, but this is
21 legislative history as much as any other floor statements by

1 the lead sponsors and authors of a provision prior to
2 enactment of the final bill.

3 These were comments made not on the earlier
4 provisions, but these were comments made on the provision
5 that's adopted. Now it is true that the earlier versions of
6 the bill did impose the reporting obligation on the lobbyist
7 as part of their LDA reports. But in going through the
8 process, people realize there was this conceptual issue,
9 which is, the lobbyist would know whether he was out
10 soliciting the money.

11 But people raised the very good point that the
12 lobbyist wouldn't necessarily know if the money was received
13 by the candidate and he certainly wouldn't know whether the
14 candidate was giving the lobbyist credit for having raised
15 the money. And I think that was the principal reason that
16 in the final law the reporting obligation was shifted from
17 the lobbyist to the candidate, because the candidate does
18 know exactly those two things, whether he's received the
19 money, and the candidate knows whether he is crediting those
20 funds to the lobbyist. So that was the reason for the
21 shift.

1 But again, if you go back and read the floor
2 statements made by the principal sponsors on the final bill
3 before enactment, they talk about these issues and they
4 reaffirm that on these sorts of questions we're discussing
5 in terms of fundraising events and co-hosting and so forth,
6 the final bill as adopted was to reflect the intent that
7 they stated.

8 CHAIRMAN McGAHN: Ask a follow-up on the -- along
9 the lines of the knowledge of the member, doesn't
10 necessarily have to be a written crediting, as I understand
11 your definition. On the enforcement side, how does that
12 play out here in three different contexts? Say RAD sends a
13 letter saying they -- maybe have a question about their
14 report or let's say they're audited, what sort of
15 documentation would there be, if any, and then let's say we
16 end up in an enforcement context, how do we know what the
17 member knew short of deposing the member, which we could do,
18 but then how do we know the member really knew what he knew
19 and when he knew it?

20 MR. SIMON: No, that's a fair question. I think
21 your job here is to set a standard and I think you have the

1 right to expect the members to comply with that standard.
2 There are lots of provisions of the campaign finance laws
3 where there's always the possibility for secret exchanges
4 where it would be hard for the Commission to know exactly
5 what was going on and hard in that sense to enforce the law.

6 The coordination rules are ripe with that in terms
7 of whether substantial discussions have occurred or whether
8 material information was passed. But your obligation is to
9 set rules and I think particularly where the onus of the
10 rules falls on the member of Congress, I think you have the
11 right to expect that they'll comply with them.

12 Now if a lobbyist walks up to a member and says, I
13 raised \$100,000 for you, here's how it's going to come in,
14 and the member says, that's terrific, I really, really
15 appreciate it, but never writes it down, the member knows
16 the money was raised by the lobbyist and I think the member
17 has given that lobbyist credit, and if you write a rule that
18 excludes that transaction from disclosure because the credit
19 was never memorialized or written down, I think you're
20 opening a huge gap in the coverage of the law. I just don't
21 think that would be consistent with the statutory directive

1 to provide for the broadest possible disclosure.

2 CHAIRMAN McGAHN: On that though, it's the
3 broadest possible disclosure consistent with the subsection,
4 the activity covered by the section. It begs the question
5 because if it's not activity covered by the statute, you
6 don't have to -- you'll go beyond what the statute requires.

7 MR. SIMON: Right.

8 CHAIRMAN McGAHN: Broader than the statutory
9 language. That would be --

10 MR. SIMON: Right. That kind of reading just
11 collapses that standard back into the other language of the
12 law and attributes no weight to it and I think Congress was
13 clearly intending to say something to the Commission by
14 putting that directive in the statute. And again, statutory
15 language, I think this is an example of it here with this
16 definition of bundling, is certainly susceptible. The
17 language itself is certainly susceptible to different
18 meanings, and in that situation, I think the import of that
19 statutory directive is to choose the one that provides for
20 the broader disclosure.

21 CHAIRMAN McGAHN: So do we -- do you agree with

1 the thought that the statute does not mandate that we write
2 a reg that reaches out to non-written crediting, or does the
3 statute mandate that we -- that our reg does cover?

4 MR. SIMON: I think the statutory language, in
5 light of the subsection D directive, mandates that you cover
6 credit even if it's unwritten.

7 MR. JENKINS: I actually -- I think you have to
8 draw the line where there is no record designation or other
9 means of recognizing and I think in terms of opening up a
10 can of worms, you would be basically left with an
11 unenforceable statute, as you pointed out, Mr. Chairman, so
12 I think that while I agree that you should be pretty broad
13 in defining exactly what does constitute bundling, and
14 certainly the Bush Pioneer and Ranger model is a no-brainer
15 in terms of people getting tracking numbers.

16 If you sign up to be on the steering committee and
17 in order to be a steering committee member you have to agree
18 to raise \$10,000, I think that's sufficient in terms of a
19 record. But the old slap on the back because you walk by a
20 member of Congress and say hey, you'll be glad to know I'm
21 going to raise \$20,000 for you, so what? I mean, I may or

1 may not do it.

2 In the absence of some way that that member can
3 quantify the amount and the fact that it did happen and I
4 think you can't -- you can't subject a member to that kind
5 of a standard.

6 CHAIRMAN McGAHN: I'm not so sure that I don't --
7 I'm not so sure I said it was unenforceable. It seems to be
8 so broad though as to be an administrative potential prime
9 exposure. I'm not saying necessarily subjective knowledge
10 is unenforceable. I'm getting at the practical application.

11 But you use language that attracts the statute,
12 which is records designations or other means of recognizing
13 that a certain amount of money has been raised by the
14 person. Records is written. We agree that would be a
15 writing. Designations would be a writing. It's the or
16 other means of recognizing, and that's where I'm hung up on
17 written versus this having --

18 MR. SIMON: Let me say two things. I think
19 recognize -- recognition is knowledge. I think that's what
20 the word means. The root of recognition is cognition, which
21 is knowledge. But let me make another point. Joe said

1 before that in the years since he filed the written
2 comments, he's thought about this more and actually, I had
3 one additional point on this that I did not include in our
4 written comments, but I think it's a useful analogy here in
5 a very closely related area.

6 The Commission has longstanding rules regarding
7 earmarked contributions that are transmitted by a conduit or
8 intermediary, and that's based on a statutory directive
9 governing earmarking, and that's what the statute says; it
10 talks about earmarking.

11 Now in the rule that the Commission issued I think
12 20 years ago that defines earmarking, it says, earmarked
13 means a designation, instruction, or encumbrance, whether
14 direct or indirect, expressed or implied, oral or written,
15 which results in all or any part of a contribution
16 expenditure being made to a designated candidate.

17 So the Commission took the concept of earmarking,
18 the statutory term "earmarking," and I think appropriately
19 expanded it to include implied or expressed, oral or written
20 forms of earmarking. So if somebody gives a check to a
21 political committee and says -- and just says, I want this

1 check to go to Candidate A, it's never written down, that's
2 an earmarked contribution.

3 Now there may be enforcement issues about how the
4 Commission would know that that earmarking designation was
5 attributed to that check, but nonetheless, it's
6 appropriately -- the oral designation is appropriately
7 treated as earmarking. And I think again, the situation here
8 is analogous.

9 CHAIRMAN McGAHN: But that gets to the heart of
10 contribution limits and earmarking money is an end-run
11 around the limits, which is an essential issue under FECA,
12 and you usually infer the earmark from facts to timing, that
13 kind of thing. This is a disclosure regime and I'm not -- I
14 understand your point, but is there a distinction between
15 the need to really go after earmarks versus the Senate
16 disclosure regime, which to me shouldn't necessarily have
17 such probing fact-finding issues, or at least some could
18 argue that.

19 MR. SIMON: I recognize the point between the
20 difference between contribution limits and exposure, but I
21 think this is important disclosure and I think if you say

1 that unwritten forms of crediting and recognition are
2 outside the scope of the disclosure responsibility, you are
3 really walking into the teeth of not only direct statements
4 by the principle sponsors in both houses on this specific
5 point, but you're also walking into the teeth of the
6 statutory directive, because I do not think that you're then
7 providing for the broadest possible disclosure. I think --
8 I think that just gets the Commission into trouble.

9 CHAIRMAN McGAHN: Mr. Sandler, you kind of grabbed
10 the mike and then I --

11 MR. SANDLER: I just briefly, Mr. Chairman, I
12 think the distinction here largely dissolves in practical
13 application. The -- most committees one way or the other
14 have a way of tracking people who have raised money for
15 their committee and tracking credit. This is not a business
16 in which people say, I'm going to leave this to memory,
17 because there are consequences to it in terms of -- you know
18 people are recognizing -- a state party or a candidate and
19 acknowledge that there are events and that kind of thing.

20 So I think that while Don certainly has the intent
21 of the statute right, in reality, the committees that are --

1 and candidates that are responsible for this are going to --
2 are going to keep track of it, do in fact keep track of it,
3 and that's just how it works in real life.

4 MR. JENKINS: Yeah, I tend to agree with that. I
5 think the record that the sort of Bush Pioneer model is one
6 model, but as Joe said, I think most of these situations are
7 going to be accounted for. The people that are out there
8 raising money, they absolutely want to get credit for it.

9 So you have sort of an institutional, if you will,
10 imperative there where getting the recognition is something
11 that almost invariably is done because if I say I want to
12 get -- raise \$10,000 for a senator, I'm not going to leave
13 to chance that senator acknowledging or knowing that I did
14 it. It's in my interest to be credited with that.

15 So I think the concern comes where money is raised
16 and it really doesn't have any nexus back to the member and
17 the member is then somehow required to go back and figure it
18 out. I think -- so I would suggest that you use the record
19 designations or other means and define the other means as
20 broadly as you can, but do it objectively and again,
21 prescriptively, so 10, 15, 20 situations, that would be

1 enough to give the member knowledge. And then other than
2 that, I think the member's got to be off the hook.

3 MR. SIMON: I agree with Joe's point that in the
4 normal case, this is tracked carefully by committees and
5 that lobbyists are plenty interested in making sure they're
6 getting the recognition, they're getting the title or the
7 invitation or whatever. So in the normal case, this issue
8 kind of takes care of itself.

9 I just want to caution you though about opening
10 the door to -- at the very time and the statute, with the
11 very intent of surfacing bundling and making it transparent
12 and publicly disclosed, I just caution you against opening
13 the door to the creation of a kind of underground bundling
14 where because things just are not written down, even though
15 all the other attributes or elements of the bundling are
16 apparent, that the disclosure responsibilities can be
17 evaded.

18 CHAIRMAN McGAHN: Actually just one final question
19 on this point before -- I don't want to hog up the whole
20 time. But let's just, if you can indulge me, assume the
21 subsection that says needs to be the broadest possible

1 reporting -- assume Mr. Simon -- was not in the statute, so
2 let's just focus on the records designations or other means
3 of recognizing that a certain amount of money has been
4 raised by the person language, that standing alone, can that
5 be read more than one way, meaning, can that be read to mean
6 written only versus written and oral communications?

7 MR. SIMON: Well, it is being read to mean that by
8 other commenters. You know, again, I think --

9 CHAIRMAN McGAHN: I understand -- I know that, but
10 what do you think?

11 MR. SIMON: I think that recognizing is knowing.
12 If the member knows that the lobbyist raised the money for
13 him, he recognizes, that's a form of recognizing the
14 lobbyist bundled the contributions. I think the language on
15 its own supports that interpretation. I think in light of
16 the legislative history, and the statutory directive, that's
17 a very strong case.

18 CHAIRMAN McGAHN: I understand supports that
19 reading. What I'm saying is could the language be read
20 another way, because it doesn't simply say records
21 designations or recognition of or recognize; it says other

1 means of recognizing?

2 MR. SIMON: Yeah, I think --

3 CHAIRMAN McGAHN: Means is a mental note?

4 MR. SIMON: I think a means of recognizing is
5 knowing.

6 CHAIRMAN McGAHN: Okay.

7 MR. JENKINS: Once again, I want to get to this
8 legislative history. The statute, as everybody knows,
9 trumps legislative history, emphatically trumps legislative
10 history. This is another example where the language that
11 the authors who were very, very outspoken on the floor
12 statements, was rejected.

13 The Senator Obama provision that emerged from the
14 Senate used the word "formal" or "informal" credit in lieu
15 of the language that emerged, which is record designations
16 or other means of recognizing. So I think irrespective of
17 this expansive interpretation language, which is then of
18 course, qualified by "consistent with the law or the
19 statute," irrespective of that, I think there is -- there is
20 some significance to the transition from what the authors
21 originally wrote and where it ended up, and I think the fact

1 that informal credit is just not subject to enforcement, or
2 as you suggested, it's very difficult to enforce and would
3 require multiple subpoenas potentially, I think you have to
4 look at the evolution of the House and Senate bills and the
5 final product as Commissioner Weintraub said, recognized
6 that it was a compromise.

7 It was a compromise because they wanted to get it
8 passed. And the more -- the more difficult or the more
9 stringent provisions just were not going to fly at the end
10 of that session when they were crunched on time.

11 CHAIRMAN McGAHN: Commissioner Weintraub.

12 COMMISSIONER WEINTRAUB: Yeah, I'd like to follow-
13 up on the same line of questioning, because I think that you
14 started out with one of the key issues that is a source of
15 controversy amongst the witnesses. I was actually pretty
16 gratified when I read the comments because overall there was
17 a lot of agreement from the commenters that in general the
18 proposed rule pretty much does what it needs to do to
19 implement the statute. Even you, Mr. Simon, I think were
20 basically happy with it, although there's a couple of issues
21 where you disagree with some of your other -- from the other

1 commenters.

2 I'd like to get back to the practicalities of
3 this. Maybe I should start with just asking Joe, and maybe
4 Tim also -- I was thinking that this was more of a Joe
5 question, but you may also have some insight in this -- how
6 does this work in practice? What do committees do in order
7 to track bundling and why do they do it? Do they feel a
8 need to do it? Does it help them raise more money to do it?
9 And as you said, are people fighting over the credits so
10 that there actually is a lot of interest in maintaining
11 these kinds of accurate records?

12 MR. SANDLER: Yes, there's -- both for party
13 committees and candidate committees there's a significant
14 interest in -- on the part of the raisers to be credited for
15 what they've raised, for their efforts with the committee,
16 and also there's a significant incentive on the part of the
17 candidate committee or the party committee to give credit.
18 So as a practical matter -- and the system is not -- the
19 system is not perfect and committees may have to adjust,
20 make it more precise and come up with some objective -- more
21 objective criteria internally to make this work in response

1 to the new regulations.

2 But basically, in most contribution systems that
3 are maintained by candidates and party committees, there is
4 a means of recognizing when somebody's -- somebody has
5 raised a contribution other than or should be credited with
6 having raised the contribution other than a staff member or
7 a consultant to the committee.

8 MR. JENKINS: Yeah, I very much agree with that
9 and actually as public record would show, I'm a very active
10 fundraiser personally and host many events, so first and
11 foremost, when I do that, as I suggested earlier, the last
12 thing I want is for the member who should be in attendance
13 at the event and should recognize it, but in the absence of
14 that, if I'm not the venue host but I'm one of the sponsors
15 on the invitation, I want it to be very much known that I've
16 done what I purported I was going to do or suggested I would
17 do.

18 The other thing on the committee side is that the
19 -- you know, the folks that work for the candidates are paid
20 on a commission basis. They get a percentage generally of
21 the money that is brought in. That requires detailed

1 accounting and records.

2 So I just think this is -- it's not necessarily a
3 red herring, but I think it's a little bit of a red herring
4 in that again, subject to the \$15,000 threshold issue, which
5 is hugely, I think, material, as long as that 15,000 is the
6 way it should be in my view, then I don't think this is
7 going to come up very often, because people that are at that
8 level are absolutely going to be sort of accounted for.

9 So you raise \$15,000, you're responsible for
10 15,000 of a \$50,000 fundraiser, three people together raise
11 \$50,000, I guarantee you, there will be a record of that.
12 So I think it's -- I think -- you know, I think the -- end
13 of the day, I think this is a little bit -- as I said, a
14 little bit of a red herring.

15 MR. SIMON: If I just may add one point to that.
16 I have no doubt, as I said before, that that's a fair
17 description of common practice. I guess the concern I have
18 is whether the imposition of a new disclosure requirement
19 changes the status quo such that it might then drive at
20 least some bundling to not be written down or that there
21 might be some incentive to not write it down, specifically

1 in order to avoid the disclosure requirement if the
2 Commission's rule allows that, and that's why the
3 Commission's rule shouldn't allow it, and then I think you
4 probably preserve the fact that it's -- in the normal course
5 it would be written down.

6 COMMISSIONER WEINTRAUB: And I guess my question
7 for you, Don, is how big a practical problem do you think
8 this really is going to turn out to be? Because I'm just
9 thinking about my own memory capacity, which ain't as good
10 as it used to be, and just based on what people are
11 voluntarily disclosing about their bundling in the last few
12 cycles, you see these very complicated regimes with
13 different levels, 50,000, 100,000, 250,000, and there's
14 hundreds and hundreds of names on these lists of bundlers.

15 It just doesn't seem likely to me that you could
16 maintain that kind of information in your head. There may
17 be a few random people who could do that, but I know I
18 couldn't. So what's the real concern? Are you concerned
19 that there will be individuals that just won't want to
20 disclose that particular individual, so they'll make sure
21 they don't have a record of that person? Or do you think

1 this is really going to turn into a big loophole?

2 MR. SIMON: Let me make a couple points. One is,
3 you're describing big league presidential level bundling
4 programs, and that's fine, but bundling occurs in
5 congressional races, it could be much smaller amounts of
6 bundling in a given campaign, and they're not all
7 necessarily as formalized as the extreme presidential
8 bundling activities.

9 But I do think the problem could come up in the
10 context of specific lobbyists who don't want to be disclosed
11 or the member doesn't want to disclose that specific
12 lobbyist as a fundraiser. In a kind of Jack Abramoff type
13 situation where a lobbyist becomes radioactive publicly for
14 whatever reason, a member might not want to disclose that
15 that person raised \$100,000 for them. And so there just
16 might be a deal where the lobbyist comes up and says, you
17 know, I'm going to raise this money for you, but let's just
18 not write it down. And the member thinks great, then I
19 don't have to disclose it.

20 I just don't think the Commission should implement
21 a rule that signals that's okay, and I think that's the

1 concern here.

2 COMMISSIONER WEINTRAUB: In the enforcement
3 context, okay, so down the road somebody says, you know
4 what, I know that that lobbyist was out there raising money
5 for that candidate because he asked me for money. He told
6 me to send the money and he said, don't put any numbers on
7 it, no tracking number, just send the check and they'll know
8 it's -- that I raised the money.

9 So let's say we actually get that complaint in and
10 then we depose the member or the finance committee chair,
11 whoever it is --

12 MR. SIMON: Or the lobbyist.

13 COMMISSIONER WEINTRAUB: And the member says,
14 well, but -- but the member has to know about it. I mean,
15 the lobbyist might say well yeah, I was out raising money,
16 but I never told them about it. And then the member comes
17 in and says, well, gee, I didn't know anything about it.
18 Then what do we do?

19 MR. SIMON: Or the lobbyist might say, yeah, I
20 told him about it, and then you have pretty good evidence
21 that the member knew.

1 COMMISSIONER WEINTRAUB: You're right, that would
2 be good evidence, but --

3 MR. SIMON: From an enforcement case, he is only
4 as good as the evidence he can develop based on a reason to
5 believe you should conduct an investigation. But you could
6 have a situation where we have two parties to this
7 transaction, one of them admits that there was that
8 discussion.

9 CHAIRMAN McGAHN: Let's -- I don't mean to
10 interrupt, but it's really not just what this agency will do
11 with this rule, this disclosure regime. Let's take a
12 hypothetical. Let's say there is the next Jack Abramoff
13 comes along and he gets himself caught up in some sort of
14 criminal investigation, and when he is sat down in the chair
15 by law enforcement, they say, what can you give us? And he
16 said, well, I've bundled all these contributions for all
17 these members and they didn't report any of it.

18 And they say, okay, how do you know that? Well, I
19 ran into these guys on the street and they said I raised all
20 this money for you. And you put those members under oath
21 and they're going to be telling the truth, they don't

1 remember that conversation. I mean, let's assume these
2 facts to be true. And then all of a sudden this guy, who's
3 the outside bad actor, is going to essentially remember
4 conversations that may or may not have happened, but no
5 reasonable person on the other side is going to remember and
6 they're going to use that lack of reporting to beat that
7 public official over the head.

8 How do we -- maybe we don't care about that and
9 maybe that's just a natural consequence of the statutory
10 language. But to me it seems like that's not what Congress
11 would have intended, because they wouldn't put that sort of
12 bull's-eye on their own back. So how do I address that
13 concern?

14 MR. SIMON: I think members of Congress did put
15 this reporting obligation on their own back. It had been on
16 the back of the lobbyists and they took it off the
17 lobbyists' back and put it on their own back and they made
18 themselves responsible for the reporting.

19 You know, I'm not quite sure what to say about
20 your specific hypothetical. I mean, that just goes to the
21 credibility of the person, the lobbyist under investigation,

1 and the credibility of the information they're giving as
2 part of a plea bargain or whatever. But I think if there's
3 -- if there's good evidence that the lobbyist told the
4 member and the member therefore knew, the member then had a
5 disclosure obligation.

6 MR. JENKINS: Again, I think that in real life
7 that situation, the lobbyists are always going to want to
8 oversell how much they've done for the member. But in the
9 situation you've cited, if the lobbyist says yeah, I raised
10 \$50,000 for you, the follow-up question is okay, from whom,
11 and when were those checks cut?

12 Last I looked, that's all public information, so
13 that's subject to being verified as well. If you've got
14 \$50,000 worth of personal checks that come in within a
15 condensed time frame, that's pretty good evidence that yep,
16 the member should have known that. I mean, their campaign
17 committee person's not going to say well what a -- this is
18 manna from heaven. Here comes 50,000 bucks we never thought
19 we were going to get and I don't even know who these people
20 are; it's wonderful.

21 That's -- you know, that is something that the

1 campaign is going to know about and I think using the
2 knowledge standard does not necessarily sort of open up the
3 loophole that Mr. Simon is suggesting it does.

4 CHAIRMAN McGAHN: Mr. Vice Chair.

5 COMMISSIONER WALTHER: Let me just say that I take
6 very to heart the command that we have from the legislature
7 to interpret this in the broadest possible way, and so in
8 trying to do it, I'm sure it meant the most reasonable way.
9 But for my own history, being from Nevada all my life and
10 raising money there, it's a little different there than it
11 is here.

12 We know most everybody who's a candidate and some
13 of my best friends are on the other side and it's just the
14 way it is in some of these other states, areas. So there
15 really isn't a need in most instances to have a log. You
16 know it and it's a mental thing. Not that it's
17 unappropriated; it's just that people know if somebody's
18 raising money and how much and somebody comes to you and
19 says, I got that 10,000 for you, that's -- you can put it to
20 the bank.

21 But is that going to be enough? Is knowledge

1 enough if there's no writing? I'd ask maybe Mr. Jenkins.

2 MR. JENKINS: I think if they have the knowledge
3 that I got that \$10,000 for you and that \$10,000 is
4 deposited in your bank account, and the follow-up question
5 would be all right, who contributed it? Yes. I think
6 you're right about Nevada. You're right about places like
7 Alabama and Mississippi; it's just sort of a good 'ole boy
8 network. I get all of that.

9 But once they get here to Washington, it's a
10 little different here. It's a different dynamic and I think
11 these are federal officeholders we're talking about. These
12 are folks that are not necessarily back in a state regime
13 where sometimes there's no disclosure of some of these
14 contributions. The thresholds, as you all know, are all
15 over the map. Some are very high.

16 Here it's a pretty tightly regulated regime and so
17 I think the wink and the nod days are sort of over in terms
18 of whether you can slide \$50,000 into a candidate. And I'll
19 go back to the institutional imperative, which is, you're
20 only regulating lobbyists and entities that essentially
21 employ or retain them through their PACs.

1 Those are -- those are folks that are all about
2 getting the credit versus the guy back at home who went to
3 college with you, and this is -- a lot of Obama supporters
4 are people like that. They don't have the direct interest
5 in the Washington policy debate, at least not as direct an
6 interest. So I just think that you've got an institutional
7 incentive there or sort of a structure where this sort of
8 stealth bundling is probably just a complete non sequitur.

9 MR. SIMON: Well, let me just say--

10 COMMISSIONER WALTHER: Let me just, if I may -- I
11 apologize -- I didn't mean to direct my comments to the good
12 'ole boys that doesn't -- helping the candidate who's not a
13 federal candidate. I'm talking about people who are running
14 for federal office in other states, just because of the way
15 that people live, they know each other. It's a smaller
16 state, like even small world here in some ways.

17 So I didn't mean to imply that there is anything
18 wrong about it. It's just people haven't necessarily
19 finalized it to the same degree they do here because by the
20 way we live, it isn't done. So in those particular cases,
21 I'm interested to know if knowledge is enough, even though -

1 -

2 MR. JENKINS: Well, I'll try to answer the
3 question, but I think first the threshold issue is whether
4 the person you're talking about back in Nevada is a covered
5 entity, if the person is a federal registered lobbyist.

6 COMMISSIONER WALTHER: Let's assume --

7 MR. JENKINS: They are.

8 COMMISSIONER WALTHER: There's lobbyists in Nevada
9 too.

10 MR. JENKINS: Of course, there are. They're
11 federal -- you know, there are a lot of state lobbyists in
12 Nevada; few are federal.

13 COMMISSIONER WALTHER: Let's talk about the
14 federal.

15 MR. JENKINS: Yeah, okay. Let's assume that
16 situation. I think in the case where there's a conversation
17 and the lobbyist says to the member, I'm going to -- I have
18 raised \$10,000 for you, then I think in the enforcement
19 context, if that member is under oath, that member says,
20 well, I remember him saying that, that may impose a higher
21 standard of burden on the member to actually go do the due

1 diligence to make sure it's something that would be
2 disclosed.

3 The \$10,000, again, wouldn't be disclosed because
4 it's not \$15,000. But let's assume it's 15 and none of the
5 funds came from the individual himself or his family, and
6 the facts you just presented, I think in that situation the
7 member would have an obligation. Even though it's not
8 written down anywhere, that would be knowledge. But so --

9 COMMISSIONER WALTHER: Thanks.

10 CHAIRMAN McGAHN: Follow-up along those lines.
11 How far away from the member's knowledge do we go? And what
12 I'm getting at, it's kind of going full circle. This is
13 actually based in part upon one of the questions
14 Commissioner Weintraub had.

15 There are many instances, I think, where the
16 member doesn't actually know necessarily who raised what
17 because they hire professional fundraisers to do that and
18 professional fundraisers, frankly, track everything under
19 the sun, not to give credit so much as to know who gave what
20 and who met who where and oh, this person gave money at that
21 event and therefore, maybe we can -- ask later.

1 They have all kinds of elaborate kind of schemes
2 to -- and I don't use scheme in a bad way, but just
3 spreadsheets and all kinds of things, records that aren't
4 necessarily housed at the campaign and the campaign folks
5 may not necessarily know about all of that. It's the
6 routine sort of documents that fundraisers keep beyond like
7 their own lists and their own system to keep track of their
8 own work product versus what they may give to their campaign
9 clients.

10 Is that the kind of stuff that we would reach out
11 and include in this as to knowledge and/or something we
12 would be able to obtain either in an audit or in enforcement
13 or is -- because they're private consultants. Unless it's
14 in the possession of the campaign, it doesn't count. I'm
15 trying to get at more of a practical question as how this
16 works.

17 MR. SIMON: I think that question's answered by
18 the statute, which in the definition of the type two
19 bundling says credited -- it's not just a matter of member -
20 - says credited by the committee or candidate involved. So
21 knowledge within the scope of the committees and the

1 information, the knowledge the committee possesses, I think
2 is covered by the statute.

3 CHAIRMAN McGAHN: That's what -- that's how I read
4 it; it would be the committee. I agree with that.

5 MR. SANDLER: I agree with that also. Clearly if
6 the -- a lot of what we're talking about in a practical real
7 world, these things are kept track of. They are kept track
8 of by, particularly in the case of candidates, by outside
9 professional fundraisers, but those have to be treated as
10 records of the committee for this purpose.

11 CHAIRMAN McGAHN: But under contracts though with
12 professional fundraisers, not all of the fundraiser's
13 records are the property of the committee, right? I mean, a
14 lot of times they have these deals where they can develop
15 their own lists and some records are really not the
16 committee's records and I'm getting at who's records are
17 they?

18 Is that something that ends up resulting in a
19 crediting because the fundraiser has been writing something
20 down a certain way in their own internal documents and then
21 -- to take a hypothetical, let's say they have an event at a

1 lobbyist's house and they just call it, let's say lobbyist
2 is Joe Smith, Joe Smith event, and there's all sorts of
3 people who show up and the lobbyist doesn't even know really
4 who's at his event in his house because it's really a
5 fundraising event for the campaign.

6 So the lobbyist doesn't think he's getting credit
7 for all that money, nor does the candidate. But the
8 fundraiser writes it down as the Joe Smith event. So now
9 there's a paper trail that shows some kind of crediting that
10 this actually happens. This is kind of how I think people
11 keep records.

12 And my concern is can we discuss this now before
13 we pass a rule and then wake up in two years and realize
14 this is a situation before the Commission and we don't know
15 what to do with it?

16 MR. SANDLER: I guess in our experience with
17 candidates, party committees, in that situation, the
18 fundraiser's going to know who raised that money. If the
19 host fell short and didn't raise the money and the
20 fundraiser had to go out and hustle, they're not going to
21 credit the host with having raised it. That is the very

1 reason that the host doesn't deserve the credit for it in
2 that case.

3 But whatever the record is and the knowledge of
4 that fundraiser as to how that money actually came in,
5 should be, as Don says, attributed to the committee. The
6 committee should be responsible for tracking it and
7 reflecting it in the required disclosures.

8 MR. JENKINS: I actually think in that instance it
9 would be very rare where an agent of the candidate doesn't
10 know. So in that situation, while the candidate may not be
11 knee deep with the paid consultant, the chief of staff on
12 his or her volunteer lunch hour is probably going to be
13 keeping an eye on that Joe Smith event. So somebody who's
14 basically an agent of the candidate will have a sense of how
15 much came out of that event, I think, most often.

16 CHAIRMAN McGAHN: Commissioner Petersen.

17 COMMISSIONER PETERSEN: I just have a quick
18 question that's based on a hypothetical and I think this
19 hypothetical based on the information I'm hearing may be a
20 little bit far-fetched, but I do think it goes to the issue
21 of what is crediting. A lot of our discussion here is how

1 are we going to define that term?

2 Let's imagine a candidate who decides at the
3 outset for whatever reason, that they are not going to
4 establish any system for tracking or crediting bundlers.
5 Maybe it's because they decide they want to -- maybe it's a
6 statement that they want to say that we don't want to have
7 anybody feel like we are beholden to them. Maybe they just
8 feel like we don't want to go to the hassle of the paperwork
9 burden.

10 It may be an unwise decision, but let's just
11 assume that that's the case. What happens then if a
12 lobbyist decides that he wants to contact several of his
13 acquaintances and say, I want you to send a check to this
14 candidate and his or her campaign and make some sort of
15 notation on the check or include some sort of note letting
16 the candidate know that I'm the one responsible for having
17 raised and generated these contributions?

18 And let's further assume that the total amount
19 that comes in as a result of this lobbyist's efforts exceeds
20 the applicable threshold during the covered period. Now if
21 these come in from -- and again, the candidate made a point

1 that they do not want to -- that they're not going to reward
2 this sort of activity, they're not going to -- you know,
3 there aren't going to be any special titles or designations.
4 In fact, maybe according to this candidate, they're going to
5 be disappointed that maybe their whole campaign is going to
6 be based on this I don't want to feel beholden to any big --
7 any big interests.

8 So regardless of the fact that the campaign
9 decided not to make records of this sort of activity, would
10 it be your opinion that this candidate would still have to
11 report these contributions as having been bundled? I guess
12 I'll start with you, Mr. Simon.

13 MR. SIMON: I guess I agree with your observation
14 that the hypothetical is far-fetched, but having said that -
15 - you know, look to me it's analogous to a candidate who as
16 a matter of kind of political posture says, I'm not going to
17 accept any PAC contributions and a check from a PAC comes in
18 the mail. He's got to remedy, which is to send the check
19 back.

20 And I would say the same thing here. I think it
21 falls within the statutory definition. I think he knows, he

1 recognizes that the money was raised by the lobbyist and I
2 think if he wants to avoid the obligation to report it, he
3 should just return the check.

4 MR. JENKINS: I absolutely agree with Don on that.
5 That clearly is a designation. That's sort of the Bush
6 Ranger/Pioneer model and the remedy is very simple, just if
7 you want to maintain that public posture then you got to
8 return those checks.

9 MR. SANDLER: I agree with that too. As a matter
10 of fact, in terms of the front end of this, as we sit here
11 today, the Democratic National Committee does not accept
12 contributions raised by lobbyists, so it's checked for and
13 they make it their business to know who's raised it and they
14 don't accept it. That's going on right now.

15 COMMISSIONER PETERSEN: Okay, just a couple of
16 other quick questions. Just going to a couple different
17 areas. Going back to covered period, Mr. Sandler, when I
18 originally read your remarks regarding covered period, I had
19 originally thought that maybe you were arguing that -- that
20 you were taking a position that would have been quite a bit
21 different than Mr. Simon's position, but it sounds like now

1 that while you do not believe that there needs to be an
2 aggregate semi-annual report that a committee would have to
3 submit, that you would still -- that the semi-annual period
4 is still a relevant period for determining whether the
5 applicable threshold is triggered?

6 MR. SANDLER: Yes, we think it would be confusing
7 and misleading actually to have two reports reporting the
8 same contributions, but the semi-annual should be applied
9 for purposes of the threshold and then people can report
10 what they raised, what's bundled in the actual quarter.

11 COMMISSIONER PETERSEN: And then the final
12 question I have is just on this issue of agency. You
13 mentioned that in the time that -- between having submitted
14 your original remarks and this hearing today that you've
15 come to a different conclusion that maybe there should be
16 some sort of lines drawn where there's a presumption, maybe
17 a rebuttal presumption, that certain officers within a --
18 within -- you know, a registrant, they should be considered
19 as having -- acting on behalf of that registrant. Where do
20 you think those lines should be drawn?

21 MR. SANDLER: I don't have any firm, detailed idea

1 about that, but I think that it would be appropriate to draw
2 them at the senior levels of a company in terms of its
3 officers and the people who are part of the government
4 relations operation of the company would be -- would be a
5 logical place to draw the line.

6 Because I do recognize that if you just limit it
7 to people who are listed on the LDA report, the CEO of a
8 major company that retains lobbyists in-house and they hire
9 25 different lobbying firms here in D.C., clearly the intent
10 of the law is to capture contributions bundled by that
11 individual, even though they themselves are not listed on
12 the LDA.

13 COMMISSIONER PETERSEN: Mr. Jenkins -- agency?

14 MR. JENKINS: Yeah, I actually -- I take a little
15 bit of a different view and I would actually suggest the
16 Commission look to the volunteer exception regulations as
17 maybe your guideposts here. There they have this per se not
18 volunteer activity if work is performed at the direction of
19 a superior, and I think that concept works better than
20 what's been suggested by Joe.

21 The problem there is is lobbying -- the lobbyist

1 definition is a very important sort of material element of
2 this statute and its hugely important on the LDA side too.
3 It doesn't take that much for somebody to become a lobbyist,
4 so if you have a senior vice president for government
5 affairs who's not the line lobbyist, you know, there's a
6 government affairs V.P. and then all these directors of
7 government affairs who do nothing but lobby, that person
8 almost certainly will be a lobbyist under that definition
9 where it's one or more contacts and 20 percent of their time
10 generally for that period is engaged in lobbying activities.
11 So if they're supervising and sort of overseeing that
12 activity, that counts as a lobbying activity.

13 So in the CEO situation, there are a lot of CEOs
14 out there that are very politically active and just because
15 they are CEOs of a company that have people who are engaged
16 in lobbying, I don't think that necessarily is justified by
17 the four corners of the statute. So I agree that the agency
18 concept needs to be embodied in this, but I think it needs
19 to really be more in the context of are you truly doing it
20 as a volunteer or are you doing it within the context of
21 your employment?

1 And I think some of that issue, maybe you can look
2 back at your -- at your Freddie -- Freddie Mac settlement.
3 I think some of those issues came out there a little bit
4 too. So I agree the agency has to be covered, but not
5 necessarily as broadly.

6 CHAIRMAN McGAHN: If I could follow-up on that.
7 With respect to the statutory language, where is the --
8 where is the hook to hang that hat on as far as an agency
9 concept that based upon the statutory language?

10 MR. JENKINS: I think it -- the fact -- if
11 somebody is acting in the shoes of another -- and I think
12 the contribution in the name of another is a good corollary
13 that was drawn in somebody's testimony -- but I think if
14 you're acting on behalf of that registered lobbyist -- the
15 short answer is, it's not in the statute. But if you're
16 acting on behalf of the registered lobbyist, at the
17 direction of a registered lobbyist, if you're the PAC
18 supervisor or the PAC coordinator, not a registered
19 lobbyist, but you essentially are the name and the face of
20 the PAC, then I think that should be -- that should be
21 disclosed.

1 CHAIRMAN McGAHN: Commissioner Weintraub?

2 COMMISSIONER WEINTRAUB: Thank you. I just want
3 to follow-up on that precise point, because I've been
4 struggling with this concept also, and I think where it
5 comes from in the statute is that there is a requirement
6 that registrants disclose their bundling and -- registrants
7 or organizations -- and organizations only act through
8 individuals. So at some point you have to figure out, don't
9 we have to figure out who acts for the registrant?

10 MR. SIMON: I agree with that. I think that's
11 exactly the right answer, that the agency concept --

12 COMMISSIONER WEINTRAUB: Thank you.

13 MR. SIMON: Agency concept is necessarily embedded
14 in the statutory requirements.

15 MR. JENKINS: I disagree and the reason I disagree
16 is that under the Lobbying Disclosure Act, they intended to
17 capture those folks in the gift rules -- so actually it may
18 be in the Senate now, gift rules. Those gift rules say that
19 it's prohibited for a member or staffer to accept a gift
20 from a foreign agent, a registered lobbyist or any entity
21 that employs or retains either and the interpretation there

1 is anybody who works for him. And we don't have that
2 additional language in this statute.

3 COMMISSIONER WEINTRAUB: But we do have the
4 language that says in addition to lobbyists.

5 MR. JENKINS: The registrant itself.

6 COMMISSIONER WEINTRAUB: Registrant.

7 MR. JENKINS: Right, which is an organization. In
8 that situation, what they say is, they basically say the PAC
9 that's connected to the registrant.

10 COMMISSIONER WEINTRAUB: But that's a separate
11 category. There's registrants, lobbyists and PACs --

12 MR. JENKINS: Yeah, the registrants are going to
13 be prohibited sources almost invariably, but they don't talk
14 about anybody who retains or employs; they don't get to that
15 granular level.

16 COMMISSIONER WEINTRAUB: So what does a registrant
17 mean that doesn't -- that adds something to lobbyists and
18 PAC established or controlled by a registrant or lobbyist?

19 MR. JENKINS: I think it essentially is tied into
20 the PAC.

21 COMMISSIONER WEINTRAUB: But that would make it

1 meaningless.

2 CHAIRMAN McGAHN: Or it could be -- it could be an
3 organization. We just had an AO about whether a law firm
4 was essentially a prohibited source or not, could they have
5 a PAC? There could be organizations that are not prohibited
6 sources. Not all organizations are.

7 MR. JENKINS: That's correct.

8 CHAIRMAN McGAHN: But my innocent question was
9 really based more upon -- BCRA uses the word "agent," this
10 statute doesn't, and I was seeing if there's some sort of
11 significance to be drawn from, because Congress sometimes
12 expressly talks about agents, sometimes they don't. I just
13 don't want to be in a situation where I'm misreading or
14 over-reading significance or under reading significance.
15 That was the point of my question. But you got a whole much
16 more beneficial discussion out of it.

17 MR. SIMON: If I could make one point in that
18 context. Several of the comments deal with this point. I
19 think it's important to surface it. There are prohibited
20 sources, prohibited sources in that they can't make
21 contributions and they can't facilitate contributions. But

1 there are -- those same prohibited sources can bundle.

2 Now let me give you an example. And this is
3 explicit in the Commission's facilitation regs, because
4 facilitation regs -- actually, let me read the language --
5 say the following -- facilitating and making contributions --
6 - this is 114.2(f) -- facilitating and making contributions
7 does not include the following activities if conducted by a
8 corporation or labor organization. And it says soliciting
9 contributions to be sent directly to candidates if the
10 solicitation is directed to the restricted class.

11 So a corporation can solicit contributions for a
12 candidate which -- and tell the candidate, we're sending --
13 we're getting all these contributions to you from our
14 restricted class. That's bundling. That would have to be
15 disclosed.

16 CHAIRMAN McGAHN: That would be the registrant?

17 MR. SIMON: The registrant.

18 CHAIRMAN McGAHN: Even though it would otherwise
19 be prohibited, there wasn't a restricted clause.

20 MR. SIMON: Right, exactly. Exactly. So the
21 registrant, a lobbying organization, which is a corporation,

1 can nonetheless be a bundler under the LDA.

2 CHAIRMAN McGAHN: Okay, so that language is not
3 really superfluous. It does --

4 MR. SIMON: Correct. That's a good point.

5 CHAIRMAN McGAHN: Thanks. Commissioner Hunter.

6 COMMISSIONER HUNTER: Mr. Sandler, so it is
7 conceivable, or are you agreeing that it's possible that a
8 CEO of a corporation may host a fundraiser at his or her
9 home and may even bundle, but as long as -- and you're
10 saying that that could be covered by the act?

11 MR. SANDLER: I think the attempt is to cover it,
12 yes, even though that CEO didn't cross the LDA threshold and
13 therefore isn't going to be -- isn't listed individually as
14 a lobbyist for that.

15 COMMISSIONER HUNTER: But just because the CEO's
16 company hires a lobbyist or has an in-house lobbyist, he
17 would be covered just by virtue of that fact?

18 MR. SANDLER: Well, the intent -- I think that the
19 letter from Senator Obama, Senator Feingold, Congressman Van
20 Holland does capture what the intent of the law is and
21 basically what they're saying is that just because -- just

1 because somebody works for a lobbying entity doesn't mean he
2 or she is acting on the entity's behalf.

3 The touchstone is he's getting credit for the
4 fundraising. Is it the employer or the employee? If the
5 employee is getting credit and the employee is not a
6 lobbyist, no reporting is required. If the employer is
7 getting credit and the employer is a lobbyist registrant,
8 there's no question that reporting is required.

9 The question is, how do you -- because everybody
10 reports their occupation and every bundler has to disclose
11 their occupation and employer. The filer has to keep that
12 information. How do you tell who's getting the credit? I
13 think there have -- you know, there should be some kind of
14 objective, ideally, criteria or presumptions that the
15 employer is the one getting the credit in certain situations
16 where the individual doing a bundling is really at the upper
17 reaches of the company or acting in the government relations
18 area.

19 COMMISSIONER HUNTER: I think though, as Mr.
20 Jenkins I think suggested, it's conceivable, at least in my
21 mind, that many CEOs are not acting on behalf of their

1 corporation. They may want to open their home and host an
2 event and they may not even want to be credited for the
3 contributions because they're doing it in their personal
4 capacity.

5 Often in order for it to be credited to the
6 company, they may need to get permission from their board.
7 I mean, there's all kinds of things. They may not want to
8 be attached with some kind of bundling contribution on
9 behalf of their corporation. I happen to know some CEOs who
10 have done that, so I don't think it's inconceivable at all.

11 MR. JENKINS: Also, to your point, I agree that
12 you just -- where do you draw the line? It's almost
13 impossible to find a finite demarcation point there. A lot
14 of CEOs have a lot of personal relationships with members of
15 Congress that sometimes the government affairs people don't
16 even appreciate. They're titans in their own sort of regard
17 and members of Congress are pretty high falutin themselves,
18 so they might have relationships outside of that.

19 I think if you can tie it back to this notion of
20 is it truly volunteer versus if it's something you're doing
21 because you're being directed to do it or it's within your

1 employment capacity, so back to the Freddie Mac situation,
2 your fundraisers were regular order. And while there may
3 have been a personal relationship, that -- to basically make
4 the case that that was part of the employment context I
5 think is -- was pretty easy to do in that situation.

6 But a random CEO fundraiser, and it may be kind of
7 a non sequitur thing in terms of the member's jurisdiction,
8 what committee are they on, that -- I just don't think you
9 can -- you can draw the line there.

10 COMMISSIONER HUNTER: Thank you.

11 CHAIRMAN McGAHN: Commissioner Bauerly.

12 COMMISSIONER BAUERLY: My question goes to the
13 ultimate, the end product of what we're trying to do here,
14 is provide data to the public and how usable that might be,
15 and I'd appreciate hearing from all three of you. It goes
16 to the question of how do we allocate it in an example where
17 there's a fundraiser with many hosts? I'll give you a
18 hypothetical with some easy math for my purposes.

19 We have a fundraiser that raises \$150,000. There
20 are 10 hosts, so each of them, if we -- there are two ways
21 to attribute that credit, either 15,000 each, which would

1 require disclosure, or 150 each. If we take the second
2 approach, it seems to me that the end result would be the
3 public would -- might have an inaccurate view of how much
4 money the lobbyists were actually involved in if that
5 campaign raised \$2 million total. If we used the \$15,000
6 for each lobbyist approach, there would be \$150,000
7 attributable to that set of bundlers, which would reflect
8 the actual amount that came in the door for the campaign.

9 If we use the approach that they each are given
10 credit for the \$150,000, which was the total from the
11 fundraiser, it might appear that the lobbyists were
12 responsible for \$1.5 million of fundraising for that
13 campaign. That wouldn't be an accurate representation of
14 what -- how much money actually flowed into the campaign,
15 but under the crediting scenario, it might be a
16 representation of how much they were credited with.

17 So is this something we should be concerned about?
18 If it something we should be concerned about in writing this
19 rule, how do we provide the information to the public in the
20 most usable way? Because I think that is the goal here is
21 disclosure to the public and providing them, in my view,

1 with accurate information about the role that lobbyists are
2 playing in this campaign.

3 MR. SANDLER: I think there's two different
4 issues. One is you don't want the match situation if there
5 were 17, rather 11 hosts sharing it, that none of it gets
6 disclosed. I think that's the concern.

7 As my partner, Neil Reiff, reminded me, this is a
8 situation where no one's going to expect the numbers
9 disclosed on this to tie back into anything else in the
10 report. In fact, we would suggest that it be a separate
11 schedule in the FEC report and there's not going to be any -
12 - there's no way to crosscheck it. There's no occasion to
13 crosscheck.

14 But it certainly wouldn't be inconsistent to say
15 for purposes of the threshold and even disclosure, you would
16 attribute the entire amount of the fundraiser to the -- to
17 each of these lobbyists, but there could be some way to ask
18 for this or a memo schedule situation so that it's clear
19 that they -- you know, they were all involved in the same
20 event. I mean, given that option, the filers wouldn't --
21 wouldn't interfere with the goal that Mr. Simon and the

1 other commenters --

2 MR. SIMON: Let me -- let me strongly associate
3 myself with Joe's remarks before Mr. Jenkins goes the other
4 way in this question. This is an important issue.

5 MR. JENKINS: You know I wouldn't do that.

6 MR. SIMON: This is an important issue because
7 what's going to happen if you adopt the pro rata methodology
8 is that the 11th lobbyist will be added as a co-host and
9 none of it gets disclosed. I urge you not to do that
10 because it marks an easy path to eviscerating the obligation
11 to disclose bundling conducted through fundraising events.

12 This is example A, Exhibit A of what that
13 statutory language about writing regulations that provide
14 for the broadest possible disclosure means because --

15 COMMISSIONER BAUERLY: Can I interrupt you,
16 because my question isn't -- I understand what your view is
17 on which one. But what does -- what is the public supposed
18 to do with this information, because it appears to be out of
19 -- it doesn't reflect real dollars. And one of the things
20 that I might want to do as a citizen is understand on a
21 percentage basis or how much in proportion a campaign is

1 receiving from lobbyists. That might be something I want to
2 do and this isn't going to give me that answer.

3 MR. SIMON: Yeah, and I think the answer to that
4 question, and I think it's an important point, because a
5 goal of the statute is to provide the public with accurate
6 information. In the floor colloquy, Senators Obama and
7 Feingold discuss this very question and suggested what I
8 think is the right answer, which is. As Joe said, that the
9 Commission design the form so that each lobbyist discloses
10 having raised the entire amount at the event and that the
11 form also lists the other lobbyists who were the co-hosts.

12 So the public knows that when they see \$150,000
13 for lobbyist A, it will also reflect the names of lobbyists
14 B through G, or whatever it is. When they see that same
15 \$150,000 disclosed for lobbyist B, they will not double
16 count that money. They'll know it's the same money; it's
17 just attributed to multiple lobbyists.

18 MR. JENKINS: Thank you for asking the question.
19 If you follow that interpretation, that \$15,000 threshold
20 has zero meaning. There's no point in having it in the
21 statute. Essentially what the statute should have said is,

1 no matter what, if you raise more than one and if you bundle
2 two or more contributions, you've got to disclose it. So
3 let's take your numbers and let's use some other easy
4 numbers and let's say everybody on the 50 lobbyists, that
5 each raised \$2,500, that's a real example. There are tons
6 of those, where people in their personal capacity, and it's
7 sometimes personal money they're raising, that means that
8 it's going to be disclosed as 50 times \$100,000.

9 It is incredibly misleading. It is incredibly
10 inaccurate. It renders meaningless the \$15,000 and whatever
11 Mr. Simon says, it will not only be interpreted mistakenly,
12 it will be reported that way. And the Center for Responsive
13 Politics and Common Cause and those groups will take that
14 number and they will put it out there in the public domain
15 in the misleading fashion.

16 I just -- I've seen it. They take numbers that
17 are apples, oranges and pears and they lump them all in
18 together and put them in as an apple. That \$15,000 was a
19 product of compromise. It was in neither the House nor the
20 Senate bill and the requirement that the candidates disclose
21 it and not the lobbyist is very material as far as accuracy.

1 The LDA does not mandate accuracy. You round to
2 the nearest \$20,000. You do the best you can on specific
3 issue areas. They took it out of there and they put it in
4 your accounting regime, so you cannot go that direction
5 unless you basically want to make that \$15,000 a completely
6 meaningless provision.

7 COMMISSIONER PETERSEN: I just have one quick
8 follow-up to this discussion. There is some legislative
9 history. We've spoken a great deal about Senator Feingold
10 and Senator Obama and Congressman Van Holland and the
11 statements that they put on the public record. There's some
12 additional legislative history that we've been looking at.
13 It's the section by section summary that was put together by
14 Senator Majority Leader Reid and also Senator Feinstein,
15 chair of the Rules Committee with jurisdiction over campaign
16 finance law, and Senator Lieberman, whose committee has
17 jurisdiction over the LDA.

18 They included a statement in their summary of this
19 bundling -- for section 204, the bill dealing with bundling.
20 They say an event hosted by a registered lobbyist may
21 trigger the disclosure requirement if the committee credits

1 the lobbyist with the proceeds of the fundraiser through
2 record designation or other form of recognition.

3 Would seem from my reading of that particular
4 legislative history that there's a contemplation that word
5 "may," but the disclosure is going to be dependent on how
6 the committee itself is going to credit how those proceeds
7 were raised. So I think that the point that Mr. Jenkins
8 brings up, there is some legislative history that would --
9 that would appear to support that reading.

10 MR. JENKINS: To that point, you're not going to
11 get credit from the committee for \$150,000 if you raise 15;
12 it's just not the way it works. They're going to have a
13 list that says, you raise this much. Now where I agree to
14 sort of say let's pierce the veil is if there are 10 people
15 at 15 or let's say 11 at 15 to "evade it," if there are
16 other means of designating, in other words, if there is a
17 record or there is a code number on the checks, and I'm one
18 of the 11 and I have 17,000 in my column, that's a bundling
19 reportable event.

20 But in the absence of any other way to ascertain
21 who did what, I think you just have to divide it up by the

1 number of sponsors.

2 MR. SIMON: If I could respond to your point,
3 Commissioner. I just don't read that statement, the section
4 by section thing, consistent with what we're arguing here.
5 I mean, you can imagine a small fundraising event co-hosted
6 by a few lobbyists that collects \$12,000. It doesn't
7 trigger the threshold in that event.

8 The event would not be subject to reporting and I
9 think -- I think that's consistent with the statement and
10 the statement doesn't really address at all the question of
11 whether the total proceeds of the event should be attributed
12 to each co-host. And again, the floor statements of
13 Senators Obama and Feingold do very expressly address this
14 point.

15 CHAIRMAN McGAHN: What about the situation where,
16 let's take an event that raises \$30,000. You have three
17 lobbyists. First lobbyist shows up with \$20,000 worth of
18 checks. The other two show up with \$5,000 each. To
19 metaphysical certainty, we know those are the facts.

20 Then the campaign's going to file a report under
21 penalty of perjury that says they each get 30 -- they each

1 are credited with 30,000. That seems to be kind of an
2 inconsistency there. How do we deal with that situation, a
3 million dollar event or 11 lobbyists or any of these other
4 situations that are very real situations, but something that
5 actually does happen, somebody shows up with more checks
6 than the other two guys and the other two guys are
7 essentially going along for the ride and are not being
8 credited by the campaign for be it \$20,000, they're only
9 being credited for five?

10 MR. SIMON: You know, it's a good question.

11 CHAIRMAN McGAHN: Thank you.

12 MR. SIMON: Well, it's a hard -- it's a hard
13 question. The -- I just think the fundraising events are
14 sort of a special case of bundling and I think they're --
15 that's the way their discussed in the legislative history.
16 I just think with a fundraising event, you've got sort of
17 objective indicia of who's responsible for raising the
18 money?

19 The co-hosts are sharing in the publicity of the
20 event. Their names are associated with the event. I just
21 think the clearest public record will be created by not

1 getting into a kind of subdivision of the amounts prorated
2 among them by some methodology, but just attributing the
3 full amount to all of them.

4 CHAIRMAN McGAHN: But even though the statute
5 seems to talk about how the committee or how the member
6 credits it, even though there may be an appearance issue,
7 it's really the crediting; I mean, could the report have
8 maybe somehow an entry for \$30,000 in memo entries saying
9 these three people sponsored it and maybe break down? It
10 just seems to me the report needs to be accurate and not a
11 guess, but yet disclose that there were three people who
12 hosted the event even though maybe individually they would
13 not trigger.

14 Is there a way to do the report that would
15 actually -- would have been more closer to reality if we
16 know that -- we don't want people filing false reports
17 because people are going to rely on these. But on the other
18 hand, we want to probably get at the situation you're
19 raising. How do we -- can we do both?

20 MR. SANDLER: The sponsors also made it clear that
21 this actually -- this system is to be based on the money

1 that's actually brought in. I mean, I think in the
2 situation you mentioned where people host an event and the -
3 - to be on the host committee they had to say write or raise
4 15 and somebody falls short, you're not going to be credited
5 for it.

6 I think the situation we're talking about is where
7 they're all recognized as co-host of the event and in a more
8 realistic situation, if there's 25 different individuals,
9 and they're all each asked to raise \$3,000 and that's what
10 their -- they're not going to be considered, in no sense of
11 the word "credit" are they being credited with the whole
12 amount.

13 I think the situation we're taking about is where
14 there's a couple of people who are co-hosting an event and
15 that the full amount is credited on the committee's books.
16 In that situation, you said in the comments, it shouldn't be
17 prorated. The whole amount should be -- you know, should be
18 credited to him.

19 MR. JENKINS: With all respect, that never
20 happens. If it's a \$30,000 event, the books don't reflect
21 \$60,000 worth of receipts. And I think your example, Mr.

1 Chairman, is a great one; very clear what the disclosure
2 should be there. The person that raised \$20,000, where
3 there is a means of recognizing that, there's a tracking
4 mechanism, that person gets disclosed as having bundled
5 \$20,000, and the other 10 doesn't show up until or unless
6 those lobbyists do more fundraising within that reporting
7 period and they trip the 15,000 as individual lobbyists.

8 The word "aggregate" is not used in the statute.
9 The word "aggregate" was used in the Senate provision. And
10 again, to the -- it's a wish list of legislative history.
11 They lost on the bundling provision. It was a very heated
12 debate. It was the single provision that was holding up
13 enactment of that -- of that statute -- passage of that
14 statute in Congress and what emerged was none of the above,
15 and that's very notable from a legislative history
16 standpoint.

17 That's -- you track the evolution of the statute,
18 that signals unequivocal intent. And to do it -- to do it -
19 - I mean, how you're going to say for the 3,000 times 30
20 equals 90, we're not going to disclose that, but we are
21 going to disclose 10 times three equals 30 as 30. That's

1 just inconsistent. And you have to be accurate and from the
2 public record standpoint, it will be incredibly misleading,
3 notwithstanding memo entries and asterisks and all that.
4 Nobody reads those.

5 And what they want to see is wow, \$1.5 million was
6 raised by X company PAC for this guy. Well, it could not be
7 more inaccurate and there will not be \$1.5 million worth of
8 credit attributed to that PAC and it completely undermines
9 the global accuracy of those records. You said let's say
10 they in total raised \$3 million in the cycle, well that's
11 not going to sync up with this 1.5 million on a separate
12 schedule. I don't think you want to create schedules that
13 are inaccurate.

14 MR. SIMON: Could I just briefly respond?

15 CHAIRMAN McGAHN: Sure. Please do, but make it
16 brief.

17 MR. SIMON: I think it would be a surprise to
18 Senators Feingold and Obama that they lost on this
19 legislation. I think there is a way for the Commission to
20 design the form to make it clear how the money works, to
21 make it clear in the case of fundraising events that there's

1 shared responsibility, and to make it clear that the amount
2 attributed to a fundraising event should not be double or
3 triple counted. I think that's really just a matter of
4 draftsmanship and how the forms are created.

5 CHAIRMAN McGAHN: To the extent any commenters
6 have an actual formal suggestion, we'd be happy to take
7 supplemental comments on how to actually do the form. I
8 don't want to have forms that we know people are signing
9 under penalty of perjury that are arguably not accurate. So
10 if there's a way to do the form, that may help. But I
11 actually want to go to the general counsel, who may have
12 some questions, since we're getting a little short on time.

13 MS. DUNCAN: Yeah, given the time, I just have one
14 follow-up question. I wanted to revisit the issue of under
15 what circumstances a non-lobbyist employee of a registrant,
16 under what circumstances the rules, the reporting rules
17 would cover that individual. Mr. Sandler I think has
18 suggested an objective test with a set of presumptions and
19 Mr. Jenkins, you have suggested using the volunteer
20 standard.

21 I just have a practical question about that. How

1 does the reporting committee know when the individual is
2 acting as a volunteer or acting on his or her own behalf, or
3 acting on behalf of the registrant, particularly in the
4 example that you give in your comments, which has to do with
5 an administrative assistant who is sort of pressed into
6 taking action, taking fundraising action on behalf of the
7 registrant?

8 MR. JENKINS: Yeah, I mean, I think that's a
9 difficult mechanical issue to navigate. I think any of the
10 solutions that have been proposed are very difficult to sort
11 of get your arms around from an enforcement standpoint.

12 I guess what I would say is while it's on the
13 committee, it's the burden on the committee, I think that
14 the committees are pretty sophisticated and if you have PAC
15 manager, for example, in the title of the bundler, or you
16 have as the person who's doing the work, the administrative
17 assistant to the vice president for government affairs, I
18 think that creates a reasonable inference that there's some
19 evasion going on there. It's not perfect, I grant you, and
20 I understand the concern you've raised.

21 MS. DUNCAN: Thank you.

1 CHAIRMAN McGAHN: Mr. Vice Chair.

2 VICE CHAIRMAN WALTHER: I'd just like to make a
3 comment, who's present here today is Bob Lenhard, our former
4 chairman, who worked very hard at this NPRM and we give him
5 a lot of credit for the hard work and the thoughtfulness
6 that went into this. It's great to see you here.

7 I want to make one other comment. We never have
8 talked about the situation where you can have a lobbyist and
9 five people who are co-hosts are not lobbyist. At that
10 point, things can get watered down quickly, and I'm worried
11 about the arbitrariness of an automatic pro rata superseding
12 any other method of credit here. We don't have time to go
13 into it, but it's a thought that nags me.

14 CHAIRMAN McGAHN: Why don't we do this, actually.
15 Does the Office of Staff Director have anything?

16 MR. GIBSON: I don't.

17 CHAIRMAN McGAHN: Okay, thank you, Mr. Gibson.
18 Why don't we hold the record open for a week for
19 supplemental comments in the event that people have things
20 to follow-up on, whether it's a suggestion on how to report
21 or to address actually that concern, because that was one on

1 my list, what if you have one lobbyist and a bunch of other
2 hosts, does that still mean the lobbyist is automatically
3 credited or can it be prorated? Because for me it's more
4 practical how we implement this statute.

5 So the record can be held open for one week
6 without objection. I don't -- no objection then, so
7 ordered. With that, it is -- the time for this panel has
8 expired. On behalf of the Commission, I want to thank the
9 commenters. I think that it's been very helpful and really
10 helpful to me and I'm sure I speak for all, very helpful to
11 all of us.

12 Thank you for your time and your effort. With
13 that, we are going to recess for 13 minutes and reconvene at
14 11:30 for the second panel.

15 (Recess)

16 CHAIRMAN McGAHN: The special session of the
17 Federal Election Commission reconvenes. The second panel is
18 Mr. Paul Ryan, the Campaign Legal Center; Marc Elias, here
19 as Marc Elias, not on behalf of a client; and Craig Holman,
20 here on behalf of Public Citizen.

21 Each witness will have five minutes to make an

1 opening statement. We're using the lights; thought that
2 would be a nice touch. The green light at the witness table
3 will start to flash when the person speaking has one minute
4 left. The yellow light will go on with 30 seconds, and red
5 means wrap it up. The balance of time is reserved for
6 questioning by the Commission and general counsel and the
7 Office of Staff Director.

8 How we did the first panel, you probably came in
9 at some point, is more of a free forum and my preference is
10 more the Chairman Lenhard model where commissioners can
11 drill down on particular issues and not necessarily in an
12 orderly fashion take turns because as a former witness, I
13 found that it gets frustrating when you get on a role and
14 then the time expires, another commissioner starts asking
15 about something else and three commissioners later you come
16 back to the topic that was almost exhausted. So I think the
17 more flowing system works for me.

18 So with that, we -- to fall, I guess, to the
19 alphabet or drawing straws, with no straws we'll do the
20 alphabet, so Mr. Elias, you win the alphabet game.

21 MR. ELIAS: Well, I'm going to be brief and not

1 use my full five minutes hopefully and answer the questions
2 that you all have. Let me first repeat at the outset that
3 I'm here only as a private citizen, as I said to someone
4 earlier, petitioning my government for redress of my
5 grievances. And I'm not here on behalf of any client. I
6 have a number of --

7 COMMISSIONER WEINTRAUB: We'll be here all day.

8 MR. ELIAS: I have a number of clients with
9 different -- with no doubt different views from each other
10 on these topics. I decided that I would submit comments on
11 my own behalf really to represent only my own views on these
12 and no one else's, so I hope that that's understood and
13 respected.

14 I also wanted to say at the outset what a pleasure
15 it is to be before the newly reconstituted Federal Election
16 Commission. I have testified on a number of matters with
17 the chairman in rulemakings in the past and it is therefore
18 both a pleasure and slightly intimidating to now be
19 testifying before him.

20 To add to this pressure, I have two former Senate
21 staffers who were present during the consideration and

1 passage of this very piece of legislation and one
2 commissioner who has made it a good chunk of her
3 professional life trying to move towards bundling disclosure
4 more generally. So I will be brief in my introduction, but
5 it is truly a pleasure to be here today and particularly to
6 be here today testifying on an issue that is really a blank
7 canvas.

8 It is rare for those of us who were not in
9 practice in the mid-seventies to have an opportunity to
10 address an issue that really has never been addressed before
11 by the Commission, and in that sense, this is kind of a
12 historic opportunity to sort of take a new concept, even in
13 some sense, McCain-Feingold was the implementation of old
14 concepts or that had to do statutory framework.

15 But this is really an opportunity to testify on
16 something that is wholly new. And with that in mind, I want
17 to back up. I heard only portions of the panel before me,
18 but I want to back up and sort of take this to what I think
19 is its most basic level.

20 What I understood Congress to be doing, from my
21 vantage point, was something very, very simple, which is

1 that at the end of the night, at the end of the night of a
2 successful fundraiser, or the end of a quarter of a
3 successful fundraising period, or an unsuccessful
4 fundraising period, a member of Congress or a candidate
5 would sit back with their finance director and they'd say,
6 gee, this was a good quarter, this was a good event, how did
7 we raise the money?

8 And it wouldn't be based on pro rata. It wouldn't
9 be based on double counting. It would be based on frankly
10 what campaigns do, which is that they know they raised
11 \$200,000, and they can tell you to the penny who raised that
12 money. Why? Because that's their business. Their business
13 is in being able to track money and report it accurately.

14 So one of the essential issues in this rulemaking
15 I'll just preview for you. I oppose both the pro rata and
16 the double counting approach. To me, the answer ought to be
17 nothing more complicated than the subjective, not objective,
18 but the subjective belief that the member and the campaign
19 have about who raised the money. Why is that?

20 Well, let me step even further back, how we wound
21 up with this legislation. We wound up with this legislation

1 because the Bush Campaign did something very clever, and I
2 say that as the former general counsel to the Kerry/Edwards
3 Campaign. It was clever and successful, which is it came up
4 with a very, very sophisticated system of tracking who was
5 raising money for it and then it gave them titles and it
6 gave them codes.

7 So the Bush Campaign at any one time could tell
8 you that person X had raised and was credited with having
9 raised \$100,000 or \$250,000 or \$188,253.72. They could --
10 they tracked it, they credited it through records and other
11 forms of designation, titles and the like, and they were
12 able to then keep that internal.

13 Well the press came along and said if you know
14 that internally, why don't you tell us? And now Congress
15 has come along and said, if you know this, come and tell us.

16 No one ever questioned whether or not the Ranger
17 or the Pioneer had a right to be reported or tracked a
18 certain way, always from the standpoint of the Bush
19 Campaign. Why? Because if the Bush Campaign believed you
20 raised \$250,000, that's what mattered, right? In the eyes
21 of the public and the eyes of disclosure, what mattered was

1 what does the officeholder or the candidate believe the
2 lobbyist has done for them?

3 Because that's presumably what's significant in
4 whether or not that lobbyist is going to receive some
5 special benefit or preference down the road. So I want to
6 begin by saying that I think we should simplify this down
7 from what I think we've gotten slightly, and the standard
8 for all of these things ought to be, what did the campaign
9 believe, what did they track, what did they credit, and
10 that's what ought to be in reality reported.

11 One other -- one other small point that I wanted
12 to make. The original -- the original bill -- and I think
13 there was some disagreement among us on the panel -- the
14 original bill, as it was introduced in the Senate, would
15 have tracked by event. That was replaced by a different
16 system, which was not to report by event, but to report by
17 person credited.

18 And I think that rather than focus as much as
19 people have on who is the co-host of an event, we ought to
20 go back to that -- the principal of what was in the final
21 bill, which is who gets credit for the money raised.

1 Thank you. I took in fact my full five minutes;
2 I apologize. I'll be happy to answer any questions.

3 CHAIRMAN McGAHN: Mr. Holman.

4 MR. HOLMAN: Hello. Do I begin?

5 CHAIRMAN McGAHN: Yes, Mr. Holman. Sorry.

6 MR. HOLMAN: Chairman and Commission, thank you
7 for letting me testify before you about section 204, which
8 is the -- probably the single most important provision of S-
9 1 and the new lobbying law.

10 When it comes to keeping a paper trail of bundling
11 activity, it isn't always done as precisely and as
12 systematically as George Bush would lead us to believe.
13 George Bush was phenomenal at keeping records as to his
14 bundling activity, but we found that some of the newer
15 candidates, such as John McCain specifically, is not as
16 diligent at recordkeeping on bundling as George Bush used to
17 be.

18 First of all, I want to emphasize how important
19 this issue is. The public has never really had a very good
20 clue as to what sort of role lobbyists have been playing in
21 the fundraising game until now. With the new LD-203

1 reports, for instance, we find that there's about \$200
2 million being brought in in the first half of this year just
3 by lobbyists and registrants through various activities,
4 which is far more than what most of us expected.

5 Meanwhile all this activity has been done within
6 the shadows, for the most part. Public Citizen has set up a
7 web page that we've had in operation since the early two
8 thousands trying to track bundling activity in the
9 presidential campaigns, and by the way, it's a mantle that I
10 gladly turn over to you.

11 Our web page, WhiteHouseforSale.org, has tried
12 monitoring who the bundlers are and how much they're
13 bringing in. And with the Bush Campaign, we had an easier
14 time of monitoring that because Bush kept very, very precise
15 records. He had his Pioneer program going on.

16 With the 2008 campaign, it's been a lot more like
17 pulling teeth trying to identify who the bundlers are.
18 While Obama has provided us with fairly systematic records,
19 McCain has provided us with general records and only after
20 we keep asking him, in your opinion, in your knowledge, do
21 we -- have we properly identified who your bundlers are?

1 Just to show you how important this is, at this
2 point, we've identified more than 3,000 bundlers involved in
3 the presidential campaigns and they tend to often times,
4 which is what we're looking for, is a mutual benefit that
5 bundlers get with the presidential campaigns. We identified
6 that of all Bush bundlers, 24 percent of them have received
7 some form of governmental appointed -- appointment within
8 the Bush Administration.

9 So there is -- tends to be a reciprocal relation
10 going on, but before my time runs out, I want to get to this
11 point that you've been debating all morning, and that is,
12 what is an appropriate means of recognizing to credit a
13 bundler?

14 We found that with the John McCain Campaign, we
15 kept on asking, who are your bundlers, and we wouldn't get
16 an answer, especially early in the campaign, because I think
17 the campaign was operating on a shoestring and they weren't
18 probably keeping, I don't know, accurate records that one
19 would expect.

20 But it also appears that the McCain Campaign
21 doesn't really assign this tracking number that the Bush

1 Campaign is known for. Instead, we would have to go and
2 winnow through McCain's web page to try to identify what he
3 labeled as chief fundraisers, major fundraisers for the
4 campaign. And we would post those major fundraisers using
5 the title concepts that the -- that this NPRM recognizes as
6 perhaps an appropriate means of recognizing who the bundlers
7 are.

8 But then we wouldn't know for sure if that title
9 was an accurate depiction. So we would then send a letter
10 to McCain and ask him, McCain, we're asking you your
11 knowledge; have we identified the bundlers? Is this an
12 accurate list? And from the response we get from McCain,
13 that's what we developed as our list of bundlers.

14 So just to address that one issue, it is
15 imperative that you go beyond any kind of traditional
16 written records. You even go beyond the Bush Pioneer
17 tracking program, because that will not always be accurate.
18 There are in fact campaigns that are using a much more
19 informal system of fundraising and it is the campaign that
20 knows who their bundlers are and without necessarily a paper
21 trail.

1 There are other issues that I hope we can address
2 in the question and answers, but I see the time period's
3 running out. And by the way, I'm very delighted with the
4 draft of the NPRM. I mean, this is something that I found
5 getting very close to hanging on to the spirits and the
6 letter of the new law.

7 CHAIRMAN McGAHN: Mr. Ryan.

8 MR. RYAN: Thank you, Mr. Chairman, members of the
9 Commission. It's a pleasure to be here this morning on
10 behalf of the Campaign Legal Center. The principle behind
11 the disclosure provisions at issue in this rulemaking is
12 simple. It's to shed light on a growing campaign finance
13 practice of lobbyists bundling large sums of money to
14 influence federal candidates in an effort to gain access to
15 officeholders and influence the decisions that they make.

16 To this end, Congress included in the legislation
17 itself a direction to this commission as to how it should
18 proceed in crafting these regulations that we're here to
19 discuss today. The Commission shall provide for "the
20 broadest possible disclosure" of the bundling activities
21 described in the statute.

1 This unusual statutory directive to the Commission
2 is not simply legislative history. This is the law itself.
3 This directive must guide the Commission in this rulemaking
4 process.

5 I want to discuss a couple of specific issues
6 raised in the NPRM itself. Under the statutory scheme, a
7 reporting committee must file a separate report for each
8 covered period in which the committee received two or more
9 bundled contributions in excess of the \$15,000 threshold
10 amount from a lobbying registrant.

11 The NPRM sets forth three different options for
12 how to define this term "covered period," two of which are
13 detailed rather extensively, and there's actually draft
14 regulatory language at the end of the NPRM. A third
15 proposal is simply mentioned in the text in lieu of either
16 the proposed rule or the alternative.

17 For the reasons that are detailed in the written
18 comments we submitted, the Campaign Legal Center supports
19 the third proposal, which would require committees to report
20 both semi-annual and quarterly information at the end of
21 each semi-annual period. Further, we suggest in our written

1 comments that the Commission modify this third approach by
2 also requiring a committee to report an aggregate amount
3 bundled within a calendar year by any given bundler where a
4 report on that bundler would otherwise be required by the
5 statute.

6 I'm happy to discuss with you what I perceive to
7 be the benefits of this approach versus the drawbacks to the
8 other two proposals in the NPRM if you have questions on
9 that point. But I'll move on at this point to the
10 definition of bundled contribution.

11 The NPRM raises three important questions
12 regarding the definition of bundled contributions. The
13 first regards employees of lobbying organizations who are
14 not registrants themselves. The Campaign Legal Center is of
15 the view, and we state this in our written comments, that
16 lobbying -- lobbying organizations engage in reportable
17 bundling when an employee bundles money as an agent for the
18 lobbying organization, even if that employee is not a
19 registrant himself or herself. The statutory trigger is
20 whether contributions are credited by the committee or
21 candidate to the registering organization.

1 The second issue regarding the definition of
2 bundled contribution relates to the treatment of fundraising
3 events, and this is an issue that was discussed extensively
4 in the first panel. The NPRM raises the question of how the
5 reporting requirements should be applied where there are
6 multiple lobbyists who co-host a fundraising event.

7 Where are two more registrants co-host the same
8 fundraising event, the recipient should credit the entire
9 amount raised at the event as having been raised by each of
10 the registering co-hosts. This interpretation is
11 undoubtedly consistent with the views of the sponsors, the
12 principal sponsors of this legislation, as we detailed in
13 our written comments, citing to the Congressional Record.

14 And the alternative of dividing the total proceeds
15 of the event by the number of co-hosts and attributing only
16 that amount to each registrant, would mark an easy path to
17 evasion of any disclosure at all. It's for that reason that
18 we oppose that approach.

19 The third issue that I want to raise is the
20 definition of -- within the definition of bundled
21 contributions, the meaning of the phrase, designations or

1 other means of recognizing. A bundled contribution is one
2 where the recipient candidate or committee credits the funds
3 to the registrant through records designations or other
4 means of recognizing that a certain amount of money has been
5 raised by the registrant.

6 Importantly, the proposed rule, it enumerates
7 means of recognizing as illustrative and not exclusive or
8 exhaustive. This is the correct approach, I believe. There
9 are a wide variety of ways in which a candidate or recipient
10 committee can give credit to a bundler as having raised a
11 certain amount of money and those means of recognition can
12 be written or unwritten. Indeed the Commission's own
13 regulatory definition of earmarked incorporates or
14 recognizes this reality by including formal and informal,
15 written and unwritten, oral or written earmarking.

16 As detailed in our written comments, the three
17 principal sponsors of this provision, Representative Van
18 Holland in the House and Senators Feingold and Obama,
19 pointed out that crediting the lobbyists simply means that
20 the recipient candidate or committee knows that the
21 contributions have been raised by the lobbyists. And indeed

1 the root of the word "recognizing" is "cognoscere", which is
2 the Latin for the verb "to know." That's what's at the
3 heart of all of this.

4 I have no further comments. I'm happy to answer
5 any questions you might have to the best of my ability.
6 Thank you.

7 CHAIRMAN McGAHN: Thank you. Who wants to go
8 first? Mr. Vice Chair.

9 VICE CHAIRMAN WALTHER: I thought I would take
10 advantage of the fact that Mr. Elias is not representing
11 anyone and now we'll get your personal views exactly, I
12 hope, on how you feel about a couple of issues.

13 CHAIRMAN McGAHN: Hopefully just related to the
14 rulemaking.

15 VICE CHAIRMAN WALTHER: Ah shucks. Going to the
16 issue of a couple of points you made, I tend to really
17 sympathize with the fact that proration seems quite
18 arbitrary to me. I mean, I recognize that it's a way to
19 show that it was shared somehow, that it seems in a number
20 of ways it could be quite arbitrary, so to be comfortable
21 with the allocation or the subjective decision of the

1 recipient on how that would be done, but I'm wondering,
2 would you have any problem if there was a second column
3 there? It wouldn't necessarily say they're credited with
4 raising it, but it would be informational to show it was
5 part of an event that raised 150,000?

6 MR. ELIAS: I would for the following reasons.
7 There are two reasons. One, I don't think the statute
8 supports that, which is sort of a baseline test, but at a
9 practical level, my opposition to it is a practical one. I
10 listened a little bit in interest to the prior panel on
11 this. Events are not static things.

12 Sometimes someone gets listed as a co-host and
13 they don't raise money because they flame out on you.
14 Sometimes they get listed as a co-host because it's a favor
15 to someone else who is raising money for you. Sometimes
16 they have raised money for you in the past, but they're not
17 raising now and therefore they get listed as a co-host.

18 Sometimes they get listed as a co-host because
19 frankly, the event isn't going well and adding their name
20 adds some heft to an event that isn't raising much at all.
21 And sometimes they get added as a co-host because they are

1 themselves prominent. So you might add a prominent trial
2 lawyer as a co-host if you're doing a trial lawyer event to
3 make it look like yea, trial lawyers, come give money
4 because look who's the co-host, much in the same way you
5 might list a senator as hosting an event.

6 So my problem with the co-host, this idea that
7 we're going to trigger off of co-host, is that of all the
8 things that from my experience campaigns track, that is --
9 it's like titles. You want to be the deputy northwestern
10 chairman of the -- of the zebra-loving -- Zebra Lovers for
11 Smith Campaign? Great. How much are you going to give?

12 Right? I mean, it's -- putting their name as a
13 co-host doesn't signify what I think the NPRM suggests that
14 it does, which is some -- some actual economic stake in what
15 money is raised. In fact on the prior panel I heard someone
16 say, well, we know that the money was raised by the co-host
17 generally, and that isn't even true. Very often, in my
18 experience, campaigns will use someone's home and they will
19 be listed as the host and the host raises zippy.

20 But they provided the home. All the money is
21 being raised by people who aren't on the invitation at all.

1 So I just -- I think that this keying off of kind of what's
2 on the invitation and who's listed as host, is frankly a bit
3 off -- off the path of frankly what Congress was trying to
4 get at, and what I think frankly would be more accurate
5 disclosure.

6 CHAIRMAN McGAHN: Can I -- just to follow-up on
7 that point. So there is a difference between all that and
8 actual formal crediting?

9 MR. ELIAS: Correct. My experience is that
10 campaigns, they will credit the person who raised the money,
11 who they believe deserves credit, because it's important to
12 them, because if Commissioner Weintraub says to Smith, I'm
13 going to raise you \$50,000 --

14 COMMISSIONER WEINTRAUB: I'd never do that.

15 MR. ELIAS: But if you did, they are going to
16 credit the \$50,000. Sometimes they'll fight with Weintraub
17 over it. Weintraub will say, but I raised -- I raised the
18 Petersen money and the campaign will say, you didn't raise
19 the Petersen money. What are you, out of your mind? The
20 Petersen money came in through McGahn.

21 And so the campaigns are interested in this in

1 part because the donors are interested in it, but also in
2 part because they're putting together a budget. They say we
3 need to raise \$200,000, we're going to find 10 people to
4 each raise 20, and they need to have a system internally to
5 have some accountability.

6 Now, what if they don't have that system? If they
7 have that system then they offer -- then they give some
8 credit for it. If they don't, well then frankly, I assume
9 we're in a place where the gentleman to my left, and it's
10 fair to say it's rare that -- for the FEC I am the person
11 most to the right, but --

12 CHAIRMAN McGAHN: Congratulations. How does it
13 feel?

14 MR. ELIAS: The gentleman -- but the gentleman to
15 my left should be thrilled, because if campaigns don't track
16 what lobbyists have raised, presumably they're happier,
17 because then there's no credit being given to lobbyists.
18 Lobbyists have no sway over the campaign. Nothing gets
19 reported, but everyone -- the campaign doesn't know the
20 lobbyists raised it. There's a total break between money
21 and lobbyists.

1 CHAIRMAN McGAHN: Marc, the flip side though is
2 really as a practical matter, real campaigns and even the
3 ones who aren't real, but are convinced by consultants that
4 they're real, hire professional fundraisers who track all
5 kinds of stuff, not because they're necessarily crediting,
6 because they need that information to know who to go back
7 now --

8 MR. ELIAS: You raise a -- you raise a separate
9 question, which is in my comments and which I was hoping
10 that somebody was going to ask me about, which is I do think
11 the Commission needs to define the word "credit." It wants
12 to define what comes after credit, but it doesn't define
13 credit. And to me you wouldn't credit through records if
14 records were kept. In other words, you wouldn't -- if all
15 they meant was that you kept a record or had a -- or other
16 form of designation, they would have just said, that is --
17 that is, kept a record of the form of designation.

18 The fact that you used the word "credit" to me
19 connotes something more than that, and I think the
20 Commission ought to engage in some probing as to what it is
21 it means to credit a contribution to someone.

1 MR. HOLMAN: Could I offer a response a little bit
2 since I was brought up in here?

3 CHAIRMAN McGAHN: That would probably make sense
4 to drill down on this a little bit while we're -- while
5 we're hot on this one, because this is an issue that I
6 raised in the first panel and everyone looked at me like I
7 had three heads. But there's a difference between what the
8 fundraisers keep record wise and what's actually crediting
9 and does it even matter and can -- will we reflect that
10 distinction? I don't know.

11 MR. HOLMAN: First of all, I want to clarify that
12 McCain is keeping track. He's just not doing the tracking
13 numbers, to my knowledge. He gives credit to those that he
14 believes are out hosting fundraisers and collecting a great
15 deal of money for him and he calls them co-chairs and
16 financial chairs within his -- within his committee.

17 It's just he's not using the system, to my
18 knowledge, where each of these financial chairs are assigned
19 a number and the number gets written on the memo check.
20 It's just more McCain's knowledge of who's bringing in the
21 money for him.

1 So this -- he is keeping track of this. Bundling
2 is as much, if not more, important in the McCain Campaign
3 than it was in the Bush Campaign. McCain does have 850
4 bundlers that we've been able to identify, and he's --

5 CHAIRMAN McGAHN: But this rule's going to apply
6 to someone else other than John McCain, right?

7 MR. HOLMAN: That's right. I'm just talking about
8 McCain because he's --

9 CHAIRMAN McGAHN: Let's not -- let's not -- one
10 point of frustration I've always had at the Commission --
11 presidential is that that is illustrative to all other
12 campaigns and I always come at it from sort of the smaller
13 campaign perspective. So I understand McCain may or may not
14 be tracking and all that, and if that helps me understand
15 what the smaller campaigns go through, then keep going. But
16 let's assume arguendo McCain's tracking somehow and how he
17 tracks would be something that would be crediting.

18 MR. HOLMAN: All right, my next point was going to
19 focus more on the congressional campaigns.

20 CHAIRMAN McGAHN: Great.

21 MR. HOLMAN: With the presidential campaigns, it's

1 easier to try to identify these 850 bundlers just because
2 it's higher profile. When we get to the smaller campaigns,
3 especially the congressional campaigns, that's where it's
4 important to make sure that any of the House organizers and
5 the fundraising events get counted for their bundling
6 activity, generally because of their hosts. Because a
7 smaller campaign isn't going to keep the same type of
8 records that most of the presidential campaigns are going to
9 keep.

10 You brought up earlier this morning an example in
11 which you hypothesize a fundraising event, I presume for a
12 congressional candidate, where three lobbyists are hosting
13 it, but one walks in with checks for \$20,000, the other two
14 walks in with checks for 5,000, which is in fact mixing two
15 different types of crediting.

16 I presume that is the Bush style of Pioneer
17 crediting in which a lobbyist actually walks in with \$20,000
18 worth of checks that are credited specifically to that
19 lobbyist. If there's a written trail that identifies
20 specific lobbyists, then that ought to be the method that's
21 being used. But in most of these fundraising events, you

1 just have sort of ambiguous list of hosts that are hosting a
2 fundraising event and people show up and write a check to
3 the general campaign or the fundraising event itself.

4 That's where each of the hosts need to be credited
5 equally because it is impossible otherwise to identify the
6 relative weights that any particular host had in a
7 fundraising event unless they walk in with checks that said,
8 Joe brought in this check.

9 CHAIRMAN McGAHN: Do you agree though if the facts
10 -- assume the facts in my hypothetical are correct, you know
11 to a metaphysical certainty that lobbyist A walks in with
12 \$20,000 worth of bundled checks, lobbyist B has five and
13 lobbyist C comes in with five, that their report ought to
14 reflect that reality and it should not be automatically
15 prorated in that instance?

16 MR. HOLMAN: If you have a system of written
17 crediting, a tracking system, then I would -- I would prefer
18 that system in terms of crediting who gets the funds. In
19 the case of a fundraising event absent a tracking system,
20 absent any written records, then each of the hosts, whoever
21 the campaign, ought to be credited equal amount in terms of

1 the fundraising event.

2 When it comes to fundraising events, it's going to
3 be the latter. You don't really have fundraising events
4 where the hosts walk in with the checks already written out
5 and credited to the fundraiser. That's -- I mean, they
6 wouldn't even need the host in events then; they just get
7 the checks and hand over the checks.

8 If you have a written system, you know, that ought
9 to predominate. But where I'm most concerned is these
10 fundraising events in which there isn't a particular
11 tracking mechanism provided.

12 CHAIRMAN McGAHN: -- host. It's actually -- this
13 was off the vice chair's question, so once the vice chair --

14 VICE CHAIRMAN WALTHER: I only have one more
15 question and -- Mr. Elias and then ask anybody else how they
16 feel. I hear your position, but we have a situation where
17 we're told how we must interpret the statute, so our views
18 don't necessarily have to prevail here. It is what is the
19 broadest possible disclosure? That's the law. It's
20 legislative intent legislated.

21 So then you say okay, the broadest possible

1 disclosure. If somebody's acting as a team, the fundraiser,
2 otherwise they don't need to have a fundraiser if they're
3 going to walk in with five checks and 10 checks. They're
4 there to help each other raise money and maybe not only at
5 that event, but in the future.

6 It is always nebulous. It can't be unnecessarily
7 identified exactly in terms of monetary terms. So if
8 somebody is going to, like the campaign, is going to do some
9 crediting when they report, what would be wrong with letting
10 the public know that it was part of a team effort and show
11 how much money was raised and then let the public be the
12 judge if it wants, that okay, this person got 2 percent
13 credit or 90 percent, but in any event, credit was given and
14 there was an event to help generate it, given the statutory
15 language that we're under here?

16 MR. ELIAS: A couple of things. One is the
17 statutory language is to do it as broadly as possible,
18 consistent with the terms of the statute. So I read the
19 statute as requiring the disclosure by campaigns of
20 contributions credited to them through designation or other
21 means of recognition.

1 And if it's not credited to them, then it's -- we
2 can be -- we can be as expansive as we want. We can say
3 we're going to be as expansive as possible. But if it does
4 not meet that threshold test, which is why I think a
5 definition of crediting is so important, if it does not meet
6 that threshold test of having been credited to them, then
7 we're just talking about a different statute. We're talking
8 about a statute that they could have written, which by the
9 way, the prior panel is correct, was in the original version
10 of the bill, which was replaced in its entirety with a
11 different bill, which was event based.

12 The original bill would have required people who
13 host events to -- lobbyists who host events to disclose the
14 contributions raised at events they host to the secretary of
15 the Senate, clerk of the house. That language, gone,
16 replaced with this, which was FEC reporting based on
17 contributions credited.

18 So to me, again, I think there's a relatively
19 simple way to deal with this and I think we keep
20 complicating it because we keep looking at it from the
21 perspective of a lobbyist, and I would tell everyone to take

1 a step back and go back to what this is trying to do, which
2 is, what does the campaign believe? What do they think?

3 Do they believe that lobbyist A raised 20 and
4 lobbyist B raised 25? Maybe they're right, maybe they're
5 wrong. It doesn't seem to me it matters. What matters is
6 what they believe, because that's who's going to get the
7 juice, right? That's what you're trying -- you're trying to
8 figure out what lobbyist is getting the juice with the
9 member and the one that's going to get the juice is based on
10 what the member and the campaign believes happened.

11 So I think we can -- I think it's not as important
12 whether it's written or complex or not. What we're trying -
13 - what we ought to be doing is trying to get as accurate a
14 picture of what the campaign believed an individual lobbyist
15 did.

16 CHAIRMAN McGAHN: Commissioner Weintraub.

17 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
18 I wanted to ask Mr. Ryan about that, because I think -- I
19 really appreciated your opening comments, Marc, because it
20 went to something that I've been thinking about, which is
21 what's our charge here? Is our charge to tell people how to

1 credit the lobbyists or to find out how the committees are
2 crediting the lobbyists and make sure that that is
3 accurately reported to the public?

4 So what's your reaction to the idea that what we
5 should really be focusing on is, however we define credit,
6 we'll get to that, however the campaigns are crediting the
7 lobbyists, that's what we should be trying to get the
8 accurate disclosure of?

9 MR. RYAN: I think your responsibility is two-fold
10 and it is to identify how these campaigns are crediting
11 these funds that are being raised. But the second part of
12 your responsibility is to avoid drawing roadmaps for ways or
13 opening up channels through which these requirements can be
14 evaded.

15 Vice Chairman Walther raised some very good points
16 during the first panel about how in much of the country
17 these fundraising practices may be much less formal than we
18 are used to here in Washington, D.C., specifically with
19 respect to the co-hosted fundraisers for example. In the
20 comments, the written comments that were submitted by the
21 principal sponsors of this legislation, they address this

1 issue and express explicitly their concern on page six of
2 the comments from Senators Feingold, Obama and
3 Representative Van Holland.

4 They state, lobbyists and campaigns can try to
5 gain the system by dividing the amount raised at an event
6 among a large number of lobbyists, thereby -- excuse me --
7 thereby making sure that none of them reach the reporting
8 threshold. So I think it's possible to design the reporting
9 system, the reporting requirements, the forms that are
10 required to be completed in that process, in such a way as
11 to attribute the full amount raised at a co-hosted
12 fundraising event to each of the registrants who are there
13 co-hosting it, but also to include perhaps as a memo, and I
14 think Senator Feingold suggested this on the floor of the
15 Senate, including as part of that disclosure form a listing
16 of the other co-hosts of the event.

17 Perhaps this is not something that we got into in
18 our written comments, what I'm about to say, but perhaps you
19 could even invite reporters to, and the candidates and
20 committees reporting to, elaborate on that list of co-hosts
21 with what they perceive to be the specific -- specific

1 dollar amounts that each of the registering co-hosts were
2 responsible for.

3 But this all being done in the context of the
4 chief requirement being you look at the entire amount raised
5 at the event and you attribute it to each of the co-hosts
6 equally and then --

7 COMMISSIONER WEINTRAUB: Where does the statute
8 say that?

9 MR. RYAN: The statute simply requires -- it
10 doesn't speak to this issue directly, but we do have -- we
11 do have legislative history that does speak directly to this
12 question. And I know it's been marginalized here, both in
13 the first panel and to some extent by Mr. Elias, the fact
14 that the presumption or assumption that Senators -- or
15 Senators Feingold and Obama lost and this isn't the law that
16 they wanted.

17 MR. ELIAS: I never said that.

18 MR. RYAN: My impression of your comments were
19 that this is not the law that those to your left are wanting
20 to point to legislative history about.

21 MR. ELIAS: But that's different than Senator

1 Obama and Senator Feingold; they're not sitting to my left.

2 MR. RYAN: No, but we're pointing to that comment

3 --

4 MR. ELIAS: And you don't represent them.

5 MR. RYAN: No, we don't.

6 MR. ELIAS: Again --

7 CHAIRMAN McGAHN: Comments to the Commission, not
8 to each other.

9 MR. RYAN: My point is simply I think that the
10 legislative history, the statements of the senators and
11 Representative Van Holland should be taken very seriously.
12 They achieved a major victory in passage of this
13 legislation. And their comments that we cite to in our
14 written comments are with respect to the legislation that
15 passed, not with respect to earlier bills that ended up
16 being completely rewritten or tossed out.

17 And Senator Feingold, for example, states --
18 stated explicitly on the floor of the Senate that when two
19 or more lobbyists are jointly involved in providing the same
20 bundled contributions, as for instance in the case of a
21 fundraising event co-hosted by two or more lobbyists, then

1 each lobbyist is responsible for and should be treated as
2 providing the total amount raised at the event.

3 So the statute, I concede, is silent on this level
4 of specificity, but we do have some view into what the
5 principal sponsors of the legislation intended.

6 COMMISSIONER WEINTRAUB: But the statute talks
7 about what the campaign -- how the campaign credits the
8 bundlers, and if the campaign is not actually crediting
9 somebody for -- I mean, let's say -- I think we talked about
10 this example earlier, the example where the campaign knows
11 that the main guy at this event raised \$20,000 and then
12 there were a couple other guys that raised \$5,000. So why -
13 - and the campaign knows this and they're not giving those
14 other two guys credit for having raised \$15,000. They say
15 those guys have raised 5,000 and if they raise another
16 10,000 apiece, then we'll give them credit for raising
17 15,000.

18 So why -- why under a statute that calls for
19 disclosure of bundling of \$15,000 or more would you want to
20 have those other guys on the list?

21 MR. RYAN: My fear is that -- and the fear of the

1 Campaign Legal Center, I think this is likely a fear that's
2 shared by the principal sponsors, at least as represented in
3 the comments they filed with you, is that the systems will
4 be modified in -- may be modified by members in an effort to
5 evade disclosing the identities of some lobbyists who are
6 bundling contributions for them.

7 So yes, systems of credit may be working one way
8 to today, but if you adopt a regulation that again sets out
9 a roadmap for a manner in which they could say well, what we
10 really think here is that this co-hosted event, we're going
11 to spread out our belief of who's responsible for this.

12 COMMISSIONER WEINTRAUB: It's a lie? Is that what
13 you're suggesting, that they're going to lie?

14 MR. RYAN: No, I'm suggesting that they may just
15 start thinking about co-hosted fundraising events
16 differently than they did in the past, and they may think
17 that well, maybe it's most honest and fair to attribute this
18 money equally to all these players who work together to hold
19 this event.

20 COMMISSIONER WEINTRAUB: Let me -- let me go back
21 to something that you were talking about before, Marc, and

1 that's -- and the chairman was talking about it -- because
2 I'm not sure I get this. The difference between tracking
3 and crediting.

4 CHAIRMAN McGAHN: Can we -- I have one -- actually
5 one follow-up. I hear what you're saying. I don't think
6 it's necessarily that they're going to lie. What you're
7 saying is they're going to adjust their conduct to get
8 around or be consistent with, depending on your point of
9 view, the law, right?

10 But if we go down that road now or we go a little
11 bit maybe broader than we might otherwise would, I read the
12 AFL-CIO comments and they say well, we got to be careful
13 going that direction as well. I don't know if you've read
14 their comments, but they raise some very good points to me
15 that all of a sudden you're putting innocent actors on the
16 outside into a overly inclusive disclosure regime. How --
17 how do we go the way you want to go and not run afoul of the
18 concerns the AFL-CIO raises?

19 MR. RYAN: I would point to the fact that the
20 House and the Senate took this burden upon themselves. It's
21 been stated earlier here today, I'll repeat it, they changed

1 the onus of the reporting to themselves from the lobbyists
2 and they certainly have the option of not asking, not
3 accepting bundled contributions from individuals who might
4 be put out in some way by the very fact that their names
5 would then be reportable on the public record.

6 I think -- but again, the burden and the
7 responsibility falls on the candidate.

8 CHAIRMAN McGAHN: I hear you, but it's a -- it's a
9 reporting regime -- I understand all that, but if what we
10 decide is covered by the reporting regime and it reaches out
11 and covers conduct by the union that otherwise wouldn't be
12 covered if we adopted something, for the sake of argument,
13 more consistent with the statutory language, although the
14 burden's been shifted to the committee, you're bringing in
15 people who maybe really shouldn't have been credited for a
16 bundle into the -- into the public eye and in a way that
17 they may not particularly like.

18 Although we can say Congress put the burden on
19 them essentially, them being themselves, that's not the same
20 as being able to drag in the AFL-CIO. My concern is, is
21 once you go out there, it's sort of -- it's a jurisdiction

1 of the Commission issue, and then we get into discovery and
2 all kinds of things and I can imagine a situation where if
3 we go that way, and then we have to get to the bottom of
4 whether or not a report's accurate or what really happened
5 somewhere, trying to take discovery out of a union hall
6 seems to me very problematic, First Amendment concerns,
7 rights to associate, that kind of thing.

8 I want to try to nip these issues in the bud
9 before we get there. When the AFL-CIO raises concerns, I
10 take those very seriously, and that's, I think, consistent
11 with how Commissioner Weintraub was going, different way to
12 probably get to the same point in the road. But I want to
13 try to get a handle on can we do both, go where you want to
14 go, but yet not -- not do violence to the issues that
15 someone like the AFL-CIO raises other than -- other than to
16 say well, the burden's not on them to report, it's on the
17 campaigns? I understand that, but is there more to it?

18 MR. RYAN: I think this may be an instance where
19 there's a fork in the road. I don't know if we can
20 accommodate both the interests that I've articulated and
21 simultaneously address all of the concerns of the AFL-CIO.

1 But again, I would point to the statutory language itself
2 that urges the broadest possible disclosure to the extent
3 the decisions -- the hard decisions need to be made, and
4 this will make -- and inevitably they will be and have to
5 be. This commission should error, if you want to call it
6 that. I wouldn't call it error. I would call it, the
7 Commission should choose the broader disclosure path.

8 CHAIRMAN McGAHN: Sort of like in Wisconsin Right
9 to Life when close calls, the speaker wins. That same thing
10 kind of concept, just the other direction for purposes of
11 reaching regulation.

12 MR. RYAN: Right.

13 CHAIRMAN McGAHN: That kind of concept.

14 MR. RYAN: I hadn't thought of that analogy.

15 CHAIRMAN McGAHN: No, I didn't think you would.
16 But that's kind of what I think of. When you flip a coin,
17 which way is it going to go? And you're saying, when it
18 flips, we should go in favor of more regulation.

19 MR. RYAN: Congress said that.

20 CHAIRMAN McGAHN: There's a distinction though.
21 Is it our discretion because of the way the statute's

1 structured? Are you saying the statute mandates this or is
2 it something that we actually have a decision to make?

3 Because under the APA, there is a difference when the court
4 looks at this kind of thing, whether it's something that we
5 have to do versus part of our decision making. I think
6 that's part of where Commissioner Weintraub was going. At
7 least -- at least that's kind of how I heard -- what I took
8 from some of her questions.

9 MR. RYAN: Whether or not the rule that you
10 eventually promulgate is -- complies with the requirements
11 of the APA is, I think, a decision that necessarily need to
12 leave to another day. I'm not sure if -- it depends on what
13 the this is that you choose to do it.

14 MR. HOLMAN: Could I join in on this briefly?

15 CHAIRMAN McGAHN: Sure.

16 MR. HOLMAN: I don't think neither the campaign,
17 the candidate, nor the Commission should be placed in the
18 position of the burden of determining the relative weights
19 of who organized, brought in more money at general
20 fundraising events. The purpose of this law is disclosure
21 only. It's not to restrict anything. It's not to forbid

1 any fundraising events or activity. It's to disclose who
2 are the lobbyists who are most involved in the fundraising
3 campaign and pass that threshold of bundling activity.

4 You know, it's pretty straightforward and pretty
5 simple to come out with the equal crediting of the co-host
6 of the fundraising events, and if you try coming up with a
7 system that prorates any of this or gives -- tries to
8 determine who's more responsible and who's less responsible,
9 you're opening up a huge hole in the disclosure regime that
10 can easily be gained or evaded.

11 Many of the fundraising events, you were bringing
12 up the labor unions, especially labor union events will have
13 20 hosts of any particular fundraising events. And to try
14 assigning relative weights that doesn't accommodate the
15 funds that are brought in at the fundraising event is going
16 to end up undermining this disclosure regime.

17 CHAIRMAN McGAHN: Thank you.

18 MR. ELIAS: Can I add one point to this? Because
19 you're right, our purpose is addressing you today. I just
20 want to a) reiterate that I'm here testifying on my own
21 behalf, not on behalf of any of my clients. That said, I

1 have never said that the -- that Senator Obama or Senator
2 Feingold or for that matter, Senator Reid, who was, and I
3 think deserves a fair bit of credit, was in fact the sponsor
4 of this legislation. Go on Thomas. Look it up. This was
5 the Leaders bill. This was put in as S-1, which was his
6 right, and he fought hard for this bill.

7 And he and Senator Feingold and Senator Obama and
8 a number of other Democratic senators and some Republicans
9 along the way, strengthened this bill, in my view, in moving
10 it from being an LDA disclosure bill into an FEC disclosure
11 bill. So I've never suggested that that was a loss for
12 anyone.

13 In fact, I think it was a victory for disclosure.
14 That said, it was a victory for a certain kind of
15 disclosure. It was a victory for a very accurate
16 disclosure. It was a victory to make the campaigns, who
17 were in a better position, to know who got credit for the
18 money due to disclosure.

19 When I say that the old bill went out the window,
20 the old bill would have been real rough justice. It would
21 have been a bunch of lobbyists at the end of every quarter

1 sitting down as they got ready to submit their lobbying
2 disclosure forms saying, geez, how much money do you think
3 we raised last quarter? This is a much more rigorous bill.

4 But in the rigors of the bill, it put the
5 disclosure where the information lies, which is with the
6 campaigns, the people who have to track these monies, the
7 people who have to track these events, the people who know
8 whether an event, whether it's big or it's small or it's in
9 Washington, D.C., or it's outside of Washington, D.C., who
10 know what their budgets are, who know what a budget -- an
11 event is budgeted for.

12 And I think there's -- when it was switched from
13 one to the other, the intent was to make it about a
14 campaign, what does a campaign believe has just happened,
15 what does it believe has been raised for it and by whom? So
16 I don't think it's a question of winners or losers. I think
17 it was a strengthening of the bill, frankly, to do that, but
18 I think it was also strengthening in part because it was a
19 more accurate snapshot. So I just wanted to clarify the
20 record on that.

21 CHAIRMAN McGAHN: Commissioner Weintraub.

1 COMMISSIONER WEINTRAUB: Can I go back to tracking
2 and crediting? Explain to me in what circumstances a
3 campaign would be tracking somebody's -- the amount of money
4 that somebody raised, but not crediting them for having
5 raised that money, because that distinction is lost on me?

6 MR. ELIAS: Mostly -- you notice I didn't put it
7 in my comments the definition of crediting. I suggested the
8 Commission come up with one.

9 COMMISSIONER WEINTRAUB: Feel free to suggest one.

10 MR. ELIAS: And I don't have a suggestion as I sit
11 here today. I could imagine and I don't have -- I don't
12 have a fully formed view on this or a hypothetical on this,
13 but I do think it's important. If they are -- whatever
14 crediting means, we ought to -- we ought to say it so that
15 there are not then opportunities to evade and there is also
16 not traps for the unwary.

17 If it means something, we ought to say what it
18 means. It's the operative word in that provision of the
19 statute, so we ought to define it. I suppose I could
20 imagine a scenario where a contribution comes into a
21 compliance person, that it is tracked for purposes of

1 putting it on the FEC report, but there is no -- there is no
2 recognition given to the person who raised it. It wouldn't
3 be in an event context. It would be in some other context
4 where there's no recognition given to the lobbyist, there's
5 no -- there's no credit, there's no -- there's no credit to
6 them.

7 I mean, they're not -- they're not credited with
8 it. Like I said, I didn't provide an alternative
9 definition, but rather I suggest -- a definition at all. I
10 rather thought that it's something the Commission ought to
11 wrestle through.

12 COMMISSIONER WEINTRAUB: You're not being entirely
13 helpful to me as I wrestle.

14 MR. ELIAS: These gentlemen may have an idea.

15 CHAIRMAN McGAHN: I'm not down there, but maybe I
16 can give a whack.

17 COMMISSIONER WEINTRAUB: Well you I can talk to
18 later though.

19 CHAIRMAN McGAHN: Okay.

20 COMMISSIONER WEINTRAUB: I want to take advantage
21 of the time to --

1 CHAIRMAN McGAHN: Good, okay. That's right, we
2 can talk after this is over.

3 COMMISSIONER WEINTRAUB: That's right.

4 CHAIRMAN McGAHN: We don't have to do it here.

5 COMMISSIONER WEINTRAUB: That's right. That's an
6 unusual circumstance for you and I, Mr. Chairman.

7 CHAIRMAN McGAHN: Yes.

8 COMMISSIONER WEINTRAUB: So the moving onto
9 another phrase that I'm going to solicit suggestions on.
10 Other means of recognizing, what might these other means be
11 of recognizing? The easy cases somebody's got a tracking
12 number, somebody's got a title that announces that they're a
13 Hill raiser, an innovator, whatever titles these guys are
14 using these days.

15 But what else -- what else should we be trying to
16 capture other than knowledge? Because I heard your Latin
17 definition. I thought that was very erudite. But give me
18 some more concrete suggestions here, anybody.

19 MR. HOLMAN: Well, I'll quickly join in. I mean,
20 I don't mean to be attacking McCain. I'm not attacking
21 McCain by the way. I mean, McCain has been participating in

1 our disclosure program and letting us know how accurate our
2 list is, striking names off, adding names to the list.

3 However, I do want to go back to that example
4 because as far as I can tell, he has no tracking number for
5 these finance co-chairs. He just has assigned people, given
6 them an informal title with the expectation that they're
7 going to go out and do a lot of fundraising for him. And he
8 knows they're doing a lot of fundraising, even without a
9 specific tracking mechanism that's going on.

10 So he's giving them credit for bringing in a great
11 deal of money to his campaign. The NPRM really touched upon
12 -- most fundraising is going to have either a tracking
13 number, it's going to have titles, it's going to provide
14 special access to fundraising events for the campaigns based
15 upon how much the campaign knows that the bundler's bringing
16 in.

17 Sometimes it's just going to be an expectation
18 that you've got someone who's good at fundraising and so
19 they're part of your team out there fundraising. Otherwise,
20 you've really discussed most of the types of designations
21 that I am familiar with at this point. However, there is

1 that one caveat that on some occasions, a campaign just
2 knows that this person is responsible for hosting
3 fundraisers and bringing in a lot of money.

4 MR. RYAN: We stated in our comments and I want to
5 reiterate here today that I think that the illustrations of
6 what constitutes these means of recognizing that are
7 included in the NPRM are great. We think that you've done a
8 good of identifying -- I'll echo Craig -- identifying the
9 methods that are most commonly used.

10 Again, I think the touchstone here at the end of
11 the day is knowledge on the part of the candidate or the
12 committee of that candidate. But I would encourage you to
13 keep this illustrative list of what constitutes these
14 practices that are proposed in the NPRM and the most
15 important point from my view is that you not convert this,
16 as some commenters have suggested, to an exhausted list
17 because I don't think you can identify all possible
18 approaches to this activity here in the NPRM.

19 COMMISSIONER WEINTRAUB: I've got more if you want
20 or we can -- somebody else can talk.

21 CHAIRMAN McGAHN: Let's let the vice chair.

1 VICE CHAIRMAN WALTHER: One more question maybe to
2 Mr. Holman. You seem to be the advocate for the pro rata
3 approach, if I'm not mistaken.

4 MR. HOLMAN: Pro rata, no, not at all. I'm just -
5 - I said if there is a written record then I would prefer
6 using that written record. Once you go into a fundraising
7 event where there isn't a written record, then everyone
8 should be credited who is hosting the fundraising equally
9 with that. Any pro rata effort, absence a written record,
10 is going to undermine the disclosure regime.

11 VICE CHAIRMAN WALTHER: Do you think the credit
12 could come in a number of different ways? Knowledge, I can
13 see the argument that knowledge means that there's credit,
14 but then if they're to monetize it and somebody walks into a
15 fundraiser and the whole idea of the fundraiser is to get
16 George to come because he really knows one of the main
17 hosts, and to get to know the candidate, and so when the
18 person walks in he says -- George the person being sought --
19 I'm one of the general partners of a partnership and there's
20 100 partners in this thing and we report as partners and I
21 think we're all going to be able to max out for you.

1 So then at the end of the thing, the money hasn't
2 come in right away, but the fundraiser has been a success.
3 Now what do you think should be done in a case like that if
4 the person -- if the candidate wants to really give credit
5 at that point on an unallocated basis not pro rata?

6 MR. HOLMAN: That's an interesting situation. I
7 would --

8 VICE CHAIRMAN WALTHER: It does happen that one,
9 you know?

10 MR. HOLMAN: I would normally assess the equal
11 value of any checks that are coming in later because of the
12 fundraising event, following the same disclosure regime of
13 equal credit to whoever was co-hosting the fundraising
14 event. The people who are responsible for organizing a co-
15 hosting event, if they're registered lobbyist or
16 registrants, they should be the ones assigned the equal
17 value.

18 And I do know that checks do roll in after a
19 fundraising event, but if it's clear and obvious to the
20 campaign that these checks are coming in because someone
21 planned on showing up at the fundraising event, didn't make

1 it, sent in a check because of it, whoever were the co-hosts
2 and registered lobbyists and registrants ought to be given
3 equal credit for those contributions for disclosure
4 purposes, let's emphasis this.

5 MR. ELIAS: Can I just add one thing? I do think,
6 and I think -- if the Commission goes that way, then it
7 ought to modify the form somehow so that campaigns are not
8 certifying under penalty of perjury that it's accurate,
9 because the fact is, it won't be. It won't -- it will not
10 be accurate that these people raised this money.

11 And you ought -- you ought to make the form clear
12 that this is not trying to be a -- because, you know, I
13 could see a treasurer looking at this form and saying, but
14 this isn't what happened. I know, I was there.

15 CHAIRMAN McGAHN: Can we actually explore that a
16 little bit, because this gets at something that's in my
17 mind, and it goes back to something Mr. Simon said in the
18 first panel. I'm not going to give a hypothetical because
19 that's almost going to limit it and I don't want people to
20 read into what I'm really thinking.

21 But it seems to me a situation where somebody may

1 tell a member of Congress, hey, I raised 20,000 for your
2 event the other day or something, is the member really going
3 to remember to tell the treasurer that? Probably not. And
4 ultimately the treasurer is the one in theory who's signing
5 the report, and is the custodian of records or there may be
6 a separate person, but in most smaller campaigns, mid-size
7 campaigns, it's the same thing.

8 I have a concern not because I want to limit
9 disclosure, but as a practical side on when this agency has
10 to deal with that on the back end situation where the
11 treasurer honestly says, well, I didn't know. I didn't know
12 that conversation happened. Whose fault is that and what do
13 we do in that situation?

14 (Pause)

15 CHAIRMAN McGAHN: Those campaigns have multiple --
16 multiple folks, right, and just to keep it going because
17 everybody hesitated and that means I get to keep talking.
18 In the first section where it talks about of each person
19 reasonably known by the committee to be a person described
20 in paragraph seven, which we're short-handing as kind of a
21 registered lobbyist without getting into what paragraph

1 seven says in that debate, but what does reasonably known
2 mean?

3 Let's say you have a person named Robert Smith,
4 but everybody knows him as like Butch Smith, right. When
5 the volunteer doing this stuff or helping the treasurer put
6 together these reports, checks the lobbying disclosure
7 reports and looks on the web site, they don't see a name
8 that matches and they inadvertently forget -- they don't
9 forget, they don't realize they have to report.

10 So there's a lot of moving parts in campaigns and
11 this is a disclosure regime which people seem to think well
12 that's the easy part. But it's sometimes not the easy part
13 and in fact in a lot of ways, a much more important part of
14 what the law is trying to do. So my concern is more the
15 practical when you have moving parts and that kind of thing.

16 And to sort of go full circle to what Mr. Elias
17 said out of the gate, if we're trying to codify essentially
18 a disclosure of what's already happening, is this going to
19 force campaigns to change and put in more sort of people or
20 less people or better lines of communication or whatnot as
21 to who really is on point to know what the committee knew?

1 And before I get done my very run-on sentence that
2 doesn't make any sense at this point, what about the
3 professional fundraisers hired to house a whole -- a whole
4 other set of records and they track everything for their own
5 purposes, not for crediting, but for their own desire to
6 raise more money irrespective of some concept of credit or
7 what an elected official may or may not want to know for
8 those purposes? How about we start with you Marc; you may
9 understand what --

10 MR. ELIAS: My point -- let me make my -- before I
11 answer, the point I was making slightly clearer. If we're
12 going to say that everyone who attends an event who is
13 listed on a host committee is either getting like a pro rata
14 share or automatically getting assigned 100 percent or
15 anything, if there's an automatic way, if either option one
16 or option two is adopted, then I think we need to make
17 clear, so that we don't later have disagreements with the
18 Department of Justice, that this is the FEC's instruction.
19 Because the fact is, I could see a campaign looking at that
20 and saying, but it's not true.

21 He didn't in fact bundle money. He didn't in fact

1 raise a dime. He wasn't in fact responsible for a dime. He
2 was not credited through written forms, through non-written
3 forms, through formal, through winks, through nods. He was
4 credited with zippy. He's a bum. I didn't care if he was -
5 - when I found out he was at the event, he shouldn't have
6 been at the event.

7 I want to make sure there is a way that we're not
8 going to have a standoff with treasurers and campaigns that
9 won't sign the forms because they believe it to be untrue.
10 And I realize it may be administratively more convenient for
11 you all to say let's just go 100, 100, 100, or 50, 50, 50,
12 whatever pro -- wherever you do it. But I think that there
13 is a fundamental issue here which is that this is going to
14 be so disjointed from reality in the minds of these
15 campaigns that I think you need to find a way that they are
16 not in fact certifying that in fact those people raised that
17 money, because in fact -- or bundled those funds, because in
18 fact, they won't have in many, many, many, many instances if
19 we go that route. I think it is much better to have them
20 certified as to what they believe the truth to be and go
21 forward.

1 The only other thing I want to make, which goes to
2 part of your point, is in my comments -- and it was at the
3 very end, so I don't fault anyone for not having read them -
4 - I objected to the Commission's urging people to keep more
5 records. You have a recordkeeping requirement; my clients
6 are familiar with it. You've put out policies over the year
7 clarifying it. I don't believe you can urge. If you want
8 to -- my clients are not required now to come up with a
9 tracking system. They're not -- they're not required now to
10 hire a person to administer a credit system.

11 If they have it and they know it, they have to
12 report it. If they don't got it, they don't know it,
13 they're not required to now institute some new system. I
14 don't know if that's what the Commission had in mind in its
15 urging, but I have unurged, to the extent people would ask
16 me, that yeah, I looked in that green -- I looked in the
17 orange book, wasn't in there. I looked in the thicker book
18 with 11 on the front, it wasn't in there. I unurged.

19 MR. HOLMAN: Marc's response, I think, drives home
20 the point how important it is that the Commission reduce the
21 amount of discretion as possible when it comes to

1 determining what gets reported at what amounts. If you're
2 going to allow the type of discretion that Marc is urging
3 when it comes to hosting fundraising events, you're going to
4 get that kind of debating and just worry on behalf of
5 treasurers and accountants as to how much do I award this
6 host, how much do I award that host, is it accurate, as
7 opposed to having more of a bright line test of just
8 awarding each host an equal amount based on how much was
9 brought into the fundraising event.

10 You've got to try as much as you can to reduce the
11 amount of discretion that's going on in this. But the
12 second point I want to bring up is a proposal that is in the
13 NPRM, which is excellent and quite frankly, during the whole
14 drafting of the legislation, I was urging this as well, and
15 that is having a distinct, separate bundling schedule, which
16 I believe you are going to go ahead with.

17 This schedule is going to make it very clear that
18 the numbers being recorded here are not the numbers that
19 count towards the campaign budgets. They're not the numbers
20 that are going to be double counted in itemized receipts and
21 contributions. This is for disclosure purposes only so you

1 can get an idea as to how much lobbyists and registrants are
2 playing a role in the fundraising of these campaigns. It's
3 a different level of accountability. It's not that type of
4 accountability.

5 CHAIRMAN McGAHN: It's still under accountability
6 though. I agree with you in the big picture that it is a
7 different kind of accountability, but you know, treasurers,
8 I know these kinds of treasurers that Mr. Elias is talking
9 about where they're going to freeze and not want to sign it
10 and all this other stuff. And then you get into big
11 problems because then you have people not wanting to file
12 reports and that kind of stuff.

13 I'm trying to figure out a way to balance this so
14 that -- so that -- and your way makes some sense, because if
15 there's an objective criteria like somebody hosts or that
16 kind of thing, but if there isn't, shouldn't have to create
17 that. It should be what the reality is so the report then
18 becomes more accurate and not less. I don't -- I don't want
19 inaccurate reports that are best guesses.

20 MR. ELIAS: Can I ask a question? What if they
21 don't host? What if they are featured guests? What if

1 they're listed as attending? What if they're listed as part
2 of the host committee, but not as a host? What if it's a
3 special host? I mean --

4 CHAIRMAN McGAHN: My question is how does the
5 campaign view that?

6 MR. ELIAS: Look, I keep arguing that it should be
7 -- it should be what the campaign thinks, but if we're going
8 to -- if we're going to write regulations, we're just taking
9 100 percent, is it just name on the invitation? Does it
10 matter font size, placement, or if it goes on the back or
11 the front? It just seems to me --

12 CHAIRMAN McGAHN: Don't give us any ideas.

13 MR. ELIAS: It's a very -- it just seem to me --

14 CHAIRMAN McGAHN: We're taking notes.

15 MR. ELIAS: It is --

16 COMMISSIONER WEINTRAUB: How about color, should
17 we --

18 MR. ELIAS: At the risk of -- I feel like I am the
19 most reform minded here because I actually think the public
20 has a right to know what actually happened. I don't think
21 campaigns ought to be able to hide behind putting 100 people

1 on an invitation and they're reporting the same number for
2 100 people, whether it's 100 percent, 50 percent, 100th of a
3 percent. They're obscuring from reality the truth.

4 I want to know what John McCain -- what a real
5 number is for John McCain's lobbyists who bundle for him,
6 not a average number, not a -- we took everyone's name who
7 was on the invitation. I want to know the real numbers.
8 And I find it odd because I feel like, I said, I'm actually
9 advocating, I think, more disclosure, more complete and
10 accurate disclosure.

11 What is the -- what is the campaign actually
12 crediting this person for? That's a number that's worth
13 putting in the newspaper. Hey, John McCain gave this person
14 credit for \$200,000. That means something.

15 CHAIRMAN McGAHN: How come John McCain's the only
16 one that gives credit? I don't understand this.

17 MR. ELIAS: I -- Bush.

18 CHAIRMAN McGAHN: It does go to a point you made
19 earlier and -- go ahead.

20 MR. HOLMAN: If you do that system of having 100
21 hosts and you allow the campaign to divvy it up among those

1 100 people, you are going to undermine the entire disclosure
2 regime. There are going to end up being pro rated 1/100th
3 of how much money was brought in and we'd lose the entire
4 intent of this law.

5 CHAIRMAN McGAHN: But the reality is in some of
6 these presidential ones you do have a gazillion hosts and
7 all kinds of tiers on the invite because you know people
8 want to put their name on the invite and they may not raise
9 any money. And that's the concern I hear from Mr. Elias, is
10 that that's not accurate either to just give everybody full
11 credit for everything, because the campaigns aren't getting
12 full credit for everything.

13 It's -- I guess it's a balancing we have to come
14 up with that the statute doesn't necessarily tell us the
15 right answer. It's within -- it's what the agency's here
16 for, make these kinds of decisions, right? The statute
17 doesn't really tell us how to answer this question. Would
18 you all agree on that, or do you disagree with the --

19 MR. RYAN: No, I agree with that point. I wanted
20 to make one point with respect to your perjury concerns and
21 that is that I think there is a way to design the reporting

1 forms themselves to accurately reflect what's being reported
2 so as not to be raising perjury concerns for those who have
3 to sign those reports saying, for example, in the schedule
4 that is used for reporting of co-hosted fundraisers, this is
5 the -- this line is the total amount of funds raised at this
6 co-host -- this fundraiser, fundraising event co-hosted by
7 registrants for whom the candidate's required to disclose
8 bundling contributions, instead of saying -- having the
9 language in the form be able to be misinterpreted as each
10 one of these candidates -- or each one of these lobbyists
11 raised this amount of money. I think it's a question of
12 wording.

13 But I also want to get back to a comment Marc made
14 a couple minutes ago with respect to his being the better
15 reformer, the more ardent reformer at this table and wanting
16 more disclosure.

17 In all fairness, I think we are dealing with --
18 we're weighing two different competing interests and Marc
19 has described the situation in which the information maybe
20 isn't quite as accurate, depending on how you do it as it
21 might be.

1 But Craig articulates the other end of the
2 spectrum, which is no disclosure, because you have the
3 attribution spread out among such a large number of
4 lobbyists and none of them meet the \$15,000 threshold. And
5 my concern articulated earlier regarding the possibility or
6 even probability perhaps that campaigns would change the way
7 they look at these events and structure these events so as
8 to not require disclosure of their lobbyists because they
9 may not want to be that closely affiliated --

10 CHAIRMAN McGAHN: Isn't that the natural
11 consequence of any long -- line drawing? Once you draw a
12 line, people are going to act in a way consistent with that
13 line and simply because they may get close to that line or
14 stay far away from that line, it's still a line and they
15 should be able to act accordingly?

16 MR. RYAN: Certainly. Yes, and you can draw the
17 line in a way that will make it pretty easy for people
18 perhaps to evade disclosure completely or you can draw the
19 line elsewhere and require what -- depending on how it's
20 drawn, could result in misinterpretation or over-disclosure,
21 or if you have, as Senator Feingold suggested and we

1 reiterated in our comments, a part of the co-hosted
2 fundraising reporting, including a listing of all of their
3 co-hosts or even going one step beyond that and while
4 attributing the total amount to each of those co-hosts, also
5 allowing the campaigns to use their own recordkeeping to
6 attribute what they believe was a specific amount to those
7 co-hosts within the context of this schedule that says
8 everyone, every co-host was responsible for the total dollar
9 amount.

10 MR. ELIAS: If I can just make a couple points of
11 clarification. Number one, I join my two colleagues --

12 CHAIRMAN McGAHN: Sure, go ahead.

13 MR. ELIAS: -- in completely rejecting the pro
14 rata shares, so I'm not advocating the 100 -- you take 100
15 and you divide it up. I think that that is as frustrating
16 to reform and the intent of the statute as anything would
17 be.

18 But I oppose the opposite, which is we just take
19 it all and we attribute it to everybody. I'm arguing for
20 the third way, which is we try to get as close to the
21 reality of who got credit for each check. So I don't -- I

1 don't -- just so you know, I don't want the Commission to
2 misinterpret. I don't support the pro rata approach either.

3 CHAIRMAN McGAHN: Commissioner Weintraub first,
4 then I'd like to get to the General Counsel at some point
5 before we run out of time.

6 COMMISSIONER WEINTRAUB: The big question, okay.
7 One -- first question is suggested by this last exchange and
8 try and keep it focused. I think that Marc raises an
9 interesting concern about the possible obscuring effect of
10 having too much disclosure. It's like a document dump in
11 discovery, where you know you've got one bad fact in there
12 so you try and bury it under a mound of paper and hope they
13 won't notice.

14 And this is sort of the flip side of the scenario
15 that I was talking about with Don Simon earlier where maybe
16 somebody wouldn't write down Jack Abramoff because you don't
17 want that name to show up on your disclosure so for him and
18 him alone you have the unwritten recognition.

19 But here is the flip side. Suppose that Jack
20 Abramoff actually did raise \$100,000 and you want to dilute
21 that. You say well okay, we'll just say, well really, even

1 though we know that he's the guy that brought in all the
2 money, we're going to add all these -- this is great. We're
3 adding all these other co-hosts and then it looks like he
4 didn't do as much, he wasn't as significant a figure in our
5 fundraising operation as he really was.

6 So I just wanted to ask quickly, Mr. Ryan, whether
7 you have any concerns about that kind of obscuring effect of
8 just assuming that everybody raises everything?

9 MR. RYAN: I do have concerns, but they're not as
10 great as my concerns that an alternative approach could
11 result in less or no disclosure.

12 COMMISSIONER WEINTRAUB: All right, fair enough.
13 Second question, I want to go back to the issue of who
14 speaks for the registrant, because you had said earlier,
15 Paul, that if a non-lobbyist is acting on behalf of the
16 registrant and the registrant's getting credit, then that
17 should be disclosed and that seems reasonable, except how do
18 we know when they're acting on behalf of the registrant?

19 I come at this from a real point of confusion
20 because I'm struggling to find a way to get content to this
21 requirement that the registrant's bundling has to be

1 disclosed, because I don't think I've ever seen an
2 organization listed as a bundler on any of these voluntary
3 disclosures; am I wrong about that?

4 MR. ELIAS: It could be, sure. I believe that --
5 list files bundling disclosure reports that are an
6 organization.

7 COMMISSIONER WEINTRAUB: Oh, okay.

8 MR. ELIAS: Partnerships which are permissible
9 bundlers could file a disclosure. There are other federal
10 PACs that would be organizations.

11 COMMISSIONER WEINTRAUB: Okay, so how do we know
12 when somebody's acting on behalf of the registrant?

13 MR. RYAN: I'm happy to just state briefly that --
14 and I've testified before this Commission previously about
15 the concept of agency, how do you deal with the agents under
16 FECA and BCRA, and I think that's the concept that needs to
17 be employed here and it is not always the neatest concept.

18 I was here for the first panel and I was intrigued
19 that Mr. Sandler was advocating broader disclosure in this
20 context than we, the Campaign Legal Center, did in our
21 written comments. But I think without consulting with my

1 colleagues, I'm going to stick to our approach we advocate,
2 which was rely agents -- require any agent of a registrant
3 be covered by the statute.

4 MR. HOLMAN: And if I could double that, speaking
5 as a person who filed the Freddie Mac complaints, you folks
6 did an excellent job of determining that Mitch Delk was
7 working as an agent on behalf of Freddie Mac. You have
8 established your standards of determining who is an agent of
9 a corporation or a registrant, and that would be the
10 principal that would be applied here.

11 COMMISSIONER WEINTRAUB: Give you an opportunity
12 to weigh in.

13 MR. ELIAS: Yeah, I, in my comments take a
14 somewhat more cautious approach. Where Congress has wanted
15 to loop in agents, they have done so expressly and
16 explicitly. They chose not to do so here. Presumably they
17 knew how to do it because they did it in McCain-Feingold in
18 several instances.

19 Obviously the organizational context, there has to
20 be some way of looping it in because corporations only act,
21 or for that matter, any organization, only act through its -

1 - through its officers, employees and in that sense, agents.
2 So my caution about agents is actually less around the
3 organizational situation.

4 It is more -- there was a question, I think,
5 raised whether or not if I as a non-lobbyist host -- do an
6 event, it should automatically attribute in some form or
7 fashion to either the law firm I work for or some other
8 registered lobbyist, and it seems to me that in that
9 instance, there is no agent acting on behalf of. I mean,
10 the statute doesn't talk about agency in that context.

11 MR. RYAN: Can I just add real quickly that I
12 think that FECA has been interpreted by this commission to
13 include or cover agents in many areas where the statute
14 doesn't explicitly include agents. And I'll just point to
15 11 C.F.R. 114.2(f), which is regarding corporations and
16 unions facilitating the making of contributions. There's
17 other examples, but the statute doesn't mention agents
18 there; the regulations do appropriately so.

19 MR. ELIAS: The other concern I would have, which
20 I'm sure my colleagues will share -- they may not share the
21 solution, but they'll share the concern -- is that I don't

1 think the Commission wants to open up a suggestion that
2 corporations are now permitted to bundle contributions. I
3 mean, the fact is it is -- it has been in fact -- I believe,
4 Commissioner, you wrote eloquently in that matter involving
5 an energy company from Kansas City. I forget the name of it
6 --

7 MR. HOLMAN: Westar.

8 MR. ELIAS: Westar -- about the fact that
9 corporations are not permitted to bundle contributions. I
10 don't -- I don't want any regulations here to suggest that
11 somehow by listing it, it somehow becomes permissible
12 activity.

13 MR. RYAN: My understanding is there are
14 exceptions to the ban on corporate and union facilitation of
15 making of contributions for activities within their
16 restricted classes, and I think some of those activities
17 would meet the definition of bundling in this statute and
18 should be covered. So I think it's oversimplification to
19 say corporations can't bundle; I think they can under some
20 circumstances.

21 MR. ELIAS: I agree with that, but I don't think

1 we want -- I don't think there should be a suggestion that
2 it's opening up some -- what had been impermissible, today
3 is not permissible.

4 COMMISSIONER WEINTRAUB: I want to ask one more
5 question. Brand new topic. Nobody's talked about this at
6 all today. The concept of when -- the statute tries to
7 capture disclosure of bundling by PACs that are established
8 or controlled by registrants and lobbyists, and it's easy to
9 see it in the SSF context that it's established by a
10 registrant, if indeed the affiliated organization is a
11 registrant. But what about a non-connected committee; at
12 what point should we deem a non-connected committee to be
13 controlled by a lobbyist?

14 The Secretary of the Senate, the Clerk of the
15 House in their Lobbying Disclosure Act guidance and their
16 HLOGA guidance have suggested that if a lobbyist is on the
17 board or perhaps is the treasurer, that that would be an
18 indicia of control. Should we -- although their -- the
19 example they use makes it a little bit ambiguous. Should we
20 defer to that? Should we come up with a different
21 definition and if so, what would it be? Anybody?

1 MR. HOLMAN: We all want to answer, I think.

2 MR. RYAN: I'll jump in first. I think that we
3 would support a rule that established that a lobbyist who's
4 on the board of a non-connected committee or is an officer
5 makes that per se control by the lobbyist. I would also
6 advise or suggest that the Commission look to its own
7 regulations regarding establishing financing, maintaining
8 and control because you have a couple parts in your
9 regulations, 100.5(g)(4)(ii) and 300.2(c) both get into this
10 concept, and I acknowledge readily that's not a neat fit,
11 but there may be some language in their that would be
12 helpful.

13 MR. HOLMAN: The Commission's already tackled
14 issues like this very, very well in a tried and true sense.
15 The Commission's definition of affiliation, for instance,
16 has three indicia that I think could be used. The entity
17 directs or participates in the governance of the
18 organization, the entity hires or fires within the
19 organization, or the entity does an ongoing fundraising role
20 within the organization. That would seem to be an
21 appropriate definition of control to me.

1 MR. ELIAS: I like the idea of trying to the
2 Commission's existing regulations if possible. I realize,
3 as Paul does, that there are probably limitations there.
4 But I believe the fewer competing definitions for the same
5 words that appear in the statute is good, although I haven't
6 looked at those regulations recently, so I don't know what
7 that -- where that leads us.

8 Treasurer I would say for sure, would be -- I
9 mean, after all, that's the person who's name you put on the
10 nice letters that Ms. Duncan's office sends me and my
11 clients periodically. And beyond that, I'd be hesitant to
12 say that per se board membership is controlled, just because
13 some -- very often these boards can be very large and
14 honorific in nature.

15 I'd want something a little bit more practical
16 than that, but I think you're looking at who actually
17 controls it, not that someone's listed as one of 50 people
18 on an honorific board that they have -- that they exercise
19 no power on.

20 Because remember, most of these are not corporate
21 -- most of these non-connected PACs are unincorporated

1 associations and they don't really have a true governing
2 board. The board is very often just there for public
3 consumption, not for actual governance purposes.

4 CHAIRMAN McGAHN: General Counsel.

5 MS. DUNCAN: I know we're very short on time. I
6 just wanted to ask --

7 CHAIRMAN McGAHN: Take all the time you need.

8 MS. DUNCAN: I just want to ask this panel the
9 question that I asked the last panel about the issue of non-
10 lobbyist who are employees of registrants and how and
11 whether the rules apply there. And I know we have the
12 suggestion to apply the agency standard, and that's
13 something that we at this agency can do obviously and have
14 done.

15 But isn't the more relevant question on the part
16 of the reporting committee, how do they know when the CEO,
17 for example, is acting individually as a volunteer or acting
18 on behalf of the actual registrant; as a practical matter,
19 how does that work? Really addressing this to Mr. Holman,
20 but others can answer.

21 MR. HOLMAN: Okay, Paul could have answered this

1 probably better. I would stick to the -- I reiterate the
2 agency's standard. I mean, it's a matter for the Commission
3 to determine. If there is some sort of red flag that draws
4 your attention to the role of a CEO who is not a registered
5 lobbyist and his or her role in the fundraising, you know,
6 you've got to apply the principles of the agency standard in
7 determining whether or not that CEO was working on behalf of
8 the organization or the registrant, or on behalf of a
9 lobbyist. That is something that you've got to determine in
10 an audit process.

11 You know, really generally it would -- certainly a
12 CEO who is not a registered lobbyist and who is not acting
13 on behalf of his or her corporation or registrant, and
14 there's a fundraising event at -- in his or her home, that
15 is not someone who in my opinion would be captured in the
16 bundling provision. It's when they're actually working as
17 an agent or perhaps using the registrant's property or on
18 the registrant's time or something on that order, which all
19 falls within your agency standard.

20 MR. ELIAS: I'd say a word about -- we talked a
21 lot about various pieces of legislative history. Senator

1 Reid, who as I mentioned, was actually the technical primary
2 sponsor of the legislation, along with Senator Feinstein,
3 who was the chair -- is the chair of the Rules Committee,
4 which had jurisdiction over the lobbying disclosure pieces -
5 - you're going to correct me when I get this wrong -- and
6 Senator Lieberman, who is chair of the committee that had
7 jurisdiction over -- I have this backwards.

8 COMMISSIONER PETERSEN: Senator Lieberman had the
9 LDA.

10 MR. ELIAS: He had the LDA and Senator Feinstein
11 had the campaign finance -- submitted a joint statement of
12 legislative history in the record, which actually addresses
13 this head on and I would commend the Commission to look at
14 it carefully and follow it.

15 They make clear that only contributions credited
16 to registered lobbyists are covered, contributions credited
17 to others including others who may share a common employer
18 with or work for lobbyists, are not covered by this section
19 so long as any credit is generally received by the non-
20 lobbyist and not the lobbyist.

21 To me your question belies again what I think is

1 the fundamental divide over how to view this. My own view
2 is, it's not about agency; it's about credit. At the end of
3 the day -- I'll end where I began -- at the end of the day,
4 when the members sat back after that event, they say to
5 themselves, gee that was a great event that Fred just threw
6 for me. Or did they say, you know what, I'm giving the
7 company credit for this event?

8 It's -- I think it's driven by how they view it.
9 If they are viewing it, if they are offering credit through
10 records designation or other form of recognition to the
11 company, then it's the company. And if they're offering --
12 if they are doing that for the individual, then it's the
13 individual.

14 I think ultimately we need to not view this as a -
15 - I fear sitting in an enforcement action with you all years
16 from now in which I am being told by a lawyer at OGC that my
17 client, the candidate, is wrong in who they credited. I'll
18 just say right now, that would be an absurd place. If my --
19 if a candidate credits an individual, it is not the place of
20 this agency to say no. You actually should have credited
21 the organization, or you should have credited a different

1 individual.

2 The statute, I think, is clear on this. To answer
3 your question, I don't think it's a matter of agency
4 discretion. I think the agency would be acting outside the
5 bounds of the law if it interpreted it otherwise. I'm
6 sorry.

7 MS. DUNCAN: And I guess I suppose that if there's
8 a discrepancy between the reporting committee and the
9 individual who is being credited as to what or on who's
10 behalf he is acting, that would just get worked out between
11 --

12 MR. ELIAS: No, I don't think there's -- I don't
13 think there's a competition. Understand, the fundraising
14 community is full of individuals and entities that claim
15 credit for things that they don't receive it, right? It is
16 common that hosts, that someone believes they have done more
17 for a candidate than the candidate does.

18 My point is it doesn't get sorted out. It is
19 ultimately, what is the view, the subjective view of the
20 campaign that ought to control in the statute? Because --
21 the statute speaks about who is crediting. It is not an

1 objective crediting.

2 MS. DUNCAN: So if the CEO thinks he's doing this
3 voluntarily, as I think Mr. Hunter raised earlier, but then
4 the reporting committee for whatever reason decides they're
5 going to give the credit to the corporation, that's the
6 situation I'm talking about.

7 MR. ELIAS: Then it should be reported. Then it
8 should be reported. Look, the purpose of this statute -- I
9 go back to the beginning. Who's getting juice with the
10 member? Who does the member feel that much -- maybe it's
11 only that much -- but that much beholden to, or thankful to?

12 And if they're feeling that way toward the
13 company, then God bless, they would put down the company.
14 And if it's an individual though, they'll put down the
15 individual and there ought not to be a -- you know, someone
16 from OGC sitting around saying, well, I think you credited
17 it wrong. Well then, you run for Congress and then you can
18 credit it however you want.

19 MR. HOLMAN: Once again, I want to reiterate, that
20 type of discretion and this type of reporting regime would
21 undermine the entire disclosure element of the law. You

1 can't provide that type of wide leeway in discretion and
2 just leave it an entirely discretionary disclosure system.
3 And that is what Marc is proposing.

4 You know, suppose you had the traditional Pioneer
5 tracking number system on the checks, but the candidate
6 wanted to say, but I'm really giving credit to someone else.
7 You just can't leave that type of discretion reaching --
8 overreaching the entire disclosure regime.

9 MR. ELIAS: I'm not saying that campaigns get to
10 lie. I mean if in fact they are giving credit to person A,
11 they're not allowed to just -- person B. I mean, it strikes
12 me that you'll have one of two effects from this, both of
13 which are good. You'll either have to go to the question --
14 I think the chairman too easily concedes that there is going
15 to be some effect, some gamesmanship -- and that's my word,
16 not yours -- that will result from my view.

17 I don't think that's true at all. I think you'll
18 get one of two effects. You'll either get very robust
19 accurate disclosure, which would be a public policy good, or
20 you'll have campaigns genuinely distance themselves from
21 lobbyists. What's wrong with that? That's good, right?

1 It will be the opposite of gamesmanship. It will
2 be -- it won't -- you won't be able to put 100 people down,
3 which allows you to stay close to lobbyists. You'll have to
4 make a choice, are you willing to accurately disclose what
5 lobbyists bundled for you, or are you going to distance
6 yourself from lobbyists and not let them bundle for you?

7 And it seems to me that's a much more productive
8 public policy result. It is truer to the statute, probably
9 most importantly for this agency, than the other approaches,
10 which I frankly think invite much more gamesmanship.

11 CHAIRMAN McGAHN: Anything else? Nothing from the
12 office Staff Director? Thank you gentlemen. This concludes
13 our hearing.

14 COMMISSIONER WEINTRAUB: Mr. Chairman?

15 CHAIRMAN McGAHN: Yes.

16 COMMISSIONER WEINTRAUB: You might want to --

17 CHAIRMAN McGAHN: Explain to them about the --

18 COMMISSIONER WEINTRAUB: Yeah.

19 CHAIRMAN McGAHN: That's right. In the first
20 panel we indicated that the record's going to be held open
21 for a week in the event you want to file supplemental

1 comments or flesh anything out that happened here today,
2 particularly if you have any idea what the reporting form
3 would look like, that may -- that may help. That's one way
4 to sidestep the pro rate versus reality debate and all that.
5 Maybe there's a way that someone could creatively figure out
6 a report -- that's something that I'm looking for -- or
7 whatever else you may wish to submit, it will be open for a
8 week.

9 This concludes our hearing on the proposed
10 lobbyist bundling rules. I'd like to thank everyone who
11 appeared before us -- will no doubt help assist the
12 Commission in deciding a very important issue, and as Mr.
13 Elias said, a brand new area for the Commission that is not
14 rooted in the mid-1970s and the history since. It's a
15 chance for the Commission to do something anew and we
16 appreciate the help you've given us.

17 With that, the meeting is recess -- is adjourned.

18 Thank you.

19 (Whereupon, at 1:02 p.m., the hearing was
20 adjourned.)

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