

In The Matter Of:

*Candidate Travel, Multi-Candidate Committee
Status, Biennial Contribution Limits*

*FEC Public Hearing
October 1, 2003*

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FEDERAL ELECTION
COMMISSION
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[1] UNITED STATES OF AMERICA
[2] FEDERAL ELECTION COMMISSION
[3] CANDIDATE TRAVEL,
[4] MULTI-CANDIDATE COMMITTEE STATUS,
[5] BIENNIAL CONTRIBUTION LIMITS
[6] AND MAILING LISTS
[7] PUBLIC HEARING
[8] Wednesday, October 1, 2003
[9] 9:35 a.m.
[10] Federal Election Commission
[11] 999 E Street, N.W.
[12] 9th Floor Meeting Room
[13] Washington, D.C. 20463

[1] PRESENT:
[2] ELLEN L. WEINTRAUB, Chairperson
[3] BRADLEY A. SMITH, Vice Chairman
[4] SCOTT E. THOMAS, Commissioner
[5] DANNY LEE McDONALD, Commissioner
[6] MICHAEL E. TONER, Commissioner
[7] DAVID M. MASON, Commissioner
[8] LAWRENCE H. NORTON, General Counsel
[9] JAMES E. PEHRKON, Staff Director
[10] PRESENTATIONS:
[11] ROBERT F. BAUER, Perkins Cole, LLP
[12] STEPHEN M. HOERSTING, General Counsel
[13] National Republican Senatorial Committee
[14] GLEN SHOR, FEC Program Director
[15] The Campaign Legal Center
[16] JOSEPH E. SANDLER, Sandler, Relf &
[17] Young, PC
[18] DONALD F. MCGAHN II, General Counsel
[19] National Republican Congressional
[20] Committee
[21] CHARLES R. SPIES, Election Law Counsel
[22] Republican National Committee
[23] MARC E. ELIAS, Perkins, Cole, LLP

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[1] PROCEEDINGS
[2] CHAIRPERSON WEINTRAUB: Good morning, and
[3] welcome to the commission's public hearing on
[4] candidate travel, multi-candidate committee status,
[5] biennial contribution limits, and mailing lists.
[6] This special session of the Federal Election
[7] Commission for Wednesday, October 1st, 2003 will
[8] please come to order.
[9] Let me get some context to this because
[10] it's sort of a funny hodgepodge of topics that
[11] we're considering all in one day. All of these
[12] things came up when we were considering our Title
[13] 26 rulemaking earlier this year. We decided that
[14] rather than delay that until we could resolve every
[15] single issue that anybody wanted to perhaps take a
[16] look at, we would split off some of the issues that
[17] were originally split off into a single rulemaking,
[18] and then when we looked at the document we were
[19] creating, it was somewhat cumbersome and actually
[20] at my suggestion we split it up into separate
[21] rulemakings because it makes it easier to follow
[22] what's going on in each of the different topics.

[1] But particularly given that — Mr. Hoersting, I'm
[2] glad to see you. We were worried about
[3] you — particularly given that they were originally
[4] part of one rulemaking, and we didn't get actually
[5] all that comments or requests to testify, we
[6] thought we could probably do it all in one day, and
[7] rather than divide it up into topics and make all
[8] of our witnesses sit down and come back and sit
[9] down and come back, we could, by doing it by
[10] witness panels rather than by topic, we could get
[11] through it all and still get out in time for a late
[12] lunch.

[13] As you are aware, the proposed rules we
[14] are discussing today were included in three
[15] separate notices of proposed rulemaking published
[16] on August 21st and September 4th, 2003 in the
[17] Federal Register.

[18] In addition to the topics that we are
[19] talking about today, we also have a proposed
[20] rulemaking on telephone banks. We got one comment
[21] on that late last night, and nobody requested to
[22] testify, so I — you know, unless anybody, any of

[1] our witnesses want to say something about it, we'd
[2] be happy to hear about it, but it's not something
[3] that is necessarily covered today.

[4] We appreciate the willingness of the
[5] commenters to assist us in this effort by giving us
[6] their views, and we particularly want to thank the
[7] witnesses who have taken the time today to come in
[8] and give us the benefit of their experience and
[9] expertise.

[10] Let me briefly describe the format. We
[11] are going to have two panels. The first panel is
[12] scheduled until 11:15. The second panel will begin
[13] at 11:30 and end at 1:30, and each witness will
[14] have time to make a five-minute presentation and
[15] then we will have time for at least one round of
[16] questions from the commission, the general counsel,
[17] and the staff director. This will ensure that
[18] everyone has a fair chance to state his or her
[19] views, or I guess in this case, his views. I don't
[20] think we have any hers on the witness panels.

[21] We are going to use a light system. You
[22] will get five minutes. The green light will come

[1] on when you start, if I work this properly, and the
[2] yellow light comes on when you have got 30 seconds
[3] left, and you should think about wrapping it up.

[4] Our first panel this morning will consist
[5] of Robert Bauer of Perkins, Coie; Stephen Hoersting
[6] of the National Republican Senatorial Committee;
[7] and Glen Shor of the Campaign Legal Center.

[8] The second panel will be Charles Spies of
[9] the Republican National Committee; Don McGahn of
[10] the National Republican Congressional Committee;
[11] Marc Elias of Perkins Coie; and Joseph Sandler of
[12] Sandler, Reiff & Young.

[13] Let me invite the witnesses to come up for
[14] the first panel, and let me see — I guess, Mr.
[15] Bauer, we will ask you to lead off and let me just
[16] express on behalf of the entire commission our
[17] condolences on the recent loss of your father, and
[18] our appreciation that under the circumstances you
[19] still, trooper that you are, showed up today. We
[20] will try not to ask you too tough questions.

[21] TESTIMONY OF ROBERT F. BAUER,
[22] STEPHEN M. HOERSTING,

GLEN SHOR

[1] MR. BAUER: I will be very brief with my
[2] opening remarks. As a matter of fact, I think I'll
[3] leave the discussion of these rulemakings largely
[4] to the questions and answers. You have detailed
[5] written remarks that we provided you and which you,
[6] no doubt, put on the record.

[7] Also my colleague Marc Elias will be here
[8] this afternoon and, as you know, he has also
[9] participated in the development of our position on
[10] these rulemakings and will have an opportunity to
[11] comment on the travel and mailing list, as well as
[12] the multi-candidate rules.

[13] I will focus my one to one-and-a-half
[14] minute opening comment simply on this proposition,
[15] which is I think it is helpful for the commission
[16] to look at issues like those under examination
[17] today and to consider regulatory alternatives to
[18] clarification of the law. That is, I think, a
[19] useful exercise, and it is appreciated by the
[20] regulatory community. Of course, it is in the
[21] nature of developing rules that complications also

[1] develop along with the rules themselves, and it is
[2] our fervent hope, and I think it is a theme running
[3] throughout some of the technical commentaries in
[4] our comments that it is important to focus the
[5] rules on basic objectives and keep them as clear
[6] and simple as possible. And when I say focus on
[7] basic objectives, a law has a tendency to run away
[8] with itself. It's awfully difficult to formulate a
[9] rule and keep it simple because then the rule has
[10] to be further developed and the key terms have to
[11] be defined, and before long a regulation which is
[12] meant to clarify becomes the source of the
[13] complication that it was meant to address in the
[14] first instance.

[15] So it would be our hope that that
[16] particular — if you want to call it internal
[17] dynamic of rulemaking be kept in the commission's
[18] mind as it develops these rules, and that
[19] simplicity and clarity for the regulated community
[20] be the touchstone for the effort.

[21] Secondly, that the commission keep in mind
[22] the objective. A regulation isn't always healthy

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[1] for its own sake. There are key objectives in the
[2] administration of this campaign finance law that
[3] drives the commission's decisions. Those
[4] objectives are reflected in the congressional
[5] enactments that you are charged with enforcing.
[6] They have to do with assuring that core
[7] contribution limits are enforced, core source
[8] restrictions are enforced, core disclosure
[9] requirements are enforced, but where there is not a
[10] compelling need to meet those concerns, it is also
[11] important to take into account the particular
[12] difficulties under which the regulated community
[13] labors, and to assure that the regulated community
[14] can do what it is lawful to do as efficiently, with
[15] the maximum possible use of its resources, as it
[16] can.

[17] It is — and I think it is reflected in
[18] this rulemaking effort — also an objective of the
[19] commission to balance the regulatory objectives you
[20] have against a certain concern with allowing
[21] healthy political activity to proceed with as
[22] little unnecessary burden and with as much

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[1] efficiency as possible.

[2] The last comment along more specific
[3] lines, we have commented, as you know, on this
[4] nettlesome question of how the aggregate limit
[5] ought to be calculated, and we understand the
[6] particular issue the commission faces, which is
[7] while there isn't any developed legislation,
[8] legislative history on the point, there seems to be
[9] some clear congressional language that doesn't seem
[10] altogether consistent with the commission's first
[11] regulatory pass at the issue.

[12] Having said all of that, we urge you to
[13] consider whether now is the time to make a change.
[14] We have put a lot of effort in the wake of the
[15] enactment of the statute into alerting the
[16] regulated community to what the new legal
[17] requirements are, and to explain to donors how the
[18] aggregate contribution limit would be calculated,
[19] and so there is a great concern on our part that to
[20] have a new set of rules at this stage in the cycle,
[21] however you feel about what I call the first pass,
[22] will simply greatly confuse the donor community and

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[1] contribute to the ongoing complications we all face
[2] muddling through this election cycle.

[3] So with those comments, I close. Thank
[4] you very much.

[5] **CHAIRPERSON WEINTRAUB:** Thank you, Mr.
[6] Bauer. Well under your time limit.

[7] If I can reset my clock here.

[8] Pay no attention to this.

[9] Mr. Hoersting, you're up.

[10] **MR. HOERSTING:** Thank you, Madam Chair.

[11] Mr. Vice Chairman, Commissioners, general
[12] counsel, Mr. Staff Director, I welcome the
[13] opportunity to testify this morning and can only
[14] imagine the work you have put into these notices.
[15] I know what goes into those, and it is a difficult
[16] process and —

[17] **VICE CHAIRMAN SMITH:** — You can only
[18] imagine it?

[19] [Laughter.]

[20] **MR. HOERSTING:** I have some idea, yeah.

[21] I'll begin by saying I agree with the
[22] themes that Bob just struck, and his — though I

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[1] did not ask to speak about the biennial limit, I
[2] agree with the implementation comment that he just
[3] made.

[4] I would like to commend the commission on
[5] its travel MPRM. As you have noted, candidates are
[6] in need of more guidance in this area, as well as a
[7] uniform valuation scheme for campaign travel. The
[8] NRC agrees that the focus should move away from
[9] what types of entities own aircraft and away from
[10] destination cities that enjoy regularly scheduled
[11] service, as the means of determining the rates for
[12] reimbursement.

[13] Let me say that we agree with Mr. Shor's
[14] comments in one respect. We are talking here about
[15] proper methods of reimbursing travel expenses.

[16] Corporate and union treasury contributions are
[17] banned, and no one is advocating give-aways here.

[18] The commission is correct when it notes
[19] that under current rules, candidates who campaign
[20] in major metropolitan areas that have regularly
[21] scheduled airline service are generally able to use
[22] private planes and reimburse at first class rates.

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1) But the rural and western counterparts are too
2) often required to reimburse at the more expensive
3) charter rates. So the NRC believes that the way to
4) address this inequity is best expressed in
5) commission alternative A, and in reading the
6) comments last night, I wonder if there isn't
7) something to the remarks of Marc Elias from Perkins
8) Coie with regard to clarification, and I would like
9) to hear more about that later.

10) We also approve of removing the prepayment
11) requirements and favor a tight repayment deadline.

12) We also support allowing the campaign to
13) use a normal, advanced ticket price when
14) calculating comparable-based rates. Such rates are
15) available to anyone who plans ahead and should be
16) permitted for campaigns, unlike government rates,
17) which can only apply to official travel and are
18) awarded based on who books the travel, not when
19) it's booked.

20) I submitted brief comments on this
21) rulemaking just after the hurricane hit northern
22) Virginia, so if any of my comments with regard to

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1) 100.93 in the written comments are different from
2) my oral testimony, I respectfully request that you
3) follow the oral testimony.

4) [Laughter.]

5) MR. HOERSTING: Thank you.

6) The NRC is less enthusiastic about the
7) mailing list NPRM as it understands it, and at the
8) outset let me correct a typo in my comments that
9) may leave a misimpression.

10) We support signature agreements and
11) believe that the officeholders who engage in them
12) have a right to the names they earn. Therefore —

13) CHAIRPERSON WEINTRAUB: If you are going
14) to correct a typo, can you give us a page, please.

15) MR. HOERSTING: Page 6, second line from
16) the bottom. I would delete the word "not,"
17) something law professors always tell you to do on
18) exams. Be sure you mean "not or."

19) I see two fundamental flaws in the
20) commission's proposal which I will note briefly and
21) can address other issues in the Q&A.

22) First is the presumption that political

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1) committees of the same party do not operate at
2) arm's length in the sense that they have no
3) interest in receiving fair-market value while
4) conducting list exchanges, sales, and rentals. Let
5) me assure you that this is just not true.

6) In a year of Federal dollars and
7) individual aggregate limits, candidates of the same
8) party and parties of the same political party
9) compete at arm's length more zealously than ever.
10) Getting names is the name of the game, and each
11) committee has a strong business interest in
12) obtaining value for its names in the political list
13) market.

14) So the commission's concerns over arm's
15) length negotiating, coupled with its questions of
16) whether committees of the same party can ever
17) operate at arm's length indicate a misunderstanding
18) which I can address in the Q&A.

19) Second, to ensure that a usual and normal
20) charge is being paid for lists, the commission
21) proposes that the value be ascertained by
22) independent appraisers. We also have some concerns

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1) with that which I can address in the Q&A.

2) Generally speaking, we believe that the
3) commission and experts may have access to sensitive
4) data that political committees deal in, as it has
5) for years in the enforcement process, under
6) safeguards such as 437(g)(a)(12).

7) But the NRC does not believe there is a
8) basis for a wholesale revision of the political
9) list market, and if the commission insists on
10) issuing rules on this topic, we recommend that it
11) merely codify its historical treatment in this
12) area, as was recently explained in AO 2002-14.

13) Thank you.

14) CHAIRPERSON WEINTRAUB: Are you done?

15) MR. HOERSTING: Thank you.

16) CHAIRPERSON WEINTRAUB: I wasn't sure.
17) You mumbled that last thank you. I wasn't sure.

18) Mr. Shor, you're up.

19) MR. SHOR: Thank you, Madam Chair.

20) I appreciate everyone's affording me the
21) opportunity to testify today, and I will do my best
22) to answer your questions.

[1] Just an initial matter. With respect to
[2] the mailing list rulemaking, I submitted comments
[3] that were pretty brief and dealt on only a few
[4] discrete issues. If the commissioners are
[5] interested, I can talk to those particular issues
[6] today.

[7] For mailing-list-related issues that go
[8] beyond that, I don't think I am sufficiently up to
[9] speed to address those matters.

[10] Regarding the multi-candidate and biennial
[11] contribution limits, NPRM, I think my next
[12] statement may be memorable because of its rarity.
[13] I agree with the commission's proposals. They
[14] implement the plain language of the Federal
[15] Election Campaign Act, which is of course the
[16] commission's charge. I won't discuss now but I'm
[17] happy to answer questions about how and when a
[18] change in the treatment of contributions to
[19] candidates under biennial aggregate contribution
[20] limits should take effect.

[21] Finally, as for the candidate travel
[22] rulemaking, you have read my written submission,

[1] and know that I have a different perspective on
[2] this issue from most of those who will testify
[3] today. The perspective is not borne out of
[4] hostility to campaign travel or politicking or out
[5] of some utter lack of understanding of the
[6] challenges campaigns face in terms of scheduling
[7] demands and travel. I just can't get past the
[8] threshold question which, as I see it, is whether
[9] with these challenges in mind, the commission can
[10] propose the sort of response it has adopted in the
[11] past and contemplates building on, which is to
[12] allow candidates to reimburse providers of
[13] noncommercial air travel service at rates which are
[14] clearly below the value of the services received.

[15] I don't believe it can. The contribution
[16] amount limitations and source prohibitions of the
[17] Federal Election Campaign Act, which applies as
[18] much to in-kind contributions as they do to checks,
[19] prohibit it from doing so for reasons that are well
[20] known to the commission and weighty in their own
[21] right.

[22] Use of a charter rate for reimbursement

[1] would better reflect the value received by
[2] candidates for noncommercial air travel and in so
[3] doing better fulfill the command of the statute. I
[4] understand that this would represent a change in
[5] the course from the past, but my attitude is, of
[6] course, better late than never.

[7] So, again, thank you for inviting me to
[8] testify today. I will do my best to answer your
[9] questions.

[10] **CHAIRPERSON WEINTRAUB:** Thank you.

[11] Remarkably brief comments from everybody.

[12] Commissioner Mason, you get the first
[13] question.

[14] **COMMISSIONER MASON:** Thank you, Madam
[15] Chair.

[16] I'll start with Mr. Hoersting, who is
[17] suggesting that we, in his words, codify our recent
[18] Libertarian National Committee advisory opinion and
[19] our approach. One of the elements that is included
[20] in that opinion, which I believe Mr. Shor points
[21] out, is missing in the proposed regulation is a
[22] requirement that a list rented by a political

[1] committee in order for the rental not to be
[2] considered a contribution be developed for the
[3] committee's own use in the normal course of its
[4] operations. And we did specifically lay out that
[5] fact in the Libertarian advisory opinion in
[6] approving it.

[7] Is it your position that we should retain
[8] that requirement in any rule that we promulgate?

[9] **MR. HOERSTING:** Talking with regard to
[10] lists that it exchanges with other committees?

[11] **COMMISSIONER MASON:** To the requirement
[12] that a political committee have developed the list
[13] primarily for its own use in the normal course of
[14] its operations, in order for any subsequent rental
[15] to be considered not a contribution.

[16] **MR. HOERSTING:** We have no problem with
[17] that requirement that political committees develop
[18] lists for their own use, and that's a commercially
[19] reasonable purpose, and there certainly wouldn't be
[20] any invalid uses that we would want the commission
[21] to approve or authorize unwittingly.

[22] So we have no problem with having

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[1] committees develop lists for their own use and
[2] exchange them later.
[3] **COMMISSIONER MASON:** Thank you.
[4] Mr. Bauer, we had the — I don't know, for
[5] the sixth or seventh or eighth time, the Lyndon
[6] LaRouche Committee before us a couple of weeks ago,
[7] and they actually had a fairly compelling situation
[8] in which I think Commissioner McDonald described
[9] they felt they were damned if they did and damned
[10] if they didn't, and that is that they were
[11] contracting with certain corporations to provide
[12] services to the campaign and, on the one hand, they
[13] didn't want to receive illegal corporate
[14] contributions and, on the other hand, in the course
[15] of the audit we thought maybe they had overpaid,
[16] because public funds were involved, and that was a
[17] problem. And, indeed, in the public funding
[18] context they have to navigate between those posts.
[19] But here you seem to be saying, well,
[20] there really aren't any factors that you can look
[21] to, to determine the usual and normal charges.
[22] It's too complicated and too variable and we just

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[1] really can't identify what these factors are, and
[2] then on the other hand, I suppose, the commission
[3] should take this up in enforcement. But the
[4] problem, of course, we have, when we take it up in
[5] enforcement, is that if we haven't given people
[6] some guidelines or signposts, we have great
[7] difficulty — and you and your colleagues would
[8] with some justice be back in front of us and say,
[9] well, you never told us you were going to consider
[10] these factors or reject other factors.
[11] It really comes down to, to me, at page 3
[12] of your comments on this rulemaking, where you say
[13] the committee should be required to satisfy itself
[14] that the transaction is a bona fide arm's length
[15] transaction. And I guess the bottom line is that's
[16] not really the way regulation works. I mean I
[17] might be relatively satisfied with that, but having
[18] the regulated entity satisfy themselves that it's
[19] okay doesn't quite cut it, and the question is
[20] what's going to satisfy us.
[21] I just wonder if your proposals aren't
[22] really leaving the commission in a bad situation

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[1] because we haven't indicated what kind of factors
[2] we're going to pursue, but also potentially leaving
[3] regulated entities in a bad situation because we
[4] would then be making, you know, after-the-fact
[5] analyses of whether particular rentals were
[6] appropriate or not based on factors that we had
[7] never identified.
[8] **MR. BAUER:** One alternative, of course,
[9] would be for you to decline to enforce at all in
[10] this area, but I realize that won't press you in
[11] that direction successfully.
[12] [Laughter.]
[13] **MR. BAUER:** Let me answer the theoretical
[14] question you asked, which is how does the
[15] commission accommodate itself to comments like
[16] this, that as you characterize them, suggest there
[17] are no factors to look at. I would restate that
[18] position somewhat. I think the thrust of the
[19] comments is that the market in question is a fluid
[20] one that does take into account a wide range of
[21] factors. Any regulation that you develop might
[22] attempt to freeze, isolate and freeze some of those

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[1] factors in place, and in doing so, distort market
[2] reality, and that is always a challenge faced by a
[3] regulatory agency, particularly ones who engage in
[4] regulating commercial activity that it wishes to
[5] regulate in the public interest without necessarily
[6] introducing unwarranted market distortion factors
[7] into the conduct of commercial life.
[8] It seems to me that the risk you run with
[9] this regulation is you will take a fluid and
[10] complicated market which works itself out in its
[11] own way, and you will introduce, if you will,
[12] distortions into it by having a Federal agency
[13] decide which factors in a particular case or in a
[14] particular type of transaction are commercially
[15] reasonable or commercially accepted factors and
[16] which are not, and present proposed or purported
[17] enforcement difficulties.
[18] We think that you ought to try to avoid
[19] that situation, and try to avoid it particularly in
[20] light of this point, which is setting aside
[21] whatever agonies have been reported to you by the
[22] LaRouche Committee or other people who end up on

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[1] the unhappy end of Federal Election Commission
[2] audits, there is really no evidence that the
[3] largest threat to the political process in the
[4] United States lies in the current illicit
[5] exploitation of list exchanges, and the record of
[6] abuse is not such that it seems to me that you need
[7] to sort of aggressively intervene here and tinker
[8] with market forces.

[9] I think there ought to be a recognition
[10] that over time, in my judgment, by and large that
[11] list exchanges and sales and rentals have been
[12] motivated by something other than a desire to
[13] circumvent the campaign finance laws. They have
[14] been motivated by a desire to maximize opportunity
[15] precisely within the context of particular
[16] political goals and particular political actors,
[17] and the Federal Election Commission need not be
[18] concerned, in my judgment, that it is an area of
[19] acute potential vulnerability to the integrity of
[20] the Federal statutory scheme.

[21] So I would slightly reframe what you say
[22] is our position on this, that there are no factors

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[1] to look at. I just don't think that this
[2] commission is in the best position to both identify
[3] them and then freeze them in place in a particular
[4] rulemaking exercise. I think the watchword here
[5] ought to be flexibility and a respect for a
[6] community in which these exchanges and sales and
[7] rentals have taken place for some time without, it
[8] seems to me, any untoward consequences for the
[9] enforcement of the statute.

[10] **COMMISSIONER MASON:** Madam Chair, I have a
[11] couple other questions, but I will defer at this
[12] point. If we have time, I'll come back.

[13] **CHAIRPERSON WEINTRAUB:** Okay.
[14] Commissioner McDonald.

[15] **COMMISSIONER McDONALD:** Madam Chair, thank
[16] you.

[17] First of all, I would be happy if you want
[18] to press on.

[19] Bob and Steve, Glen, thanks for coming
[20] this morning. I'm like the Chair, I'm always
[21] appreciative of the people who will come because
[22] it's the only way to have a more decent exchange,

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[1] if you will, and I'd kind of like to follow up
[2] first, I think, on the point made by Commissioner
[3] Mason.

[4] I think, Bob, you may well be right. You
[5] know, I gather that the answer is how this issue of
[6] list exchanges, et cetera, is perceived and affects
[7] the political process. I think you are right, I
[8] think it's safe to say it may not be the overriding
[9] issue.

[10] I think, however, on the other hand, I
[11] mean what we're faced with and I thought where
[12] Commissioner Mason made a good start is that our
[13] problem is kind of one that I think you're very
[14] familiar with, which is a criticism is not
[15] delineating to a regulated community what they need
[16] to know, and so when we incorporate flexibility,
[17] which I think certainly is a commendable approach,
[18] even within the realm of flexibility, I think we
[19] have to have some parameters or otherwise we are
[20] absolutely providing no guidance, and some folks
[21] may be able to avail themselves of things that
[22] others cannot.

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[1] So pursuing it for just a second, I don't
[2] want to wish you a horrible day, but let's pretend
[3] you're sitting up here rather than down there, and
[4] you had to do something in this area to try to come
[5] to grips with it, realizing everything you have
[6] indicated, which is it may be a very flexible area,
[7] et cetera, where do you think we should go, aside
[8] from telling us that it's awful, we agree with you
[9] and that it's hard, but having taken that into
[10] account, what would you do if you were sitting up
[11] here to give some guidance and some benchmark that
[12] the regulated community might be able to count on?
[13] Because I think that's our problem, quite candidly.

[14] **MR. BAUER:** Well, it perhaps goes
[15] back — and I will also let my colleague Marc Elias
[16] elaborate on this on perhaps additional length
[17] later this morning. It goes back to the point I
[18] made about the particular formulation which
[19] Commissioner Mason advanced, which I think it was
[20] based on language he saw on page 3 of the comments,
[21] which I didn't immediately find, but I take your
[22] word for it, and that is there has to be a

[1] good-faith effort on the part of the political
[2] committee contemplating the transaction to
[3] investigate and then document in some fashion the
[4] commercial nature of what they are undertaking. I
[5] think that's what we look for. We look for good
[6] faith. We look for good faith, and at the end of
[7] the day, if there is some question — and, by the
[8] way, I suspect that the ones that are entered into
[9] improperly or in the absence of good faith will
[10] scream out for your attention. I don't think it
[11] will be difficult to identify them. I could be
[12] wrong about that. I mean I don't know what you
[13] might have simmering behind there in an execution
[14] session at the moment, but all the same —

[15] **COMMISSIONER McDONALD:** Well, we never get
[16] into those.

[17] **MR. BAUER:** If it's anybody I know, if
[18] it's anybody I know, be merciful.

[19] But the — at the end of the day what you
[20] are looking for is to advise the regulated
[21] community that there is an expectation across the
[22] lines the commission has repeated in all of its

[1] advisory opinions in this area, there is an
[2] expectation that these are commercially reasonable
[3] transactions that are entered into for the purposes
[4] stated, and entered into therefore in good faith by
[5] regulated entities inquiring into appropriate
[6] reasonable bases for doing what they propose to do.

[7] I think that will provide you with the
[8] first question, and then throw the burden back on
[9] those organizations to justify the reasoning they
[10] went through to arrive at those particular
[11] transactions.

[12] **COMMISSIONER McDONALD:** Thank you. It's
[13] good to see you this morning. Welcome back.
[14] Aren't you glad you're out there, rather than back
[15] here?

[16] **MR. HOERSTING:** It's different.

[17] **COMMISSIONER McDONALD:** Certainly not
[18] reflecting on your previous boss. I didn't want to
[19] infer that. I meant generically speaking.

[20] **MR. HOERSTING:** I agree with Bob, and I
[21] would also say that what the commission really
[22] ought to be looking for is commercial

[1] reasonableness here. It should be requiring that
[2] the lists be used as mentioned in the Libertarian
[3] AO, it should require fair market value. The
[4] committee should be able to prove in an enforcement
[5] setting that they had fair market value in mind,
[6] and if I can give you one example of detailing this
[7] too closely, I would cite frequency of use.

[8] You can imagine after frequency-of-use
[9] regs come down that certain parties to a
[10] transaction might feel obliged to make up for
[11] inequities in their lists by having one party to
[12] the transaction script and mail it more frequently.
[13] That's not implausible.

[14] But one can quickly imagine that poor
[15] scriptwriting, bad timing, or other problems could
[16] occur, and the response to the mailing could be
[17] lukewarm for the person who is supposed to mail
[18] more frequently.

[19] But economics dictate that that committee
[20] can only justify rescripting and mailing that list
[21] so many times before it becomes a losing
[22] proposition, and this is something that could be

[1] easily explained in the enforcement process.
[2] Results of the mailing could be shown under
[3] 437(g)(a)(12) confidentiality, but if the
[4] commission imposed strict and detailed frequency
[5] regulations, committees across the Nation might
[6] feel they have to throw good money after bad, so
[7] that the commission would not determine that the
[8] committee made in-kind contributions to the other
[9] organization because it didn't try to get more
[10] value of the lesser list.

[11] That is an example of the kinds of things
[12] we are talking about. And I don't see any reason
[13] to detail things such as delayed use because while
[14] the commission may feel it needs to put certain
[15] markers out there, they may discourage a lot
[16] of — unwittingly, perhaps, may discourage a lot of
[17] transactions that they believe have value.

[18] **COMMISSIONER McDONALD:** Okay. Let me
[19] ask — I appreciate that because I do want to kind
[20] of come back to this good-faith factor.

[21] But, Glen, let me just switch over to the
[22] travel for just a minute.

[1] You kind of indicated what the problem is
[2] from your vantagepoint so what is the solution?
[3] **MR. SHOR:** What I indicated in my
[4] comments, likewise that insofar as the commission
[5] is concerned, the proper solution is one along the
[6] lines of alternative C, which is to require a sort
[7] of uniform reliance on the charter rate for
[8] reimbursement.

[9] I think as far as the commission is
[10] concerned, you know, that is the nature of its
[11] responsibility, to ensure that there are no in-kind
[12] corporate contributions and to enforce 441(b)
[13] properly.

[14] To the extent anybody were to perceive
[15] that the consequences of that were problematic,
[16] then, you know, of course Congress wouldn't be
[17] precluded from revisiting the issue, and you know,
[18] sort of debating the whole thing in the light of
[19] day and considering a range of alternatives to
[20] address whatever problems there are. Obviously
[21] Congress retains its authority. You know, in the
[22] past it has carved out exceptions to the definition

[1] of contribution or expenditure. I'm not advocating
[2] that here, but I'm saying that, you know, I think
[3] the commission's concern should be limited to sort
[4] of proper and full enforcement of the statute, and
[5] then from there the policymaking body can consider
[6] the consequences.

[7] **COMMISSIONER McDONALD:** I guess the one
[8] thing that strikes me about this, I used to fly all
[9] over the state of Oklahoma, from Oklahoma City to
[10] Altus, and from places like Tulsa to Broken Bow,
[11] which our candidates have to do in a Senate race or
[12] in a House race. The scenario going from San
[13] Francisco to San Diego or Los Angeles is a lot
[14] cleaner matter, but as a practical matter the
[15] so-called charters I was on, I was just hoping
[16] they'd get up in the air, and when I was reading
[17] about the comfort and all, I felt like I had been
[18] shortchanged by the folks I had been with, because
[19] I didn't see any of those planes close by.

[20] I remember landing a few of them in
[21] fields, because they didn't work properly. So I
[22] didn't recall it like it was presented here.

[1] As a practical matter, I'm just trying to
[2] figure out how at the end of the day — let's take
[3] alternative C a minute. I mean do you see that as
[4] being able to resolve — the whole charter
[5] thing — I know, for example, always applied to
[6] availability. One charter may be available on a
[7] given day, and another one may not. It's not
[8] uncommon at all, particularly with small planes,
[9] and a lot of people, at least out where I live,
[10] flew small planes if they thought it made sense for
[11] them to.

[12] How do you resolve these issues? I mean I
[13] just don't quite understand how in the world you're
[14] going to resolve some of this to the satisfaction
[15] that you'd like.

[16] I understand where you're going, and I
[17] think you raise some very interesting points. I'm
[18] just not quite clear how you get to some of this.

[19] **MR. SHOR:** The commission, I think
[20] is — in these shorter questions, the commission is
[21] confronting a circumstance where a candidate did
[22] have access to a plane, and I think, Mr.

[1] Commissioner, what you may be referring to is sort
[2] of valuation issues.

[3] **COMMISSIONER McDONALD:** Yes.

[4] **MR. SHOR:** If you're going to go down the
[5] charter road, you know, how are you going to
[6] basically value an equivalent charter flight. I
[7] mean I think that there are ways to do it. I mean
[8] there are — you know, there's a book, I think,
[9] called "The Charter Guide." I may not have the
[10] name of that correctly. I know they have a Web
[11] site as well. There are such things are charter
[12] brokers, which I think are largely akin to travel
[13] agents, which assist people in terms of locating
[14] charter flights.

[15] I think those are potential options. You
[16] know, if the commission concluded, you know, that
[17] that was somehow unworkable, I do think that
[18] another option for the commission to sort of lay
[19] out some rates and rules itself after sort of
[20] investigating the nature of the industry.

[21] You know, again I don't necessarily say
[22] today that that's an easy task, but I don't think

1) it's necessarily beyond the commission's capacity.
2) I do think that there are ways to make
3) this workable, and that's part of the reasons why
4) we support that alternative.

5) **COMMISSIONER McDONALD:** Thank you.

6) I have a note here that says my time is up
7) now.

8) [Laughter.]

9) **CHAIRPERSON WEINTRAUB:** I wasn't going to
10) put it quite that bluntly, but we appreciate it.

11) Mr. Vice Chairman.

12) **VICE CHAIRMAN SMITH:** Thank you, Madam
13) Chair.

14) I just have to say, Mr. Bauer, I have
15) always respected you as an old Washington hand who
16) had been around and sort of knew how things worked
17) until you made the comment that regulation was not
18) for its own sake, and then I thought you don't know
19) Washington at all, do you.

20) [Laughter.]

21) **MR. BAUER:** Hope springs eternal.

22) **VICE CHAIRMAN SMITH:** You're threatening

1) to gut the bureaucracy, if that's the rule.

2) But I want to ask you one quick question,
3) just about the multi-candidate act status, and you
4) indicated in your written comments that that should
5) be an option for PACs to adopt for reasons that I
6) think are sound. It would seem odd to limit a PAC
7) with a broader group of contributors to lower
8) contributions than if it had fewer contributors.

9) Is it your view that the statute lists
10) certain requirements to become a multi-candidate
11) PAC, so you are arguing that those are essentially
12) optional as to whether or not to invoke that
13) status? Is it your view then that the commission
14) would be legally empowered to mandate the filing of
15) the form 1M to order a PAC to make a choice, and if
16) that's not done, to presume that if the PAC
17) contributes along multi-candidate limits, it will
18) be in violation of the act if it hasn't made that
19) choice?

20) You know, can we require a PAC to notify
21) us which status they are taking, in advance?

22) **MR. BAUER:** I would think so. Absolutely.

1) Our comments go, of course, to the question of
2) whether you can force them into a particular
3) contribution category, but it seems to me this
4) agency needs to know who is using or exercising
5) which contribution limits.

6) **VICE CHAIRMAN SMITH:** Okay. I asked for
7) that consistency because in some past enforcement
8) actions we have held that although the form 1M was
9) not filed, in fact that was not an actionable
10) offense because they met the statutory requirements
11) for the multi-candidate PAC status. So I wanted to
12) see if we had smoothed those out.

13) I do want to add just a couple quick
14) comments on this rulemaking.

15) First, this is a rulemaking, I think it's
16) an important one. It's worth nothing that it's not
17) one that really has much to do with, you know, how
18) much money is going to come into the system or how
19) much is going to be spent. It's really how people
20) are going to spend it, and more particularly
21) account for it. And I will go ahead and note
22) because it's been the subject of some consternation

1) that I am very sympathetic to the comments that
2) have been made about the mailing list rule being
3) overly complex and restrictive, and I would not
4) have supported that kind of rule in its final form.
5) We'll see what the votes are when it comes to its
6) final form. But I think that it does need to be a
7) more flexible ruling for the types of things that
8) you have commented both in your written comments
9) and in your comments so far.

10) I want to ask one question. Mr. Hoersting
11) raises this in his written comments, but I will ask
12) you, Mr. Bauer. He specifically says — suggests,
13) I think, that — or raises the question if we're
14) looking for arm's length agreements, he wants to
15) know whether or not — well, he always use
16) the — yes, the DSCC, they're one of your clients,
17) whether the DSCC and Emily's List or the DSCC and
18) the Environmental Defense Fund are arm's length
19) organizations.

20) **MR. BAUER:** He wants to know that?

21) **VICE CHAIRMAN SMITH:** Yes.

22) **MR. BAUER:** I could let him know after

[1] the —
[2] [Laughter.]
[3] VICE CHAIRMAN SMITH: Well, he says one
[4] wonders. One wonders whether the commission in its
[5] proposal would find a rebuttable presumption in the
[6] exchange of parties and outside groups. So he's
[7] wondering could we presume that those are not arm's
[8] length exchanges, or would you say those are arm's
[9] length exchanges when you deal with such groups?
[10] MR. BAUER: I don't have his comment in
[11] front of me, but he's suggesting that we should
[12] presume that they are not arm's length exchanges?
[13] CHAIRPERSON WEINTRAUB: He's wondering
[14] about the entire presumption analysis.
[15] MR. BAUER: I have a problem with the
[16] entire presumption proposal, so I'm pointing up
[17] some of the fallacies in it.
[18] VICE CHAIRMAN SMITH: I didn't mean to
[19] create confusion, but he's suggesting that
[20] generally speaking we're going to get into trouble,
[21] and that typically committees who lease their
[22] lists, sell their lists, rent their lists, exchange

[1] their lists are often with affiliated committees,
[2] with state party committees, with the other
[3] congressional committees, that sort of thing. And
[4] he raises the question, if we're going to put a
[5] rebuttable presumption there essentially, should we
[6] put a rebuttable presumption on groups like Emily's
[7] List and Environmental Defense Fund in their
[8] dealings with the DSCC.
[9] MR. BAUER: No, and I understand why he
[10] chose those particular examples. I think we should
[11] deploy presumptions as sparely as possible.
[12] VICE CHAIRMAN SMITH: As fairly as
[13] possible?
[14] MR. BAUER: As sparely as possible.
[15] VICE CHAIRMAN SMITH: Sparely as possible.
[16] So —
[17] MR. HOERSTING: It's the same, fairly and
[18] sparely.
[19] VICE CHAIRMAN SMITH: I guess what I want
[20] to get to is by — I'm going to sort of wrap up
[21] because I'm hitting five minutes here — do we add
[22] anything by saying this is an arm's length

[1] agreement?
[2] In other words, here would be my question
[3] for Mr. Hoersting. You suggest while groups have
[4] an interest in getting arm's length value for their
[5] list —
[6] MR. HOERSTING: Right.
[7] VICE CHAIRMAN SMITH: You're presuming
[8] your committee is selling to some other committee,
[9] but what if you're getting a list from — we'll
[10] make it one of your allied groups, the NRA or I
[11] don't know, Citizens to Destroy the Environment or
[12] some such group —
[13] [Laughter.]
[14] VICE CHAIRMAN SMITH: Well, they've got
[15] the Environmental Defense Funds. Actually, I don't
[16] believe that there is any such group allied with
[17] the Republican Party.
[18] CHAIRPERSON WEINTRAUB: But if there was
[19] such a group, it would be allied with the
[20] Republican Party.
[21] VICE CHAIRMAN SMITH: Would the problem be
[22] that such groups would give you a list for more

[1] than you would give them? In other words, the
[2] problem isn't that you're going to try to maximize
[3] value when you give a list away, it's that somebody
[4] who wants to help your committee out is going to
[5] give you more than you're giving them.
[6] MR. HOERSTING: Yeah, it's their interest
[7] that really rises and protects that transaction.
[8] The NRA cares about its names as well. It really
[9] does. That's my understanding.
[10] VICE CHAIRMAN SMITH: If they want to help
[11] elect Republican Senators or if the Environmental
[12] Defense Fund wants to help elect Democratic
[13] Senators —
[14] MR. HOERSTING: That's correct. What they
[15] want to do is they want to build — these
[16] committees really want to build a fiefdom with
[17] names, and they want to give dollars to these
[18] Senators. They don't want to give them names for
[19] free.
[20] If I could spend a minute on this —
[21] VICE CHAIRMAN SMITH: But if they're
[22] limited on giving cash, perhaps names is an

1) adequate substitute to accomplish their mission.
2) **MR. HOERSTING:** Right. So the —
3) **VICE CHAIRMAN SMITH:** So now if that's
4) true —
5) **MR. HOERSTING:** Right.
6) **VICE CHAIRMAN SMITH:** — then the fact
7) that these are arm's length agreements, i.e., that
8) the Environmental Defense Fund is not the DSCC,
9) they are arm's length, they don't have interlocking
10) directorates, so far as I know, or anything else,
11) the arm's length agreement doesn't add anything to
12) help us, does it? Because even groups that are at
13) arm's length distance may want to make exchanges
14) that are not for equal value as a way to make a
15) contribution to the committee.
16) **MR. HOERSTING:** Fair enough.
17) **VICE CHAIRMAN SMITH:** Does that make
18) sense?
19) **MR. HOERSTING:** If the commissioner
20) is — if the Vice Chairman is saying that political
21) similarity is going to adhere in any groups that
22) will exchange lists, then I completely agree with

1) that, whether or not they have interlocking
2) directorates.
3) **VICE CHAIRMAN SMITH:** So what I'm
4) suggesting is that arm's length agreement, whether
5) it's arm's length or not, really adds nothing to
6) the fundamental question we have, which is for fair
7) market value. Because, in fact, committees will
8) often be exchanging lists with affiliated
9) committees for fair market value and might have an
10) incentive to exchange lists with groups that are
11) not at arm's length, but not for fair market value.
12) So adding the whole arm's length business
13) simply is not helping the analysis, and it's just
14) burdening it with another level of inquiry.
15) **MR. BAUER:** I actually agree with that.
16) It's sort of a legal cliché, and it also overlooks
17) the fact that people have different arm's lengths.
18) [Laughter.]
19) **VICE CHAIRMAN SMITH:** Well, I don't think
20) you're — I am over my time, so we'll have to see
21) if we can get back to this.
22) **CHAIRPERSON WEINTRAUB:** I don't know what

1) to make of that last comment.
2) [Laughter.]
3) **CHAIRPERSON WEINTRAUB:** Let me sort of
4) follow up a little bit on that. Let's say — and
5) I'm sorry to leave you out of this one, Mr. Shor,
6) but the other two have —
7) **MR. SHOR:** I took myself out of it.
8) **CHAIRPERSON WEINTRAUB:** — more experience
9) with political party committees. Let's say you've
10) got somebody running for the Senate in some state
11) where there — you know, people don't necessarily
12) think they've got a great shot. They're running
13) against an incumbent. It's not somebody with a
14) great track record, and your party committee would
15) like to help them out, you know, in any way that
16) they can, whether it's your client, Mr. Hoersting,
17) or yours, Mr. Bauer. You know, you'd like to kind
18) of bolster the chances of this guy who you think
19) might be a sleeper candidate and could actually
20) knock off the incumbent.
21) Wouldn't sort of lowballing on the price
22) of a mailing list, give them a good mailing list

1) and give it to them really cheap, wouldn't there be
2) some incentive to do that?
3) **COMMISSIONER McDONALD:** Now you know what
4) Glen took himself out.
5) [Laughter.]
6) **MR. BAUER:** Thank you, Steve.
7) **CHAIRPERSON WEINTRAUB:** I'm sorry, I said
8) I wouldn't ask any hard questions.
9) **MR. BAUER:** This triggers the urge for
10) bipartisan comedy on Steve's part.
11) **MR. HOERSTING:** Oh, please, Bob. You
12) first.
13) [Laughter.]
14) **MR. BAUER:** Lowballing — if there is a
15) range, if there is a range, a political party may
16) very well look not to gouge, just sell at a
17) reasonable price. I do not believe, however, we
18) ought to speculate that parties are going to, with
19) an asset as valuable as a mailing list, start
20) selling it, if you will, at fire sale prices or
21) renting it at fire sale prices. I've never seen
22) that, in fact. I agree with Steve that parties

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[1] which, after all, don't have many enduring
[2] assets — their treasuries are emptied out at the
[3] end of the election, their staffs leave, and now,
[4] for example, national parties can't build their own
[5] buildings any more, and there are all sorts of
[6] problems with being asset-rich parties. That is to
[7] say one can't be.

[8] Mailing lists count for something, and the
[9] names are guarded, and the values of the lists, I
[10] think, are jealously husbanded. So absent evidence
[11] that parties are prepared to take one of their key
[12] valuable assets and sell them at
[13] fire-sale prices or rent them at fire-sale prices,
[14] I don't think I would assume it.

[15] Secondly, I will tell you this, in those
[16] cases that you are referring to where you have
[17] candidates who are not incumbents, and they are in
[18] some apparent need, but their chances of winning
[19] are, you know, potentially limited, bear in
[20] mind — and I don't know if its is — I may be
[21] hypothesizing here, and I don't want to speak for
[22] the committees on this point, but it's something

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[1] that occurs to me, and I think it's triggered by a
[2] little bit of historical recollection, there is
[3] always a little bit of uneasiness about parting
[4] with the names. Because you may — you never know
[5] what anyone will do with those names.

[6] I mean there is a significant concern here
[7] about just deciding, oh, they might need these
[8] names, this particular candidate might need the
[9] names because that particular candidate to win then
[10] we thought before. It also may be that the names
[11] are provided to a candidate who is never seen
[12] again, doesn't win, and, you know, doesn't stay an
[13] active member of the party.

[14] So I think there are a variety of reasons
[15] why parties would not do what I think your
[16] hypothesis assumes that they could or would.

[17] **MR. HOERSTING:** I agree with Bob, and I
[18] would also say that they have the enforcement
[19] process to face as well. They have to be able to
[20] establish that the exchange or the rental was for
[21] fair market value, and they have to do that before
[22] you or before some other entity. So they are going

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[1] to have to be able to show that in some way.
[2] **CHAIRPERSON WEINTRAUB:** Well, what you say
[3] raises another interesting point. I gather from
[4] your comments that each of you — and correct me if
[5] I'm wrong, but each of you seem to be saying that
[6] you think it would be appropriate for the — well,
[7] the respondent in an enforcement action to have the
[8] burden of proving that the market value charged was
[9] in fact a fair market value, usual and customary,
[10] whatever term you want to use. But the burden
[11] would be on the respondent rather than on the
[12] commission to prove that it wasn't.

[13] **MR. BAUER:** Well, let's be careful about
[14] that formulation, if we may, Madam Chairman,
[15] because what we are saying here is the commission
[16] doesn't bring the enforcement action on nothing.
[17] The commission has presumably made a preliminary
[18] reason-to-believe determination that there is
[19] something wrong with the transaction. I think it
[20] is fair to say — and I don't recall what sort of
[21] burden-shifting terminology is appropriate here,
[22] but the commission has an obligation in the first

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[1] instance not really to hold up the list exchange
[2] and say now justify it, but to say something
[3] more —

[4] **CHAIRPERSON WEINTRAUB:** If there is
[5] something that looks odd about it, the burden would
[6] then shift to the respondent?

[7] **MR. HOERSTING:** Well, what I would say is
[8] if there's something that looks odd, first of all,
[9] the NRC does not support reversing presumptions or
[10] duties of proof or duties of going forward, burdens
[11] of going forward. We don't endorse that. I want
[12] to be clear about that.

[13] But committees do realize that if the
[14] commission is able to put together a
[15] reason-to-believe finding, it is for a reason, as
[16] Bob mentions, and they'd realize that whether it's
[17] their burden to go forward first or to prove, which
[18] we respectfully submit it should not be, they
[19] realize that even if those things are not true,
[20] it's going to have to have some evidentiary backup
[21] for what it did, and some basis of countering the
[22] argument that it was not for fair market value and

[1] it was not used in a commercially reasonable
[2] manner.
[3] **CHAIRPERSON WEINTRAUB:** And that
[4] would — and you would have to make kind of showing
[5] other than saying, well, we bought, they sold, or
[6] we sold, they bought, therefore it was by
[7] definition fair market value because there was a
[8] willing buyer and a willing seller. You'd need to
[9] show a little more than that, wouldn't you?
[10] **MR. HOERSTING:** That happens to be the
[11] definition in Black's, if I recall the narrative in
[12] the NPRM. But what I would say is I think all
[13] committees realize that their chances of surviving
[14] an enforcement action without having something more
[15] than, hey, we bought it and they sold it, is enough
[16] incentive for them to want to ensure that they are
[17] getting fair market value over and above the
[18] economic justifications we spoke about earlier.
[19] I'm speaking directly to your question.
[20] **CHAIRPERSON WEINTRAUB:** Well, I have more
[21] questions, but I believe my time is up, so I will
[22] yield to Commissioner Toner.

[1] **COMMISSIONER TONER:** Thank you, Madam
[2] Chair.
[3] Just to follow up, Mr. Bauer, I think you
[4] indicated that in terms of an arm's length type
[5] analysis, that you didn't support that as part of
[6] the equation. Is it your view that in determining
[7] whether or not a prohibited contribution has
[8] occurred with list exchanges and list rentals,
[9] that — is it your view that our touchstone ought
[10] to be is fair market value paid?
[11] **MR. BAUER:** Yes. That's my point. My
[12] point was I thought Commissioner Smith's question
[13] was whether or not the use of the phrase arm's
[14] length added anything to the analysis, and I don't
[15] think that it does. I think it's something — it's
[16] legal rhetoric.
[17] **COMMISSIONER TONER:** And so in your view,
[18] the bottom line for us ought to be look, what was
[19] paid, what price was paid, what consideration was
[20] given. And if that's the case, that should be
[21] dispositive?
[22] **MR. BAUER:** Yes.

[1] **COMMISSIONER TONER:** Mr. Hoersting, do you
[2] concur?
[3] **MR. HOERSTING:** I agree.
[4] **COMMISSIONER TONER:** Mr. Shor, let's get
[5] you involved because you have skipped the last
[6] couple of questions.
[7] In your notes, in your papers, you — at
[8] page 2 of your comments, you discuss one of our
[9] favorite topics, leadership PAC activity. The
[10] mailing list. Yes, I'm sorry. And you talk about
[11] leadership PAC activity, and you indicate at one
[12] point perhaps we ought to have a tighter scrutiny
[13] of list exchanges or list rentals between a
[14] candidate's campaign committee and his or her
[15] leadership PAC.
[16] Would you support sort of a per se
[17] prohibition on that kind of activity? Do you think
[18] that that is something we should seriously think
[19] about?
[20] **MR. SHOR:** I wasn't advocating a per se
[21] prohibition in my comments. Kind of what I was
[22] focusing on there kind of picks up a little bit on

[1] what the Chair was discussing with Mr. Bauer and
[2] Mr. Hoersting, which is essentially the fire sale
[3] scenario, a scenario where here the leadership PAC
[4] is selling the mailing list to a candidate, and of
[5] course the leadership PAC may have
[6] developed — probably developed the mailing list
[7] with the extensive involvement of solicitations by
[8] the candidate.
[9] Maybe selling it to the candidate for a
[10] value that I just don't think accords to the value
[11] received by the candidate, and I think that that
[12] should be a special area for scrutiny for the
[13] commission.
[14] Again, my comments didn't advocate per se
[15] bans on transactions between leadership PACs and
[16] authorized campaign committees, but I think the
[17] value scrutiny there has to be searching. I mean,
[18] among other things, I mean the value of a mailing
[19] list — and I think this was actually reflected in
[20] NVRI's comments as well — the value of a mailing
[21] list developed by a leadership PAC to the
[22] candidate, that sells to the authorized committee

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[1] of the candidate associated with that leadership
[2] PAC is quite large, probably larger than it would
[3] be to somebody, some other potential buyer out
[4] there, because this is a mailing list of persons
[5] who are responsive to solicitations by the member,
[6] who is going to be using it for their authorized
[7] committee.

[8] So that's why this is an area I think
[9] for — again for the commission to be very sort of
[10] careful in terms of analyzing. And sort of the
[11] nature of the price for those transactions.

[12] **COMMISSIONER TONER:** And let me just ask
[13] your bottom-line judgment. Do you think we'd be
[14] going too far in prohibiting it per se?

[15] **MR. SHOR:** Well —

[16] **COMMISSIONER TONER:** Or do you think —

[17] **MR. SHOR:** Well, look, my position, of
[18] course, reflected in prior comments submitted to
[19] the commission, is that the commission would not be
[20] going too far in saying that leadership PACs and
[21] the authorized committees of the candidates
[22] associated with those leadership PACS operate under

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[1] a common contribution limit. So I would go so far
[2] as that.

[3] **COMMISSIONER TONER:** In a related area,
[4] also on the same rulemaking, you talk about
[5] national committee list rentals or list exchanges,
[6] when those lists have been developed for mixed
[7] funds.

[8] **MR. SHOR:** Yes, sir.

[9] **COMMISSIONER TONER:** And is it your
[10] position that we need to take account of that, that
[11] the rental streams that might be generated through
[12] those sales, if any part of those lists were
[13] generated with soft money in the past, that we need
[14] to take account of that?

[15] **MR. SHOR:** I did express concern in my
[16] comments about what I sort of at least conceptually
[17] see as sort of converting a soft money contribution
[18] into a hard money donation.

[19] The — you know, I don't think it's an
[20] issue for all times. I mean I think the RNC kind
[21] of gets at this in their comments, though I'm not
[22] sure I quite agree in the details, which is that,

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[1] you know, after a while the value of a mailing
[2] list, I think, rests solely in the investment of
[3] Federal funds because the mailing list has to be
[4] updated and enhanced, and otherwise its value would
[5] basically — the nonfederal value essentially
[6] depreciates pretty quickly.

[7] I guess I might have a slight difference
[8] of opinion as to when you should determine the time
[9] that —

[10] **COMMISSIONER TONER:** When do you think we
[11] should determine that?

[12] **MR. SHOR:** I think this two-year cycle
[13] would be — I think that for a mailing list, during
[14] this two-year cycle, I think that essentially the
[15] proceeds should be allocated and that means, you
[16] know, that the national party couldn't accept the
[17] full proceeds, but after that time for a mailing
[18] list, I think you could assume that the nonfederal
[19] value had depreciated fully, and whatever remaining
[20] value is from the investment of Federal funds and
[21] the national party could take the full value.

[22] **COMMISSIONER TONER:** Mr. Bauer, do you

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[1] concur with that approach?

[2] **MR. BAUER:** No, of course not.

[3] [Laughter.]

[4] **COMMISSIONER TONER:** Is it your person
[5] that basically given the fact that the national
[6] committees are a hundred percent hard dollar
[7] operations that going forward with whatever list
[8] exchanges or rental streams they're generating
[9] ought to be viewed as Federal funds?

[10] **MR. BAUER:** Yes.

[11] **COMMISSIONER TONER:** Why would that be?

[12] **MR. BAUER:** Well, I'm not sure I heard
[13] Glen say, if I understood him correctly — I mean I
[14] heard him say that he was talking about sort of the
[15] nonfederal asset based list depreciating over time.
[16] I understand where he's coming from and I
[17] appreciate it. I don't know where you're getting
[18] it, and I don't know on what basis one would make a
[19] rule — I'm not even sure — here's the difference
[20] between Glen and me. He really, really goes out of
[21] his way to worry about things like that, and I
[22] don't think they're of central concern to anybody

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1) at the moment. I don't think it has anything to do
2) with what Congress just do, and I don't think it
3) has anything to do with corruption. I don't think
4) if we have a — if we immediately sort of make the
5) transition that he said he'd be willing to make,
6) and we make it immediately now, you know, I really
7) think that the Republic will stay, you know, very
8) firmly moored to its foundation.

9) **MR. SHOR:** I would just add I get the
10) worrying from my mom, but —

11) [Laughter.]

12) **MR. SHOR:** No, I would certainly agree
13) with Mr. Bauer that this is not —

14) **CHAIRPERSON WEINTRAUB:** I'm very
15) sympathetic.

16) **MR. SHOR:** — I would certainly agree with
17) Mr. Bauer that this is not, you know, the fate of
18) the Republic is not at stake here, but I'm — I'm
19) not trying to portray this as an ongoing scheme
20) going on right now, or the worst abuse. But I mean
21) you have my opinion as to sort of conceptually what
22) the problem would be and since he's acknowledged

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1) that he doesn't care about it, let's move on.

2) [Laughter.]

3) **MR. BAUER:** I didn't say that.

4) **COMMISSIONER TONER:** And with that, Madam
5) Chair, I think my time has expired for now.

6) **CHAIRPERSON WEINTRAUB:** Thank you,
7) Commissioner Toner.

8) Commissioner Thomas.

9) **COMMISSIONER THOMAS:** Thank you, Madam
10) Chair. Thank you.

11) Well, just to follow up on this, let's
12) take it to the state party realm with regard to
13) this kind of question where state parties have
14) still been allowed to maintain nonfederal soft
15) money accounts. What if a state party committee
16) sells use of a list? How would you all recommend
17) we treat the proceeds in that circumstance?

18) **MR. HOERSTING:** As a representative of the
19) NRC, Commissioner Thomas, I really have no comment
20) and really didn't think about it, to be candid with
21) you.

22) **MR. BAUER:** I may let Joe Sandler this

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1) afternoon, with Marc Elias, speak to that issue.
2) I'm not dodging it. I just haven't thought about
3) it.

4) **MR. SHOR:** Consistent with my position in
5) the other context, I think they should allocate the
6) proceeds. I mean I don't think that you can take
7) the proceeds that correspond to nonfederal
8) investment and put it in the Federal account.

9) **COMMISSIONER THOMAS:** Okay. With regard
10) to lists, since we're on that topic, I'd like your
11) opinions on how to deal with the circumstance where
12) someone who is a leader of a leadership PAC has set
13) up some sort of arrangement to characterize the
14) list that's being developed by the leadership PAC
15) as a list that is owned by that leader. It's
16) something that we may have encountered in the
17) context of folks gearing up for a Presidential
18) campaign where they have been involved with a
19) leadership PAC and they're thinking of utilizing
20) the list ultimately for their Presidential campaign
21) if they get up and running with a Presidential
22) campaign, and the question would be is there a way

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1) that they can characterize the list as being owned
2) by the leader of the leadership PAC such that it
3) could then be given in an unlimited amount in terms
4) of value for the benefit of the Presidential
5) authorized committee once it gets going.

6) Any comment on how we should deal with
7) that kind of an issue?

8) **MR. HOERSTING:** I have no comment on how
9) it would apply to Presidential funding.

10) **MR. BAUER:** Neither do I at the moment.

11) **MR. SHOR:** Unfortunately, neither do I,
12) Mr. Commissioner.

13) **COMMISSIONER THOMAS:** How about, let's
14) move on to the \$95,000 contribution issue, or the
15) aggregate contribution limit issue.

16) I gather that some of you don't, Bob Bauer
17) particularly, you don't favor us modifying the rule
18) at all and you would prefer us to sort of treat
19) contributions made toward Senatorial candidates in
20) the future election cycle, for example, as going
21) toward that future two-year aggregate limit. But
22) assuming that we don't go that way and we

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[1] ultimately change it so that the contributions are
[2] going to be attributed to when they are made, you
[3] are suggesting that maybe the effective date should
[4] be January 1 of 2005.

[5] Just out of curiosity, how would you have
[6] us deal with the contributions that are made in
[7] 2003 and 2004? Would you be comfortable letting us
[8] treat those as contributions toward the
[9] 2006 — 2005-2006 two-year period, or would you
[10] prefer that as to those we sort of put them in a
[11] special category and say they don't have to count
[12] towards the 2003-2004 period? Or do they have to
[13] count toward the 2005-2006 period?

[14] **MR. BAUER:** I don't believe that we have
[15] addressed that point specifically in our comments,
[16] and I would like to reflect to make sure I'm
[17] answering the question precisely the way upon
[18] reflection I should, but I'm not sure we would take
[19] the position that it should never be applied to any
[20] election cycle.

[21] I think our simple concern was that the
[22] commission promulgated a rule — and again, in its

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[1] first pass, it is now reconsidering, and changing
[2] that rule at this stage, it seems to me, is
[3] complex, so I would like to see — and I think
[4] that's the burden of our comments, see the
[5] commission enforce the rule that it promulgated,
[6] and that rule, I believe, does apply the
[7] contribution to a future cycle.

[8] **MR. SHOR:** I certainly think — I'm of the
[9] opinion that, you know, you had contributions made
[10] and because of the commission's regulations and
[11] probably as amplified in the record, that the
[12] donors assumed that was charging against a future
[13] aggregate limit, and where the commission had
[14] changed those rules, I don't think that those
[15] donations should be charged — I don't think it
[16] should apply retroactively. I don't think that
[17] those donations should be charged to the current
[18] cycle. You know, people may have maxed out for the
[19] current cycle in terms of the 37-5 aggregate.

[20] However, the donations should not
[21] disappear for purpose of tallying against an
[22] aggregate limit. People assumed that they were

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[1] going to tally against a future aggregate limit,
[2] and they should continue to do so were the
[3] commission to make a change.

[4] **COMMISSIONER THOMAS:** Do I have time, or
[5] am I —

[6] **CHAIRPERSON WEINTRAUB:** You have a little
[7] bit.

[8] **COMMISSIONER THOMAS:** With regard to a
[9] different issue, the travel issue, I think we
[10] should attempt to extract from you, although I'm
[11] not getting much success on extracting things this
[12] morning, what the degree of disparity is out there
[13] in the area of travel. Glen Shor, you were urging
[14] that we go to a charter rate valuation system,
[15] rather than first class airfare in circumstances
[16] where we have heretofore allowed just a first class
[17] airfare calculation.

[18] Here is your chance to help us fill the
[19] record. What is the extent of the disparity out
[20] there? How much of a subsidy are we allowing with
[21] the first class rule?

[22] **MR. SHOR:** Mr. Commissioner, I don't have

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[1] the figures at the top of my head, but in my
[2] comments I did cite you a number of studies that
[3] sort of tried their best to look at this issue.
[4] One of them was an Air Tobacco study, put together
[5] by the minority staff of the House Government
[6] Reform Committee.

[7] I think that there was another study
[8] called Presidential Frequent Fliers by the Center
[9] for Public Integrity, which analyzes in the context
[10] of Presidential travel.

[11] I think certainly I probably cited one or
[12] two other studies or analyses of this issue, and I
[13] think that those would be useful and I mean those
[14] studies did indicate that the degree of the subsidy
[15] was quite large.

[16] **COMMISSIONER THOMAS:** Do either of the
[17] other of you have any evidence you can point to us
[18] that would work the other way and suggest that
[19] there is really not much of a difference, or not
[20] much of a so-called subsidy?

[21] **MR. HOERSTING:** Commissioner Thomas, I did
[22] not research those figures nor have any really

[1] numerical basis for telling you about the gap
[2] between charter rate and first class rate.
[3] **COMMISSIONER THOMAS:** Okay.
[4] **MR. BAUER:** Same thing.
[5] **COMMISSIONER THOMAS:** Thank you.
[6] **CHAIRPERSON WEINTRAUB:** Mr. General
[7] Counsel.
[8] **MR. NORTON:** Thank you, Madam Chair.
[9] I'm going to try to follow up on a couple
[10] of questions that have been asked before.
[11] If I have a situation where a candidate
[12] enters into an agreement with his or her own
[13] leadership PAC and exchanges the use of the
[14] candidate's name for fundraising solicitations in
[15] exchange for access to the list or ownership of the
[16] list, and then the candidate in turn licenses or
[17] gives the list from the candidate's leadership PAC
[18] to the candidate's principal campaign committee,
[19] how would we go about analyzing whether there are
[20] contribution consequences there? Mr. Shor?
[21] **MR. SHOR:** I mean I think that, you
[22] know — well, I think that it's an analysis of the

[1] sort of value of the list — to the value of the
[2] list to the authorized committee, and sort of
[3] comparing the amount provided by the authorized
[4] committee to the leadership PAC to that value, and
[5] to the extent it's below the — the price is below
[6] that value, it's — or the price paid is below that
[7] value, it's an in-kind contribution.
[8] **MR. NORTON:** Mr. Hoersting or Mr. Bauer,
[9] you want to take a run at that?
[10] [Laughter.]
[11] **MR. HOERSTING:** Well, I would simply say
[12] that — I would say a few things. We don't have
[13] any detailed comment on this particular issue at
[14] this time. I do realize that there is such a thing
[15] as a personal use doctrine. I do realize there is
[16] such a thing as in-kind contributions, and I do
[17] realize that ownership of lists adheres in some
[18] entity and that has to be transacted for fair
[19] market value at some point.
[20] But I think the NRC's comment would be
[21] whatever problems are going on with regard to
[22] candidate personal property, authorized committees

[1] and leadership PACs, that's no reason to, if I may
[2] use this term, overly regulate the list exchange
[3] market and provide seemingly helpful but really not
[4] helpful, frankly, deleterious regulations on this
[5] market that's pretty vibrant and has extremely
[6] strong incentives for fair market value in
[7] commercially reasonable uses.
[8] **MR. BAUER:** I don't have a detailed
[9] comment to make. I wish I could suggest to you
[10] right now sort of what methodology. I haven't
[11] given it enough thought.
[12] I do think, however, that it is actually
[13] viewed as a regulatory problem. I can see that it
[14] presents some interesting issues and they need to
[15] be puzzled through.
[16] I would like to step back and also
[17] recognize it as sort of a practical issue which
[18] might call upon us to view somewhat benignly what's
[19] taking place here, because the truth of the matter
[20] is that the very life, the very brand, if you
[21] will, of the leadership PAC is the particular
[22] leader who stands behind it, and that person is

[1] developing assets largely based on his or her
[2] public profile and personal fundraising travel and
[3] other efforts.
[4] So it is not altogether surprising,
[5] certainly it's entirely predictable, that an
[6] individual who develops those specific political
[7] assets through individual political efforts would
[8] want to be able to transfer those assets to other
[9] political pursuits, and I would hope that whatever
[10] methodology was adopted wouldn't heavily burden the
[11] ability of candidates to do so.
[12] Beyond that, I'm afraid I can't be
[13] terribly specific at this point.
[14] **MR. NORTON:** Just one follow-up for you,
[15] Mr. Hoersting.
[16] You had suggested that in the enforcement
[17] context that the committee should be able to come
[18] forward and prove that it had fair market value in
[19] mind, and I gather from your comments and Mr.
[20] Bauer's comments that the explanation for how they
[21] determined fair market value is fluid based upon
[22] the fluidity of market factors.

[1] The difficulty we have is in placing some
[2] yardstick, applying some yardstick to what we hear
[3] back from the committees. What should that
[4] yardstick be? How should the commission go about
[5] determining whether the explanation for fair market
[6] value, what the parties say they had in mind, is
[7] indeed adequate support for fair market value?

[8] **MR. HOERSTING:** I'd say two things. I'd
[9] just quibble with your representation a bit. I did
[10] not say that committees had the burden of going
[11] forward or of proving that it — that their
[12] transactions were reasonable. I do believe the
[13] commission has that burden, and I could
[14] double-check the law on that. I did not research
[15] that before arriving today, but I believe that's
[16] the burden of proof.

[17] We happen to — a lot of committees use
[18] list brokers, and list brokers provide some
[19] objective evidence of what's going on in the
[20] market. But to — if I hear where you're going,
[21] Mr. General Counsel, I hear you saying don't we
[22] really need third party independent appraisers, and

[1] I would respectfully submit that you don't have the
[2] power — that sounds awfully forceful, but you
[3] don't have a statutory mandate to require such
[4] sensitive data be disclosed from a party committee.

[5] You really ought not be asking these
[6] private entities who responded to their lists, let
[7] alone who gave in excess of \$200, how much money
[8] they make. And these are specifically listed in
[9] the narrative of the NPRM as methods the commission
[10] would use in ascertaining fair market value.

[11] You shouldn't be forcing committees,
[12] indirectly or directly, to divulge that information
[13] to third party appraisers. You should be gathering
[14] that information in the enforcement context, and at
[15] that point you can have experts, third party
[16] appraisers, in that process who abide by the
[17] confidentiality provisions that the commission has.

[18] **MR. BAUER:** I agree with that. I would
[19] suggest that you consider what the commission's
[20] position would be. I would suggest you consider
[21] that position to be one comparable to a court
[22] applying sort of an arbitrary, capricious abuse of

[1] discretion standard. I mean a lot of them worry
[2] whether or not you can satisfy yourself that a
[3] particular price ought to have been charged or was
[4] charged, that you look at the good faith efforts of
[5] the regulated entity to establish fair market
[6] value, and unless there was something clearly
[7] inappropriate about it, something that stands out
[8] as an apparent exercise of bad faith or grossly
[9] incompatible with any evidence collected on
[10] commercial practices, that you stand back and allow
[11] the transaction to proceed or to decline
[12] enforcement.

[13] I think that's all you really need to do.
[14] I mean you have an awful lot before you, and
[15] it's — again, I'm returning to the question of
[16] allocation of priorities, it seems to me you want a
[17] methodology for addressing these issues that
[18] conserves your resources for the larger problems
[19] that you face.

[20] **MR. NORTON:** Thank you very much.

[21] Thank you, Madam Chair.

[22] **CHAIRPERSON WEINTRAUB:** Mr. Director.

[1] **MR. PEHRKON:** Madam Chair, thank you very
[2] much.

[3] Mr. Hoersting, Mr. Bauer, Mr. Shor, once
[4] again, welcome to the commission.

[5] I want to pursue a little bit the
[6] multi-candidate committee status area. What I am
[7] sort of trying to understand is what's going to
[8] happen, and particularly should the commission
[9] decide that the application of a political
[10] committee, once it meets this criteria established
[11] by law, would automatically become a
[12] multi-candidate committee, and not by a matter of
[13] choice.

[14] In other words, if it should say you
[15] satisfy these criteria, you are in fact a
[16] multi-candidate committee.

[17] How is behavior going to change in the
[18] regulated community with respect to reporting
[19] registration? Are we going to see any change in
[20] behavior?

[21] I'll take any comment from anyone.

[22] **MR. HOERSTING:** I would say, Mr. Pehrkon,

1) those are very good questions and I understand
2) where they're coming from, but as a representative
3) of the NRC, we just don't deal with PACS very
4) often, in terms of my representation of them, it
5) never happens. So I have no comment, and did not
6) comment.

7) **MR. PEHRKON:** Mr. Bauer, you talked about
8) this topic a good deal on the multi-candidate
9) committee status. Can you help me out on this one?

0) **MR. BAUER:** It's very hard to judge how
1) things are going to change. I really don't know. I
2) mean I have not tried to — I haven't looked at it
3) as an empirical problem. That is to say,
4) determining how behavior might change and then
5) determining whether the commission ought to craft a
6) rule one way or the other in anticipation of a
7) change in behavior.

8) I viewed it sort of more as a legal
9) regulatory issue, and one thing we didn't say very
10) clearly in our comments — and if I could, I don't
11) mean to piggyback on your time here, but just very
12) briefly, sometimes there are problems that only

1) Congress can solve, and if Congress views this as a
2) significant issue, Congress can be expected to
3) address it.

4) Congress obviously recently identified
5) what it thought were significant issues and it
6) intervened to address them, and so I simply would
7) suggest that on this issue the commission turn to
8) other matters and let this play out a little bit
9) longer.

10) **MR. SHOR:** I can't say I know what will
11) happen, but, you know, I guess the question kind of
12) is, you know, do — I guess a starting point for
13) analysis would be do multi-committees that right
14) now meet multi-candidate status — well, I
15) don't — again I don't know quite what — how the
16) commission has treated this in the past but, you
17) know, if these committees are filing form 1M and
18) embracing multi-candidate status, then sort of
19) changing it to — well, expressly specifying that
20) it's automatic I don't think would produce a big
21) change.

22) **MR. PEHRKON:** We should not anticipate

1) them terminating and reregistering?

2) **MR. SHOR:** I can't say I know. I
3) mean —

4) **MR. PEHRKON:** I would like to follow up on
5) some things the General Counsel brought up a little
6) bit earlier and something you alluded to earlier,
7) Steve, which is the need for some evidentiary
8) materials in order to establish fair market value.
9) You indicated there was a need to have some
10) evidentiary materials, and I'm sort of curious as
11) to what you would suggest we would be looking for.

12) **MR. HOERSTING:** I'm saying it's in the
13) interest of the committee that's facing enforcement
14) to have some evidentiary materials. That's what
15) I'm saying.

16) I would think they could point — they
17) would be able to, if the commission needed to, it
18) could — it could depose the list broker who is
19) involved in a lot of these type transactions. That
20) would be one example.

21) It could certainly depose the principals
22) of the direct mail folks and in certain

1) organizations, it could do that in enforcement
2) context if it felt it had to. And those type
3) entities would produce documents associated with
4) their lines of work.

5) **MR. PEHRKON:** Do you see any need for
6) recordkeeping requirements associated with this, or
7) would it be by deposition?

8) **MR. HOERSTING:** That's a very interesting
9) question. I hesitate to say sure, no problem,
10) because I don't know what detail they would be and
11) the commission frankly would be presuming to know a
12) lot about what happens with these transactions and
13) what kind of records ought to be kept.

14) A general listing that records should be
15) kept? I'm not even sure I'm comfortable with that,
16) to be candid with you.

17) **MR. PEHRKON:** And one final matter.
18) Assuming that a committee did not produce any
19) evidentiary materials, what would you see the
20) outcome of that being?

21) **MR. HOERSTING:** Of course, that's a
22) hypothetical, and it applies completely on factual

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[1] patterns, but I think it's fair to say, generally
[2] speaking, that entities that go into enforcement
[3] matters without evidentiary backup of their
[4] arguments tend to fare not as well as those that
[5] bring plenty of documents.

[6] **MR. PEHRKON:** Bob, do you want to add
[7] anything?

[8] **MR. BAUER:** I agree that if the NRC
[9] doesn't produce any evidentiary materials, you
[10] should slam them.

[11] [Laughter.]

[12] **MR. PEHRKON:** Thank you very much.

[13] **CHAIRPERSON WEINTRAUB:** Well, gentlemen,
[14] we have a little bit more time. Would you want to
[15] just ask a couple more questions apiece? I think
[16] we can do that. Commissioner Mason.

[17] **COMMISSIONER MASON:** Oh, one of the things
[18] I wanted to follow up on is what was just being
[19] asked, and the problem that we have in the
[20] investigation — and let me say first I'm intrigued
[21] by the suggestion in Mr. Bauer's comments, and I
[22] believe it's in some of the others we'll hear from

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[1] later, that if you use a list broker, that in and
[2] of itself may sort of satisfy us. I don't know in
[3] absolutely every case that would be the case, but
[4] take direct exchanges between a political committee
[5] or between two political committees, and then six
[6] months or a year after the exchange we get a
[7] complaint and six months or a year after that we go
[8] to investigate, and nobody has any papers.

[9] So then we have to go, you know, depose
[10] people and we are now talking about market
[11] conditions that prevailed as much as two years or
[12] three years before the investigation was going on,
[13] and I sort of thought both Mr. Bauer and Mr.
[14] Hoersting earlier in their testimony were
[15] suggesting that some sort of burden on the
[16] committees, which I understand is not the issue of
[17] burden of proof, but some sort of recordkeeping
[18] might be appropriate, and I wonder whether that
[19] might rise to the point of saying that committees
[20] have to have contemporaneous records of the basis
[21] for the valuation and the exchange, absent
[22] say — and that might be satisfied by the use of a

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[1] list broker.

[2] Would you be willing to go that far and
[3] say they have to have some kind of records that if
[4] it then comes up in an audit or an enforcement
[5] matter, we can review it, and that it would be
[6] contemporaneous rather than something that somebody
[7] would go and try to find an expert to justify two o
[8] three years after the fact?

[9] **MR. BAUER:** Well, I suppose my response is
[10] in part — I don't know that it's my full
[11] response — that Steve is correct when he says that
[12] the failure — a committee that fails to maintain
[13] contemporary documentation enters the enforcement
[14] process very much at its own risk.

[15] Now your question had a slightly different
[16] slant on it, which was but look at the trouble the
[17] commission has to go through if the commission is
[18] suddenly now having to create the record that the
[19] committee didn't create for itself.

[20] **COMMISSIONER MASON:** And that the
[21] commission was in no position to create at the time
[22] the transaction took place.

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[1] **MR. BAUER:** Right. And I think that's a
[2] fair point, Commissioner Mason. If I said yes, I
[3] think that's a good — if I responded affirmatively
[4] to your proposal, I would be responding to a
[5] proposal whose details are unknown to me, and if
[6] made known to me might distress me unduly.

[7] [Laughter.]

[8] **MR. BAUER:** So let's keep the response at
[9] a theoretical level. In principle, yes, but in the
[10] details you and I might part ways.

[11] **COMMISSIONER MASON:** Steve?

[12] **MR. HOERSTING:** I would respond
[13] affirmatively to your proposal without —
[14] [Laughter.]

[15] **COMMISSIONER MASON:** That's fine. I'll
[16] count that as a qualified yes.

[17] I just wanted to go back to the personal
[18] ownership issue again because we have seen some
[19] evidence of that, and to ask any members of the
[20] panel if they have encountered or are aware of
[21] situations where candidates, either with their
[22] authorized committees or their leadership PACs,

1) have claimed or exercised personal ownership of the
2) mailing lists that resulted from the fundraising
3) efforts of those committees.

4) **MR. HOERSTING:** If I may, I'm sorry, I
5) didn't even get that last question.

6) I'm not sure I can say that testimony is a
7) qualified yes.

8) **COMMISSIONER MASON:** I characterized it
9) that way.

0) **MR. HOERSTING:** Fair enough.

1) **MR. BAUER:** Obviously, for a whole host of
2) reasons, I can't answer that question. If I had an
3) adequate data base of information about Republican
4) Presidential campaign practices, I would share them
5) with you freely. But I will say this. As I think
6) about it, because you are showing an unusual amount
7) of interest in this, I would only — I would make
8) the following comment. I realize that it — again,
9) this is a slight reprise of the comment I made to
10) General Counsel Norton. I understand the concern
11) with making sure that you don't have a contribution
12) issue you shouldn't have to address with some

1) regulatory response. I mean I understand that's
2) what is behind this.

3) On the other hand, as I reflect upon it,
4) I'm not quite sure why it's generating the interest
5) that it does, which is to say I could imagine a
6) circumstance in which a Presidential candidate
7) again enters into an agreement with a political
8) committee that in effect holds that he or she will
9) in fact have personal ownership of the list because
10) that list could not possibly be generated, would
11) not exist, were it not for the individual political
12) reputation and individual efforts of that male or
13) female politician. And the committee agrees to
14) that because that's the only way the committee will
15) in fact successfully develop that list. Whereupon,
16) at whatever time the candidate exercises the right
17) to take the list under whatever terms and
18) conditions apply to the agreement with the
19) leadership PAC — for example, in transferring it
20) to the use of the principal campaign committee,
21) it's a personal asset that can be deployed to the
22) use of the committee like any other.

1) I'm not certain on public policy grounds
2) that I find that very difficult to understand. I
3) mean why wouldn't you want the candidate whose own
4) efforts generated that list to enter into an
5) agreement for the use of that list in the future
6) for other political purposes? What would really be
7) wrong with that?

8) So I'm just confused by the degree of —

9) **COMMISSIONER MASON:** Well, let me shift
10) slightly from leadership PACs authorized committee.
11) As to authorized committees, don't you think it
12) raises a personal use question?

13) **MR. BAUER:** I think it does raise a
14) personal use question. I don't know that it raises
15) a fatal personal use question. I haven't given
16) this a great deal of thought, but once again I'm
17) standing back from the — I'm trying to come out of
18) the tall regulatory weeds here and ask myself
19) what's really — what are we worried about here.

20) Again, the person whose efforts, whose
21) energies, whose public reputation, whose voting
22) records, whose speeches create the value of that

1) list may want to have control of the list. And why
2) not.

3) **CHAIRPERSON WEINTRAUB:** Commissioner
4) McDonald, do you have any other questions?

5) **COMMISSIONER McDONALD:** I think we have
6) what, 20 minutes for the rest? Just very, very
7) briefly. I'll just go back and ask one more
8) question on this travel issue. I'm trying to use
9) my own personal experience.

10) It refers to in alternative C, of course,
11) the traveling of the press, et cetera. Again, let
12) me ask you just kind of a scenario to try to figure
13) out how it would be handled.

14) What we used to routinely do was I'd be
15) assigned to find planes before the end of the week.
16) I seldom ever called a charter service because
17) there wasn't much money to call a charter service
18) with, at least in the first campaign I traveled
19) extensively in. I called someone up — and this is
20) not unusual, I think, to call someone up who I know
21) has a plane, they're usually weekend fliers, which
22) is not always a good idea, but nevertheless that's

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[1] the practical reality. Two of you, maybe three of
[2] you fly from one destination to another, where
[3] obviously a lot of times charter services just
[4] don't think it's worth it to them to do it.

[5] How would you evaluate that out of
[6] alternative C, and how do you see that plane, just
[7] as a practical matter?

[8] **MR. SHOR:** Mr. Commissioner, if I'm
[9] correct, I think you're asking me — if I'm
[10] correct, you're asking me about the sort of
[11] valuation issue.

[12] **COMMISSIONER McDONALD:** Absolutely.

[13] **MR. SHOR:** To the — to the extent that
[14] maybe a charter — you're saying that maybe a
[15] charter company wouldn't fly that route, so how —

[16] **COMMISSIONER McDONALD:** And even if they
[17] did, and I couldn't avail myself of it because
[18] I — it wasn't available at that particular time,
[19] maybe I couldn't afford that kind of cost, but I
[20] didn't want to be precluded from going altogether.
[21] What could I do?

[22] **MR. SHOR:** Well, I think that there are

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[1] two things. I mean if — first, if you had trouble
[2] sort of locating sort of an analogy that was flying
[3] at that particular time, I mean I think one option
[4] the commission could consider would be to sort of
[5] find, you know, just basically find an analogy
[6] where essentially a charter carrier did that flight
[7] for another time.

[8] I'm not sure that fares would necessarily
[9] vary.

[10] The other approach, which I sort of
[11] mentioned earlier, is to deal with situations where
[12] there wasn't sort of a ready analogy out there, the
[13] commission could sort of in its own rule specify a
[14] calculus the candidates could use, sort of based on
[15] its own survey of industry practices.

[16] You know, again I don't — I would not
[17] even remotely suggest that that's, you know, an
[18] endeavor that isn't, you know, a substantial one
[19] for the commission, but I would counsel it to try.

[20] **COMMISSIONER McDONALD:** Well, the cost,
[21] for example between a single-engine and a twin, for
[22] example, is very different.

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[1] **MR. SHOR:** Yes.

[2] **COMMISSIONER McDONALD:** The cost of flying
[3] in the morning as opposed to night can be very
[4] different, you know. It's just hard. I'm just
[5] trying to figure out how candidates can come to
[6] grips with all this. I don't say it can't be done,
[7] but it seems to be awfully difficult to do.

[8] Thank you.

[9] **CHAIRPERSON WEINTRAUB:** Mr. Vice Chairman.

[10] **VICE CHAIRMAN SMITH:** I don't really have
[11] more questions here, except to note that several
[12] times some of our panel members have expressed the
[13] notion why is this sort of even going on, why do
[14] you care. That's also appeared in some of the
[15] written comments, and I guess I would emphasize
[16] that actually since I have been here, it has been a
[17] fairly regular problem, and one that has been
[18] coming up more and more recently, or more and more
[19] frequently.

[20] Having said that, I will just say again I
[21] try to approach hearings with an open mind, but
[22] this is one where I really do find myself coming in

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[1] strongly in agreement with the approach generally
[2] taken by Mr. Hoersting and Mr. Bauer, that this is
[3] something where I think it would be good for us to
[4] lay out a standard for our own deliberations as to
[5] what that standard is — what we're going to do,
[6] but I agree that the standard should be the kind of
[7] flexible, sort of easy to use standard that you
[8] have suggested.

[9] And I note that really no one has come
[10] forward to much suggest otherwise. I'm looking at
[11] the comments from the Center for Responsive
[12] Politics, and they do suggest that we should place
[13] the burden actually on the committees to show that
[14] it's fair market value. But beyond that, they
[15] don't suggest, you know, you need to look at these
[16] factors or those factors, or anything else. They
[17] suggest if it's fair market value, it doesn't
[18] matter if it's an arm's length transaction, and I
[19] haven't sensed from Glen, who I know you said this
[20] is not sort of the area you've really given a lot
[21] of thought to, but I haven't sensed either that you
[22] are in marked disagreement or that you would — and

[1] this is your chance, I guess. Do you really want
[2] to say there are specific factors that really ought
[3] to be considered in some particular way, or is it
[4] satisfactory if we're simply dealing with fair
[5] market value and the commission can determine that
[6] through the — you know, the enforcement process.

[7] **MR. BAUER:** Again, I wouldn't sort of
[8] characterize my views as in agreement or
[9] disagreement. I just — you know, sort of in light
[10] of all the rulemakings that were going on, my focus
[11] here was — this is a dodging shifting panel here.

[12] The one question I'm not sure has
[13] been — well, with the timeframe, I will stop
[14] there.

[15] **CHAIRPERSON WEINTRAUB:** He stopped. You
[16] don't get to go.

[17] Let me ask, you had mentioned in your
[18] opening statement, you talked about the burdens of
[19] and the risks of overregulation, and
[20] particularly — I'm very sympathetic to all the
[21] changes that everybody has been trying to catch up
[22] with, although I thought it was good for you guys

[1] if we keep changing the terms of engagement.

[2] Do you think that any of the rulemakings,
[3] including the phone banks, which I know none of you
[4] addressed, that we are looking at right now, do you
[5] think there are any that we should just drop as
[6] unnecessary and say, you know, we've got enough on
[7] our plate right now to deal with all the changes
[8] that have been happening, and that we anticipate
[9] happening in the near future. This isn't
[10] necessary, just stop, stop and drop it right here.

[11] **COMMISSIONER McDONALD:** You've only got 20
[12] minutes left.

[13] [Laughter.]

[14] **MR. BAUER:** I really like the idea, but I
[15] want to respond thoughtfully. It probably depends
[16] on the outcome of the rulemaking.

[17] [Laughter.]

[18] **MR. BAUER:** I suppose that of the three
[19] that we have talked about today, the two that
[20] strike me as being sort of the least immediately
[21] attractive, the ones that seem to take up probably
[22] more time than benefits they produce will justify

[1] would be the one that concerns the multi-candidate
[2] committee mandatory or elective status change.

[3] The other would be the one concerned with
[4] mailing lists, rentals and exchanges.

[5] Now I must say I do understand it appears
[6] that the commission is seeing a fair amount of
[7] traffic on these issues, and so this may arise from
[8] what I would not understand to be a regulatory
[9] imperative from within the commission, and I
[10] respect that.

[11] Again, I think all my comments about the
[12] dangers of going too far, I think still apply.

[13] **CHAIRPERSON WEINTRAUB:** Mr. Hoersting?

[14] **MR. HOERSTING:** I wouldn't presume to tell
[15] the commission how to spend its resources.

[16] **CHAIRPERSON WEINTRAUB:** Oh, surely.

[17] **MR. HOERSTING:** But I do find myself not
[18] recommending or agreeing with a lot of the
[19] proposals on the mailing list, NPRM.

[20] **CHAIRPERSON WEINTRAUB:** Mr. Shor?

[21] **MR. SHOR:** I think that the
[22] commission — I guess it kind of turns on the

[1] outcome, too. I mean I think —

[2] [Laughter.]

[3] **MR. SHOR:** You know, I endorse rulemakings
[4] where I think the commission has faithfully
[5] implemented the law, and have concerns when it
[6] hasn't.

[7] **CHAIRPERSON WEINTRAUB:** We always think we
[8] fully implement the law.

[9] Mr. Hoersting, one — I know you don't
[10] like this one, but one more time, you have
[11] indicated that one indicia of fair market value
[12] would be deposing the brokers. You want to give us
[13] any more help, any other advice on what other
[14] factors might be legitimate to look at in
[15] determining fair market value?

[16] **MR. HOERSTING:** In my role as counsel to
[17] people who would be deposed, and not billing
[18] independently for that, I'm not sure that I want to
[19] go down this road.

[20] Part of me thinks it's obvious and the
[21] other part of me thinks I shouldn't those people
[22] because they will find me and never buy me a drink

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[1] again.

[2] [Laughter.]

[3] MR. HOERSTING: So, no, I don't have any
[4] detailed comments.

[5] CHAIRPERSON WEINTRAUB: All right. All
[6] right. Well, now, Mr. Hoersting, I must ask you
[7] one final question, and I note that in your written
[8] comments you referred to fundraising activities by
[9] Senator Clinton who I believe is not one of your
[10] clients, and I'm wondering whether we have finally
[11] found the fourth of the vast right-wing conspiracy.
[12] Is it you?

[13] [Laughter.]

[14] MR. HOERSTING: No comment.

[15] CHAIRPERSON WEINTRAUB: No comment again.
[16] Boy, we can't get an answer out of these guys.
[17] Commissioner Toner.

[18] COMMISSIONER TONER: Thank you, Madam
[19] Chair.

[20] Mr. Shor, I wanted to follow up on your
[21] comments on the air travel rules. On page 6 you
[22] discuss an aspect of I guess it would be

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[1] alternative B where the reimbursement rate might
[2] vary based on whether the corporate flight was
[3] regularly scheduled or not that the candidate took.
[4] And then I guess you suggest that you think that
[5] might not be easy to implement.

[6] Could you — is that your position?

[7] MR. SHOR: I do — I think I have concerns
[8] about — I mean I think the idea is intriguing. I
[9] guess the concern would be implementing it, and the
[10] sort of arguments that the commission may find
[11] itself in with providers as whether travel was in
[12] fact previously scheduled or not, and some degree
[13] of ease of evasion, I think.

[14] Certainly, you know, there will be an
[15] improvement in the sense that I think there will be
[16] folks that don't try to evade that and thus flights
[17] that are sort of scheduled specifically for a
[18] campaign traveler would be at a charter rate in
[19] those cases.

[20] But I guess I have —

[21] COMMISSIONER TONER: Do you think we
[22] wouldn't be able to look at corporate records in

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[1] terms of when flights typically run, or — when you
[2] say ease of evasion —
[3] MR. SHOR: I think that that would be
[4] part, certainly be part of the commission's
[5] analysis in trying to figure out whether a flight
[6] was previously scheduled or not. I guess the
[7] question is the degree of confidence one would have
[8] in whether they could truly get to the bottom of it
[9] by doing that or not, or whether there was some
[10] gaming that could even go on with the records.

[11] You know, this is among the reasons I
[12] think C is better than B, because, you know, you
[13] don't have to sort of get into that analysis, and I
[14] also indicated in my comments on B, I do think that
[15] there are sort of other benefits to charter
[16] flights, apart from the fact that it can be sort of
[17] specifically scheduled for a candidate.

[18] You know, one example would be a charter
[19] flight, maybe a nonstop flight, and obviously save
[20] time as opposed to regularly scheduled commercial
[21] flight, which even at first class could, you know,
[22] entail significant stops and so that is my reasons

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[1] for favoring C.

[2] I mean I do think that aspect of B is
[3] intriguing. I just — the question is just the
[4] sort of — how successful would it be in terms of
[5] achieving its objective.

[6] COMMISSIONER TONER: And no matter what we
[7] end up doing, do you support the sort of limited,
[8] after-the-fact reimbursement proposal, the
[9] seven-calendar-day proposal? What do you think
[10] about that?

[11] MR. SHOR: I do not support it. I guess
[12] my two comments on it would be is it seems that the
[13] commission would go down that road because of the
[14] prospect of a last-second passenger. That's what
[15] is talked about in the NPRM. I think the
[16] commission — but I think that situation is
[17] probably — can be dealt with, you know, even with
[18] payment up front. I think you could write a check
[19] at the last second if you know the rate.

[20] My other concern about it is, you know,
[21] it's said to deal with a last-second passenger, but
[22] really I think it would allow payment sort of the

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[1] entire amount after the flight. I mean it's not
[2] just because — it's not necessarily only dealing
[3] with a circumstance where the
[4] candidate — everything was paid up front, and then
[5] a last-second traveler, so they're adding the final
[6] amount and the final seven days. I think the
[7] entire amount could be paid after the travel.

[8] And in terms of — you know, I think it
[9] may sort of encourage a messy situation where
[10] people don't pay up front. Then they don't really
[11] investigate the rates up front because they don't
[12] have to pay up front. Then they're paying after
[13] the fact, and trying to reconstruct whatever the
[14] reimbursement rate would have been for the travel
[15] that preceded it.

[16] I think that that could be a problem.

[17] **COMMISSIONER TONER:** So I take it you
[18] wouldn't support after-the-fact —

[19] **MR. SHOR:** May I try again so I can try to
[20] get the Chair to understand what I'm saying?

[21] **COMMISSIONER TONER:** Sure.

[22] **CHAIRPERSON WEINTRAUB:** I understand you.

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[1] I just, you know, I just don't see why it's
[2] impossible — I mean given that we are talking
[3] about a seven-day window, why it's going to be
[4] impossible seven days later to do something that
[5] you could have done seven days earlier.

[6] **MR. SHOR:** Well, will you seven days later
[7] be able to sort of check in as to what the first
[8] class rate would have been for the date of flight?

[9] **CHAIRPERSON WEINTRAUB:** Why not?

[10] **MR. SHOR:** Would you be able to ascertain
[11] it for a past date?

[12] **CHAIRPERSON WEINTRAUB:** Yes, I don't see
[13] why not. Call up the airlines. Why not.

[14] **MR. SHOR:** Okay. I mean I'm not sure
[15] exactly sort of what sort of information would be
[16] available. I mean in general, as my first point
[17] raises, I just don't it's necessary and I just
[18] don't think that there's a real need for the
[19] departure.

[20] **COMMISSIONER TONER:** And so your position
[21] would be the same regardless of what the length of
[22] time would be. In other words, five days, or you

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[1] just don't —

[2] **MR. SHOR:** Well, yes, seven days is better
[3] than 20 days. I think a sort of a tight seven-day
[4] rule is better than, you know — particularly in
[5] this context, it's sort of a fuzzier, you know,
[6] standard, you know, if the commission is going to
[7] go down the road of allowing the payment after the
[8] date of the flight, it should be — keep this in a
[9] very, very tight leash.

[10] **COMMISSIONER TONER:** Mr. Bauer, do you
[11] support, or Mr. Hoersting, do you support a limited
[12] after-the-flight period to make payment?

[13] **MR. BAUER:** Yes.

[14] **COMMISSIONER TONER:** You think seven days
[15] is about the right timeline we should focus on? Do
[16] you know it's, you know, sufficient time to get
[17] records in order and make payment?

[18] **MR. BAUER:** You could be more generous if
[19] you were so inclined.

[20] [Laughter.]

[21] **COMMISSIONER TONER:** Mr. Hoersting?

[22] **MR. HOERSTING:** That sounds right, and I

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[1] don't think it's any sort of undue extension of
[2] credit that the commission should concern itself
[3] with at all.

[4] **COMMISSIONER TONER:** Okay. Thank you,
[5] Madam Chair.

[6] **CHAIRPERSON WEINTRAUB:** Thank you. And my
[7] apologies for sort of interjecting myself into your
[8] questioning.

[9] **COMMISSIONER TONER:** No problem.

[10] **CHAIRPERSON WEINTRAUB:** Commissioner
[11] Thomas.

[12] **COMMISSIONER THOMAS:** Thank you, Madam
[13] Chair.

[14] Your allusion to Senator Clinton, I
[15] thought you were going to get to the question I
[16] wanted to ask, but you went off on a slightly
[17] different tangent, the right-wing conspiracy.

[18] **CHAIRPERSON WEINTRAUB:** You didn't want to
[19] have the use of that one?

[20] **COMMISSIONER THOMAS:** I think I knew what
[21] the answer was going to be.

[22] [Laughter.]

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[1] **COMMISSIONER THOMAS:** With regard to the
[2] suggestion that on say the Democratic side of the
[3] aisle, Senator Clinton might be very willing to
[4] sign solicitation pieces for one of the national
[5] party committees, with an expectation that any
[6] positive hits generated would be put together as a
[7] list which she would have some right to then
[8] access.

[9] Are you all in favor of a rule that would
[10] basically say that in circumstances where a
[11] politician is in essence willing to put their name
[12] on a solicitation piece for a political committee
[13] that they should be able to get some sort of right
[14] to the list that's generated on positive hits, and
[15] that that sort of right would roughly equate to an
[16] ownership interest which would then be usable in
[17] any other context, i.e., perhaps for in this case
[18] Senator Clinton's own authorized campaign committee
[19] later on? Is that the kind of rule that you think
[20] is appropriate, that it's sort of an automatic per
[21] se fair market value construct that would entitle
[22] the Senator in question to carry over to use for an

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[1] authorized committee?

[2] **MR. HOERSTING:** I'm not sure that it needs
[3] to be captured in a rule. First of all, I would
[4] say that.

[5] Second of all, I'm not certain how the
[6] commission — I'm not certain where the commission
[7] would say the property interest lies. Bob spoke
[8] about the policy reasons for wanting the actual
[9] candidates, and I agree with him here, that the
[10] candidate has built a career and they really ought
[11] to be able to take those lists with them. And if
[12] the names go to their personal property and they
[13] later exchange those in fair market bases with
[14] other entities, that seems okay. But I don't have
[15] any detailed comment as to whether the commission
[16] ought to create a rule that says candidates who
[17] engage in signature agreements with other
[18] committees have a right to the names and you talked
[19] about the authorized committee part, which is the
[20] part of the rule that I really would be speculating
[21] about.

[22] But I certainly agree with the premise

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[1] that candidates who engage in signature agreements
[2] certainly have a right to the name.

[3] **MR. BAUER:** You've asked a different
[4] question than some of the others we've addressed of
[5] a similar nature. Earlier we were talking about
[6] the candidate and leadership PACs and whether or
[7] not the candidate could take ownership of the list
[8] and then use them with Presidential campaign
[9] committees. Now you're asking a question that
[10] seems to be whether or not someone who might just
[11] on a couple of occasions, or however often, be
[12] asked be a party committee to sign a solicitation
[13] could somehow claim a right under some rule
[14] permitting that claim to legal ownership of the
[15] list or legal ownership, as you say, of the
[16] positive hits.

[17] I'm not — I don't want my comments in the
[18] earlier case to apply to that case because those
[19] are two very, very different situations. Party
[20] committees certainly do not want necessarily to be
[21] confronted with a variety of claims by people who
[22] are invited to participate in solicitations, claims

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[1] to the so-called positive hits. That is very
[2] different than the policy analysis that I at least
[3] attempted on the question of what expectation
[4] candidates might have about lists that are
[5] generated virtually exclusively by their own
[6] efforts and reputation.

[7] So I just want to make sure on the record
[8] that it is understood that the analysis I gave
[9] previously doesn't apply to the instance that you
[10] raised a minute ago.

[11] And as far as whether the commission
[12] should craft a rule to that effect, having not
[13] given it any thought, I do not have an answer to
[14] your question, but I don't — would not want a rule
[15] that would encourage candidates who are asked to
[16] solicit to immediately demand as a condition of
[17] participation that pursuant to commission rule they
[18] have a right to the results of the solicitation for
[19] their own personal use or their own personal
[20] political use.

[21] **COMMISSIONER THOMAS:** We'll let them worry
[22] about that on the Republican side if they won.

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[1] MR. HOERSTING: Let them worry about that
[2] on contract, yeah.

[3] MR. BAUER: Let them worry about that on a
[4] case-by-case basis.

[5] COMMISSIONER THOMAS: Thank you.

[6] CHAIRPERSON WEINTRAUB: Okay. We're over
[7] time, but I'll give you one last quick shot. Mr.
[8] General Counsel.

[9] MR. NORTON: I'm going to try to wrap two
[10] questions into one, then.

[11] There has been some discussion this
[12] morning of the role of list brokers in
[13] transactions, and I think one of our panelists this
[14] afternoon is going to argue that we ought to make a
[15] distinction in the way we approach transactions
[16] where list brokers are involved and where they are
[17] not.

[18] I was curious, and I would guess, Mr.
[19] Bauer, you would be the best one to ask this,
[20] whether the bulk of list transactions, list sales
[21] and exchanges involve list brokers in your
[22] experience. If you can answer that.

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[1] And the related question is we didn't get
[2] comments and we didn't actively encourage comments
[3] from anyone in the list broker industry, and I
[4] don't know how receptive they would have been to
[5] our overtures. My question is how helpful that
[6] perspective would be in addressing — their
[7] perspective would be in addressing this issue and
[8] to what extent we are flying blind without fuller
[9] information about how list brokers value lists and
[10] exchanges and rentals.

[11] MR. BAUER: As to the second half of your
[12] question, given my previously expressed view that
[13] you not put too much energy into this particular
[14] rulemaking exercise, I don't know I would now
[15] counsel you to engage at great length with the list
[16] brokering community, and I'm not certain that's
[17] really required, and I don't know that it would
[18] enlighten you at least onto the path that I have
[19] urged you on here. I'm not sure how much it would
[20] advance your cause.

[21] As to the first question, I don't know
[22] what you mean by bulk. It's possible my colleague

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[1] Marc Elias, when he is here, would have — would be
[2] willing, let's say, to venture more of a guess
[3] about what percentage of the transactions that we
[4] see, for example, at the party or the Presidential
[5] level are managed through list brokering
[6] operations. But since I'm not sure what you mean
[7] by bulk — I assume you mean the majority or
[8] something substantially in the majority, and I
[9] don't know that I could answer that question off
[10] the top of my head.

[11] I mean I suspect it's a substantial
[12] number, but whether it's the bulk or not, I
[13] couldn't tell you at the moment. But we'll be
[14] happy to correct the record, quite frankly, and
[15] tell you what our best guess is, at least on the
[16] basis of our experience such as it is.

[17] MR. NORTON: Thank you.

[18] CHAIRPERSON WEINTRAUB: Mr. Staff
[19] Director?

[20] MR. PEHRKON: No questions. Thank you.

[21] CHAIRPERSON WEINTRAUB: In that case, we
[22] will recess until 11:30, and we again thank the

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[1] panel for all of their thoughts.

[2] [Whereupon, the commission recessed from
[3] 11:20 a.m. and reconvened at 11:35 a.m.]

[4] CHAIRPERSON WEINTRAUB: Let's start again.

[5] We want to welcome the second panel, and
[6] in case some of you weren't here at the beginning,
[7] we're going to use the lights. You get five
[8] minutes to make your opening statement. The yellow
[9] light goes on when you've got 30 seconds, and then
[10] we will have at least one round of questioning and
[11] possibly one-and-a-half or two depending on how
[12] much time we have and how hungry we are by the time
[13] you all get done.

[14] So why don't we start off with Mr.
[15] Sandler.

[16] TESTIMONY OF JOSEPH E. SANDLER,

[17] DONALD F. McGAHN, II,

[18] CHARLES R. SPIES,

[19] MARC ELIAS

[20] MR. SANDLER: Thank you very much, Madam

[21] Chair and members of the commission. I am going to
[22] be limiting my comments today on behalf of the

[1] Democratic National Committee to the mailing list
[2] notice of proposed rulemaking. This is a subject
[3] of great interest to the DNC because in the
[4] post-BCRA world in which the DNC is called upon to
[5] expand its small donor base, base of activists,
[6] donors, volunteers, in order to be able to generate
[7] through contributions subject to the act the
[8] resources it needs, it is critical that the DNC be
[9] able to engage in a wide variety of list exchanges,
[10] sales — although that's not so frequent — and
[11] rentals.

[12] I just want to make a couple of points,
[13] underscore a couple of points from our comments,
[14] and then look forward to your questions.

[15] With respect to the rental of lists, most
[16] of the rentals of lists that are undertaken by the
[17] DNC are done through a list broker, and we believe
[18] that where a list broker — and our list brokers
[19] believe — that where a list broker handles a
[20] transaction, it is by definition a transaction
[21] handled at arm's length. This is what they are in
[22] the business of doing, is making a market in these

[1] lists. The ones that determine what it's worth.
[2] They are, you know, have to deal with the
[3] marketplace on the other side, and we think it
[4] doesn't make sense to impose all of these
[5] restrictions on rentals that are handled by list
[6] brokers, and in particular our list brokers have
[7] advised that it particularly does not make sense to
[8] require special documentation of the value, whether
[9] by an independent appraisal or a paper
[10] documentation and so forth, of the value in the
[11] normal course of list exchanges where a lot of
[12] these things are handled electronically and they
[13] are sort of doing this kind of thing all day long.
[14] I mean list rentals.

[15] With respect to list exchanges, we believe
[16] that the commission's proposed language is pretty
[17] much on target. However, we don't believe that
[18] there ought to be in particular — and we can get
[19] into this more in the questioning — restrictions
[20] on the ability of committees to exchange lists
[21] under agreements permitting multiple delay uses.
[22] These kinds of situations are extremely common,

[1] depending on the individual features and nature of
[2] each list, and there should not be a restriction on
[3] the ability of committees to exchange lists on
[4] those terms.

[5] We do believe it is reasonable for the
[6] regulations to require parties to a list exchange
[7] or a political committee that is a party to a list
[8] exchange to establish the fair market value of the
[9] list it is exchanging in advance.

[10] We do not believe it is useful or
[11] appropriate for the commission to try to define all
[12] of the factors that should be taken into account in
[13] determining that value because these things vary so
[14] widely. We have discussed some of these issues in
[15] our comments. It really should be based — an
[16] assessment based on all the facts and
[17] circumstances.

[18] And finally, we — as I indicated in our
[19] comments — we certainly do not believe it is in
[20] any way appropriate to take into account in
[21] determining the treatment of proceed from a list
[22] rental or the valuation of list exchange, the fact

[1] that prior to the enactment of BCRA, when the
[2] commission's allocation regulations were still in
[3] effect, that that asset may have been paid for on
[4] an allocated basis with nonfederal money.

[5] It would be like saying, you know, in the
[6] insulated sale of an asset situation permitted
[7] traditionally under the commission's rules that if
[8] the DNC sells a chair, you know, that they have to
[9] give 40 percent back to the government or whatever.
[10] I don't think the commission has ever taken that
[11] position. I see nothing —

[12] **COMMISSIONER MASON:** We'll think about it.
[13] [Laughter.]

[14] **MR. SANDLER:** — nothing in the
[15] development of the title I regulations that
[16] indicates that would be contemplated. It would be
[17] extremely troubling. We do not believe the
[18] commission in any event has legal constitutional
[19] authority to take such approach, and it is
[20] certainly not necessary in the context of this
[21] rulemaking.

[22] I will limit my comments to that, Madam

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[1] Chair, and look forward to your questions after the
[2] other presentations.
[3] **CHAIRPERSON WEINTRAUB:** Thank you.
[4] Mr. Spies.
[5] **MR. SPIES:** Thank you, Madam Chair.
[6] I have just one brief comment on the
[7] mailing lists, which is I was — after I submitted
[8] comments and talked to our other attorneys at the
[9] RNC, they thought I was far too generous, and they
[10] thought I needed to make very clear that this is a
[11] bad idea, and we do not support the idea of these
[12] regulations. They are not necessary. They are in
[13] search of a problem that is not out there.
[14] I think that is evidenced, among other
[15] things, by the fact that the EMJ — while the
[16] proposed rulemaking really focused on the finance
[17] side of lists or seemed to be targeted that way,
[18] and I think it is important to note the
[19] different — the evolving nature of lists and what
[20] we are dealing with in terms of information and
[21] exchanges of data, e-mail lists. You know, a
[22] volunteer list done on the Web, different access to

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[1] internet Web sites, and any sort of rules that
[2] the — that you would put in the regulations that
[3] may be targeted at one type of finance list are
[4] going to have implications in other areas that will
[5] quickly become outdated.
[6] So I would recommend against any sort of
[7] rigid rules.
[8] I do have an answer to a question I
[9] believe the General Counsel asked an earlier panel
[10] about the use of list brokers. In terms of the
[11] Republican National Committee, approximately 95
[12] percent of the transactions we do are done through
[13] list brokers.
[14] That's it.
[15] **CHAIRPERSON WEINTRAUB:** That's it? Well,
[16] we appreciate your brevity.
[17] Mr. Elias, over to you.
[18] **MR. ELIAS:** I will try and be brief as
[19] well in my opening remarks.
[20] We have commented on all of the rules
[21] before you. Perhaps I should have chosen one to
[22] focus on. I feel a little conspicuously greedy in

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[1] that regard.
[2] Let me say that where they are to be
[3] praised is in the areas in which they make things
[4] simpler and where they are to be less praised are
[5] in those areas where this may be an opportunity to
[6] make things that are currently fairly simple more
[7] complex.
[8] So let me start with the rule that I
[9] appreciate the most and which I think is a problem
[10] in search of an answer, to borrow a phrase, which
[11] is the travel rules.
[12] For many years the regulated community,
[13] lawyers trying to advise the regulated community,
[14] and no doubt the commission itself has struggled
[15] with a series of nagging questions about when
[16] exactly first class airfare can be used and when
[17] first class airfare cannot.
[18] There are very, very complex ownership
[19] structures. What if a plane is owned by an LLC but
[20] is regularly leased through an LLP to a
[21] corporation? What if that corporation then
[22] provides it as a regular matter to its clients?

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[1] What if it is — so that the clients have a right
[2] to use this plane. What if it is owned by a
[3] corporation that does not in fact operate the plane
[4] for any purpose other than to generate income by
[5] leasing it through to — in a timesharing
[6] arrangement. In other words, they lease it out to
[7] other people who then operate it.
[8] What has — this is not to mention the
[9] problems of states like South Dakota and Alaska and
[10] Wyoming and the issues that come up there. We're
[11] trying to figure out whether a particular area is
[12] served by a particular airport.
[13] So I applaud the commission for moving in
[14] the direction, and our comments, so that we are
[15] clear, were intended to — not to combat but rather
[16] to hopefully clarify and effectuate the intent of
[17] what I think alternative A was, which is to
[18] basically set one rule that will basically govern
[19] the use of privately owned planes except when we
[20] are dealing with, you know, an airline or a company
[21] that's in the business of providing air charter
[22] service, and that is to allow them to use first

[1] class airfare.

[2] I think it is a sensible rule, and I am
[3] now going to move to one of the other rules, not to
[4] say that it's not sensible, but we are — all
[5] joking aside, right now the regulated community is
[6] running around trying to figure out what
[7] McCain-Feingold meant, and what your regulations
[8] mean. Not all of your regulations are final. Not
[9] all of your regulations address all of the various
[10] pieces.

[11] So there are a lot of moving parts going
[12] on right now, and I know you all know that from
[13] your perspective. But there are a lot of balls in
[14] the air and moving parts right now in the regulated
[15] community, and I would encourage you all, where you
[16] can take a ball out of the air by coming up with a
[17] simpler travel reimbursement, this is precisely the
[18] time to do it.

[19] There are other rules and things that you
[20] are contemplating that may be good ideas, and I'm
[21] happy to tell you what I think about them, but I'm
[22] not sure that this is the time in history when we

[1] need to be putting new rules and new
[2] interpretations and new complications in people's
[3] way.

[4] Let me point to the one that I am
[5] particularly thinking of, and that is the aggregate
[6] limit.

[7] I think Mr. Hoersting said in his
[8] comments, who was here on the last panel, said in
[9] his comments that the NRC had advised literally
[10] thousands of people, thousands of donors, of what
[11] the rule is.

[12] Well, I can one-up him. I advised
[13] thousands of donors that the rule was what you all
[14] are proposing to change it to, based on what the
[15] statute said, only to then have to e-mail all those
[16] people and tell them that the General Counsel's
[17] Office, presumably with the blessing of the
[18] commission, had in fact said no, the rule was the
[19] same as it had always been.

[20] So people are to this today, having been
[21] whipsawed, been told that Congress had changed the
[22] rule, changed the law, and then been told that in

[1] fact Congress may have changed the law, but the
[2] commission had not changed the rule, I fear going
[3] now back to those same donors and telling them I'm
[4] sorry, the commission has now changed the rule that
[5] they changed the interpretation of the statute.

[6] So, you know, I'm not here to defend the
[7] CART rule (phon.) as it is because of incomplete
[8] disclosure. I originally thought that the rule was
[9] what you all are proposing it now be.

[10] But, again, I'm not sure in a world where
[11] people have gotten used to that, where there are
[12] arguably sound public policy reasons why that's at
[13] least in the context of Senate elections, in cycle,
[14] out of cycle, as there's a sensibility to the rule
[15] actually being this, but I'm not sure that there is
[16] a compelling need in the regulated community to
[17] have it change.

[18] And if one of the thoughts was that we
[19] ought to change it to make it less confusing, that
[20] is not going to be effectuated. People are used to
[21] this. They have gotten used to it from past
[22] cycles. They have been told that the same rule

[1] that has always applied still applies. So I would
[2] simply ask that either at a minimum this be made
[3] effective at some point in the future to give very
[4] good ramp time for people to get used to it,
[5] because otherwise you are going to be faced with
[6] just a lot of confusion.

[7] So with that I will answer any questions
[8] you all have.

[9] **CHAIRPERSON WEINTRAUB:** Thanks. And Mr.
[10] McGahn.

[11] **MR. MCGAHN:** Thank you, Madam Chair,
[12] commissioners.

[13] I am here on behalf of the NRCC to comment
[14] on two different matters. First is the proposed
[15] travel regs. The second is the proposed regs on
[16] lists, list exchanges, list rentals, and the like.

[17] Looking at the travel regs first, I echo
[18] much of what has already been said by my colleagues
[19] here. Alternative A is a very intriguing
[20] proposition in that it does provide a more simple
[21] standard that is easily understood. Whether one
[22] looks at the consistent rule of first class airfare

1) or the reimbursement after the fact within seven
2) days rule, both would simplify matters, I think,
3) immensely.

4) The concern was raised on the earlier
5) panel whether this would cause a free ride or
6) somehow there's going to be discounted air service
7) or that sort of thing. I don't think that that is
8) a concern. I say that based upon my own
9) experience.

10) When the travel regs I think were first
11) put in, which of course was long ago, long before I
12) arrived on the scene — but I've read about
13) them — air travel was different. There was a big
14) difference between charter rate and first class
15) airfare, and there still is a rate, but — there
16) still is a difference in the rate, but what has
17) changed is the amount of air travel. The number of
18) reliever airports are grown, although as of
19) September 11th, commercial service has dropped off
20) and been eliminated here and there. Compared to
21) where we were years and years and years ago, there
22) are so many more airports out there that you can

1) legitimately say you are entitled to first class
2) airfare if you fly into under the commission's regs
3) that it seems simply unfair because there are
4) certain parts of the country where that hasn't
5) happened. Parts of the South, parts of the Upper
6) Midwest, where they just do not have reliever
7) airports, so those folks are paying charter rate,
8) flying less distance than people who are paying
9) first class airfare.

10) It's not that the people getting first
11) class airfare are getting a free rate, it's that
12) the other people are being gouged.

13) The other thing that has happened, and the
14) pay-after-the-fact within seven days rule would
15) address this, is what we try to do or we sometimes
16) have to do is overpay just to make sure. And
17) sometimes corporations don't give the money back.

18) So to the extent you feel that the
19) corporations feel that they are quote, unquote,
20) buying access or something, well, they are
21) certainly buying something, because they are making
22) a little extra on the side. But it's not that sort

1) of thing.

2) The other part about travel regs is this
3) does not affect the sort of people that you would
4) assume, or at least if you read the newspapers you
5) would assume this would affect.

6) Many members fly commercial when they go
7) home, and come back from their districts. The
8) private aircraft, the corporate aircraft tends to
9) be used by those who are higher ranking in the
10) party or in the leadership structure to fly in to
11) do fundraising or grass-roots mobilization efforts,
12) for open seats challenger candidates, hot races,
13) and that sort of thing.

14) To make the cost as high as possible for
15) those people does not hurt the incumbents or the
16) leadership. It hurts the people who are scraping
17) by to mount a campaign. And once again, it
18) discourages the sort of travel into these districts
19) and hurts the proverbial little guy, to use that
20) sort of phrasing.

21) Turning to the list exchange regs, I'm
22) going to keep my comments very brief on this. We

1) are opposed to the proposed rules, and with that, I
2) look forward to your questions. Thank you.

3) [Laughter.]

4) CHAIRPERSON WEINTRAUB: And we appreciate
5) your brevity.

6) Let's see, Commissioner McDonald, we're
7) going to start with you this time.

8) COMMISSIONER McDONALD: Madam Chair, thank
9) you.

10) Joe, Marc, and Charlie, I thank all of you
11) for coming this morning. It's still this morning.

12) I guess I'll start with Marc because
13) obviously he's raised a very fundamental concern
14) over information that is out and about and, in
15) fact, not only in relationship to the aggregate
16) question, but I'm assuming that in lots of areas
17) people have been getting advice based on what they
18) think the law is.

19) I was going to ask you — I guess I will
20) ask you, so when the Supreme Court comes down with
21) something else, you'll be back again, I trust.

22) MR. ELIAS: We will be back again. We

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[1] will. And that's part of what I meant, is there
[2] are pieces of this that we are inevitably going to
[3] have to be back to donors with again. This
[4] aggregate limit issue, I realize is a bit of a
[5] thorny one because it had been the commission's
[6] recommendation for years to change it, and indeed
[7] the commission, I think, has the statutory
[8] authority to do so in McCain-Feingold.

[9] It chose not to at the beginning of this
[10] cycle. I mean I'll be honest with you, it had the
[11] opportunity and it could have and the donors were
[12] ready to do it, and I think both the NRC's comments
[13] and my representation today tell you that in fact
[14] the party committees — and Joe and Charlie — and
[15] I won't leave you out, Don — can speak for what
[16] they have advised their contributors as well. But
[17] the donors, you know, were ready to move towards
[18] that, but they were pulled back in February. The
[19] record, the FEC record specifically told people
[20] that we were going to operate under essentially
[21] what was the old rule. And I just question, A,
[22] whether that is something that has to be fixed now,

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[1] and if so, how it can be fixed in a way that does
[2] not affect people who have built-in assumptions for
[3] the cycle.

[4] **COMMISSIONER McDONALD:** The question was
[5] asked by the Vice Chairman earlier in the morning,
[6] and I hate to steal his fun, but he asked a very
[7] good question about this whole list exchange
[8] business, and I don't care who would like to answer
[9] it or is most comfortable with it. I think I'm
[10] citing it correctly, but the example was given,
[11] taking into account the comment made by Joe that
[12] the list broker approach is one that's very
[13] appealing, and particularly given the numbers
[14] Charlie cited, for example.

[15] But the question got to be whether or not
[16] a committee that might be as well placed, I guess,
[17] or maybe a committee or a group who had maxed out,
[18] wanted to aid and assist a candidate by turning
[19] over the list, their list, was there really arm's
[20] length transaction where the effort was to help the
[21] candidate as opposed to making a financial gain for
[22] that particular group.

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[1] Do you have any thoughts about that? If
[2] you had somebody, Joe, on the national party
[3] side — let's take the environmentalists, I guess,
[4] who were used this morning, an environmental group
[5] who might want to aid and assist a candidate in
[6] Montana, for example. The question, I think — and
[7] correct me, Mr. Vice Chairman, if I've got it
[8] wrong — but I think his concern or question was
[9] whether or not there you might not have a
[10] relationship that was necessarily at arm's length
[11] because the underlying goal wasn't the remuneration
[12] of the list but to aid and assist candidate in a
[13] different context, regardless of what it might be.
[14] Maybe it's because you maxed out, maybe because
[15] it's the only thing you can do, whatever.

[16] **MR. SANDLER:** If you're talking about an
[17] authorized committee obtaining a list for
[18] a — let's say, you know, a nonprofit corporation,
[19] whether they're going to pay for it, whether
[20] they're going to provide that nonprofit corporation
[21] with a list that's established to be in good faith
[22] of equal value.

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[1] If it's used as a subterfuge to make a net
[2] contribution, based on all the facts and
[3] circumstances, it seems to me that's an appropriate
[4] matter for an enforcement proceeding. I'm not sure
[5] what it is that it's contemplated to do by way of
[6] providing regulations for list exchanges in terms
[7] of banning it, based on certain relationships.
[8] When we say nonprofit — because they support the
[9] candidate, they can't give a list or — or some
[10] separate PAC has contributed? I just can't see how
[11] you can practically regulate that.

[12] The existence of an arm's length
[13] transaction is based on the exchange of fair market
[14] value. If another list were the same or the
[15] pricing, you know, cash on the barrelhead, paid by
[16] the authorized committee, in your example, to the
[17] nonprofit organization, and it should be considered
[18] based on all the facts and circumstances and the
[19] general touchstones from the commission's advisory
[20] opinions to the extent that those are codified in
[21] the proposed rules are appropriate. Arm's length,
[22] fair market value. But to automatically deem it

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1) can't be arm's length if there's certain
2) relationships, I think is highly problematic.
3) **COMMISSIONER McDONALD:** Let me go to the
4) travel for just a minute. I happen to concur with
5) alternative A at this juncture for any one of a
6) variety of reasons. But to play the devil's
7) advocate for a minute, if somebody is running for
8) the United States Senate, whether it's in Oklahoma
9) or California or wherever it might be, would it be
0) too much to ask the candidate to be able to
1) demonstrate to the commission what the cost of
2) travel was from Ardmore, say, to Broken Bow,
3) Oklahoma?

4) I mean if we think these guys and gals can
5) vote on \$87 billion budgets or health care or
6) anything else, do you think that it's too much to
7) ask candidates that are running for office to
8) provide some precise method, where maybe charter
9) service is not readily available, and if you don't
0) think it is, could somebody explain to me why that
1) would be the case?

2) **MR. ELIAS:** I guess I'll take a shot. If

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1) by someone, you mean why can't the candidates and
2) the corporation figure out what the actual cost to
3) the corporation of the plane was.

4) **COMMISSIONER McDONALD:** Or to an
5) individual.

6) **MR. ELIAS:** Or an individual. And the
7) answer is because it's, as I understand it, not
8) that simple.

9) For example, are you looking only at the
10) fuel cost and the pilot cost? Are you looking at
11) depreciation of the aircraft? Are you looking at
12) airport fees? Are you prorating airport fees and
13) hangar fees over the total number of uses in a
14) year?

15) It's just there are a lot of variables
16) that would go into actual — if you tried to figure
17) out, quote, unquote, actual costs, which I think
18) are problematic.

19) And I think that's the reason why the
20) commission originally frankly came up with the
21) rules that it did, was it was looking for easy,
22) objective criteria, so that we don't wind up in a

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1) situation where candidates and corporations are
2) trying to do this, and frankly where five years
3) from now the commission is sitting where you are,
4) with a moat in front of it, about whether or not
5) including or not including a depreciation schedule
6) was or was not required.

7) I mean I think from an enforcement
8) standpoint as well as — from your standpoint as
9) well as from the regulated community, I think a
10) clear, simple rule is just the only practical way
11) to go.

12) **COMMISSIONER McDONALD:** Thank you.

13) **CHAIRPERSON WEINTRAUB:** Mr. Vice Chairman.

14) **VICE CHAIRMAN SMITH:** Thank you, Madam
15) Chair.

16) I don't have a lot for this panel. The
17) question that I am interested in is on list
18) exchanges, and if you weren't here this morning, I
19) indicated there that I mean my sentiments are
20) fairly strong. The comments submitted by all the
21) folks on this panel, I think, and I think the
22) approach in the draft notices is far too

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1) regulatory.

2) I do appreciate your clarifying that
3) point, Mr. Spies. It wasn't clear to me from your
4) comments that you opposed the rules, but, you know,
5) words such as "ludicrous" and "troubling aspect"
6) didn't get it for me.

7) [Laughter.]

8) **VICE CHAIRMAN SMITH:** How do we value
9) exchanges where a candidate signs his name in
10) exchange for obtaining the list? Is that
11) something — should there be some other type of
12) rule in that situation, where it's not an exchange
13) of names for names or a purchase, but a candidate
14) would agree to sign a mailing in exchange for
15) getting ownership of the list, or some one-time use
16) or two-time use of the list? Does anybody have any
17) thoughts on that?

18) Is the question totally unclear, or just
19) nobody has any thoughts on the answer?

20) **MR. McGAHN:** I think it's clear. It was
21) clear enough.

22) I think it's a negotiated point. You get

[1] into the intangibles of who — it's a hypothetical
[2] in the first instance because who is the one
[3] signing and how valuable is their signature to the
[4] piece, and how many names are you talking and how
[5] many names can they get as a result, and how many
[6] hits do they get on each name? Can they mail it,
[7] can they phone it? How many times?

[8] And I can tell you my experience, these
[9] are very heated negotiations with people who sign
[10] letters and get names. It's not as if it's all
[11] this chummy, shaking hands, patting each other on
[12] the back, we're all getting along. These are
[13] pretty tough negotiations, so the market does
[14] provide I think a pretty accurate and certainly an
[15] objective standard. It's not as if there are
[16] in-kind contributions happening all the time
[17] because of this.

[18] So if I understood the question correctly,
[19] you don't need a rule to regulate that. The
[20] parties negotiate it quite well, and resolve the
[21] issue as they do in any other sort of market type
[22] transaction.

[1] **VICE CHAIRMAN SMITH:** You don't think that
[2] there is a danger — again, going back to the same
[3] issue. A group that wanted, for whatever reason,
[4] to make an added contribution to a campaign, which
[5] is limited from doing so, would arrange to — I
[6] presume that a group could not simply give a
[7] valuable mailing list to a campaign. I mean they
[8] could, but it would be an in-kind contribution.

[9] **MR. McGAHN:** Yes.

[10] **VICE CHAIRMAN SMITH:** So that a group that
[11] already, for example, if they're a PAC maxed out or
[12] something like that, might decide that they are not
[13] a good group at bundling contributions, but they do
[14] have a good mailing list. Can they just get the
[15] mailing list over by saying, well, if you'll sign
[16] this, we'll do a mailing. And, in other words,
[17] they don't really care if they get value for value
[18] because their intention is to make a contribution
[19] to a campaign. The campaign may negotiate it
[20] tightly, but the other group may not have any
[21] interest in negotiating it tightly. Their goal is
[22] to make a contribution.

[1] **MR. SPIES:** I would just support what Don
[2] said in that at least from the party's perspective,
[3] these are negotiated deals, and it's very common to
[4] have an elected leader sign a fundraising letter.
[5] But, surprising, they don't do it out of the
[6] goodness of their heart. They do it because they
[7] want something in return, and what they get in
[8] return are the responses, and usually it is
[9] a — you know, it becomes a negotiated deal where
[10] both sides sit down and do the best approximation
[11] of what an even exchange is.

[12] **VICE CHAIRMAN SMITH:** Mr. Sandler and Mr.
[13] Elias, do you have any thoughts or —

[14] **MR. SANDLER:** This is not something that
[15] is normal for us. I mean are you saying that the
[16] recipient committee provides a signature on a
[17] mailing done by the donor committee of a list?

[18] **VICE CHAIRMAN SMITH:** I'm getting lost
[19] with the names recipient and donor committee.

[20] I'm suggesting that a candidate would
[21] agree to sign a name in exchange, you know,
[22] for — in exchange for ownership or co-ownership of

[1] the resulting list. Can we assume that's of value
[2] by definition, that the list — if his name was of
[3] no value, the list he gets in return is no value?
[4] Or if his name has high value as the signatory of
[5] the letter, then obviously the list had high value?

[6] What I'm trying to get at is the notion
[7] that — what I keep kind of hearing — by the way,
[8] I think this is right, but what I keep hearing is
[9] look, the committees have the strong interest in
[10] negotiating a tight deal here and fighting this
[11] out. But I'm not sure that a group that wants to
[12] make a donation to a candidate necessarily has a
[13] strong interest. It could apply as well — you
[14] know, we could move away, perhaps an easier one is
[15] just simply an exchange of lists again.

[16] You know, how do we —

[17] **MR. SANDLER:** I guess there's a
[18] theoretical possibility that would happen, and
[19] maybe it has happened in practical application.
[20] But in my experience there are a legion of other
[21] real-world factors and concerns that mitigate
[22] your — the concern you just articulated.

1) The first is if you are a recipient
2) candidate and somebody gives you a list, my advice
3) would be, be very, very leery of that list. So
4) although you may think it's a gold mine, chances
5) are it's not.

6) So there is no such as a free list. I
7) mean this is a very — like I said before, it's a
8) negotiated point. The panel this morning made the
9) point that these lists are very valuable and people
10) don't readily give up lists.

11) The second point is hypothetically when
12) does this occur. Would someone happen to have a
13) list that happens to tailor that person's district
14) or allow that person to raise money that's
15) consistent with his issues and his platform and the
16) list would somehow be that much more valuable — I
17) just don't see the — I understand the concern in
18) theory. I just haven't seen it in practical
19) application. I'm not saying it hasn't happened,
20) but if it's too good to be true, it probably is,
21) and if nothing else, that will mitigate the
22) concern, I think, that you are articulating.

1) **MR. ELIAS:** If I can just echo one thing
2) that Don said, at least on the House and Senate
3) committee side, with respect to the negotiations
4) that go on between party committees and
5) candidates — at least the House and Senate
6) committees and candidates — those are arm's
7) length, hard-fought transactions that you can be
8) assured neither side is — both sides have an
9) interest in making sure that they are getting the
10) best deal that their side can get.

11) When you go beyond that, which I think is
12) the import of your question, to outside,
13) third-party groups, I think you have to divide that
14) world in a realistic way between those outside
15) groups that are large, established players and
16) therefore have very valuable lists, and those which
17) don't.

18) In the former category, most of those
19) folks already rent their lists and do so through
20) list brokers. So if the Sierra Club was going to
21) do a list exchange with a Democratic candidate, and
22) the Democratic candidate came to me for advice, I

1) would say, well, I'm sure Sierra Club has a list
2) broker. Whatever they charge through the list
3) broker is what you have to pay.

4) So I think you are, for the outside
5) group's standpoint, you are now limited, if you
6) knock out the large groups that have lists of
7) significant enough value that they rent them
8) regularly, you are now talking about the small
9) mom-and-pop organizations, and there I think the
10) point that was made earlier is exactly right. I
11) mean what are you talking about? You're talking
12) about a list of 2,000 names, of someone in the
13) middle of Illinois and one particular congressional
14) district has of environmentalists? I mean so if
15) they value it at \$200 instead of \$225, I'm not sure
16) there needs to be — I'm not sure there's an
17) enormous problem out there dealing with those small
18) groups.

19) **VICE CHAIRMAN SMITH:** Thank you. That's
20) all very helpful.

21) **CHAIRPERSON WEINTRAUB:** All right. We got
22) our order mixed up a little bit here.

1) Commissioner Thomas.

2) **COMMISSIONER THOMAS:** Thank you, Madam
3) Chair.

4) Thank you all for coming.
5) Just to follow up, let's put out a
6) hypothetical. You've got a state party committee
7) that's used partly soft money, partly hard money to
8) develop a very valuable list. It would be of great
9) value to the candidates that that party committee
10) wants to help get elected.

11) If that party committee wants to help the
12) candidate, chances are they're going to want to
13) maybe make that valuable list available to that
14) candidate to help that candidate raise money in the
15) upcoming election.

16) I think what Commissioner Smith has been
17) trying to get at is at a certain point, party
18) committees are trying to get their people elected.
19) They want to give them as much of a contribution as
20) they can. They want to give them as much of a
21) coordinated expenditure as they can. Isn't it also
22) logical that in those contexts the party committee

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[1] might want to give the candidates in question use
[2] of a very valuable list for less than fair market
[3] value?

[4] In other words, not require perhaps what
[5] might be viewed as full fair market value. Isn't
[6] that — I think what he's trying to get at, isn't
[7] there an incentive in some circumstances for the
[8] party to do that?

[9] **MR. SANDLER:** Not in the real world.

[10] **MR. ELIAS:** Not on the outside of the
[11] aisle.

[12] [Laughter.]

[13] **MR. SANDLER:** The Democrats have lost the
[14] House, have lost the Senate — you know —

[15] **COMMISSIONER THOMAS:** Tell me why. I'm
[16] not getting it.

[17] **MR. SANDLER:** The way that it's actually
[18] done, first of all, in our experience is that in
[19] those situations, the committee would give a list
[20] back that's worth equal value to the party
[21] committee. There is no — party committees don't
[22] give away use of their lists for less than fair

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[1] consideration as a way of making an extra
[2] contribution because there's an ongoing
[3] institutional interest in using those lists for
[4] fundraising for the party that goes well beyond,
[5] you know, support for any particular candidate in a
[6] particular race.

[7] That being said, I still think it's
[8] appropriate to require that there be fair
[9] consideration, but I'm not sure what you're getting
[10] at beyond that.

[11] **COMMISSIONER THOMAS:** No, no, I think
[12] that's more the answer I expected. I would have
[13] expected you to have said, well, sure there's an
[14] incentive there, but if it's going to cause an
[15] excessive contribution, we know we've got a
[16] problem, so we won't do that. Legally it would
[17] cause us problems. I could expect that answer.

[18] But I was still surprised by that — this
[19] answer that, no, there might not be a set of
[20] incentives there to suggest that, you know, if we
[21] could somehow find a way to low-ball it, sure, we'd
[22] like to if we could get away with it. But we

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[1] can't, we don't want to do that, because we don't
[2] want to get caught with a violation. We want to do
[3] it legally. I mean that's sort of what I expect to
[4] be the answer.

[5] **MR. SPIES:** And I would just note — and I
[6] think this goes back to Commissioner McDonald's
[7] question, too, about arm's length transaction, if
[8] your examination is of relationships between
[9] different parties and then you're going to try to
[10] make some sort of determination of whether there's
[11] an incentive because one is trying to help the
[12] other out, or they might have talked to each other,
[13] I think that's a futile path to go down. I think
[14] the focus has to be on whether it was a fair market
[15] value. And anything else about whether it's a
[16] party that's trying to help the candidate or what
[17] can you really have at arm's length if it's a group
[18] that has the same issues as the candidate — those
[19] are questions that you are never going to really be
[20] able to answer, and shouldn't be asked.

[21] **COMMISSIONER THOMAS:** I think the only
[22] reason that we're sort of asking these kinds of

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[1] questions is we're sort of, I think, trying to
[2] wonder is this rulemaking something we should be
[3] doing. Is it — are there some incentives out
[4] there that suggest that we need to do more than we
[5] have already got of the fair market value rule on
[6] the books.

[7] But let me, if I'm got a little time, I'll
[8] move on to my other issue in this rulemaking, the
[9] point of changing the regulation so that a
[10] contribution in fact made to a Senate candidate who
[11] is maybe running in 2006 will indeed count toward
[12] the time, the two-year time period when the
[13] contribution in fact is made.

[14] It has been suggested, Joe, I think in
[15] your comments, you were talking about how, you
[16] know, if we set an effective date at some point,
[17] what you would be most interested in seeing is that
[18] for contributions which have been made up to that
[19] effective date under this approach that we adopted
[20] in our existing regulation, we really should, if we
[21] change the rule, not apply those contributions to
[22] even the future election cycle where the current

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[1] regulation places them. We should basically, if we
[2] change the rule, basically allow all contributions
[3] for that future election cycle to be operating
[4] under the new rule.

[5] Am I understanding your approach? I'm
[6] just trying to get a sense of how, if we do change
[7] the rule, how can we work the effective date? How
[8] will we apply contributions that have been made up
[9] to the point of the effective date?

[10] **MR. SANDLER:** Well, at a minimum,
[11] contributions that were made up to the effective
[12] date, which if counted for the '03-'04 cycle would
[13] cause somebody to exceed the limit, we certainly
[14] don't think anybody should be penalized for having
[15] relied on the commission's regulations, you know,
[16] at a minimum. That's the main point.

[17] **COMMISSIONER THOMAS:** And that seems to
[18] make sense to me, that whether you pick January 1
[19] of 2005 as the effective date, or whether you pick
[20] say 30 days from today as the effective date,
[21] you're going to have this question about, you know,
[22] some folks who might have given up to the effective

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[1] date, expecting a contribution to apply toward some
[2] future two-year cycle, and it seems to me that
[3] perhaps the most logical way is to just give enough
[4] lead time, if we change the rule, so that people
[5] will get used to it and indeed if they want to rush
[6] out and make some contributions in this two-year
[7] period that will under the current rule count
[8] toward the future period, fine, let them have a
[9] little bit of lead time to do that, but then the
[10] effective date could kick in, and we would just
[11] apply the new set of rules to the new contributions
[12] from that point on.

[13] Would that — anybody else on the panel,
[14] would that be a reasonable approach to take, as
[15] long as we allow enough lead time?

[16] **MR. ELIAS:** I think that would be a
[17] reasonable approach to take. You might consider
[18] whether — and I don't know if the commission has
[19] ever done anything like this — you might consider
[20] that for the '05-'06 cycle, basically donors could
[21] calculate under either method, that, you know, they
[22] would — if they — because the only problem with

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[1] that approach, of course, is the person who says,
[2] well, I was planning — I gave money in '05 — I
[3] gave money now for '05-'06, thinking it was going
[4] to count then, but then when I get into '05-'06, I
[5] was planning to give to '06-'07, or '07-'08, and
[6] you have now bunched me up.

[7] So, you know, you might consider a rule
[8] that if you were going to change this, that again
[9] does not snare people from being caught in the web
[10] of based on what they planned, and one way to do it
[11] would be to basically have a two-year — a
[12] one-cycle grace period where people could operate
[13] under either — calculate it either way, and that
[14] the only — and you could do it as a matter of
[15] policy. I'm not sure you even need to put it in
[16] rules. I mean you could tell the — the General
[17] Counsel's Office could come to a conclusion we're
[18] not going to prosecute anyone who would have
[19] been — or pursue anyone who would have been legal
[20] under either calculation for this two-year period.

[21] **COMMISSIONER THOMAS:** Thank you.

[22] **CHAIRPERSON WEINTRAUB:** Commissioner

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[1] Mason.

[2] **COMMISSIONER MASON:** I don't know if it
[3] will provoke any comments, but let me try to help
[4] the panel with why we think the mailing list is a
[5] problem. Potentially a problem.

[6] We audited the Bauer for President
[7] Committee — not Bob Bauer, Gary Bauer —

[8] **MR. ELIAS:** Can we you sign you up,
[9] Michael? Will you be a Bauer Pioneer?

[10] [Laughter.]

[11] **COMMISSIONER MASON:** And the Bauer for
[12] President Committee made use of a mailing list
[13] which had been developed by the Campaign for
[14] Working Families, which is a leadership PAC run by
[15] Gary Bauer. And the Bauer for President
[16] essentially obtained effectively unlimited use of
[17] the Campaign for Working Families donor list of
[18] 87,000 names and mailed it 22 times, mailed
[19] portions of the list 22 times for nearly a million
[20] individual uses.

[21] In return, the Bauer for President
[22] Committee gave the Campaign for Working Families

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[1] apparently unlimited rights to mail any new, unique
[2] names that Bauer for President came up with.
[3] During the course of the Presidential campaign, the
[4] Bauer for President Committee came up with about
[5] 25,000 unique names, and by a couple of years later
[6] the Campaign for Working Families had mailed that
[7] list, or portions of that list, eight times for
[8] 174,501 uses.

[9] The two committees involved, after we had
[10] to subpoena documents, by the way, they wouldn't
[11] cough up the records when we asked for them,
[12] represented to us that, hey, in exchange of 957,000
[13] uses for 174,000 uses is pretty fair to us, and the
[14] commission concluded otherwise and concluded in
[15] that case, and in part based on the fact that both
[16] of these committees had their lists for rental on
[17] the open market and attached a \$115, \$130, you
[18] know, per hundred that we could put a valuation on
[19] this and come up with an \$87,000 plus excessive
[20] contribution.

[21] Now the Bauer for President Campaign was a
[22] small campaign, and so we had to go through this,

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[1] and it was a problem in the audit process, and you
[2] know, I suppose the Bauer people thought they were
[3] doing everything just fine, and they argued that at
[4] the time they made the exchange, the Campaign for
[5] Working Families thought the Bauer for President
[6] Committee would do a lot better than it did, and he
[7] might actually last through the first primary, and
[8] generate more names, and so it could have been a
[9] really nice deal for the PAC, and maybe they really
[10] believed that, but we didn't come to that
[11] conclusion.

[12] And so when you see in the course of a
[13] small campaign an \$87,000 item come up, and then we
[14] look at the history in this area where frankly when
[15] one committee, entity, side, or whatever comes up
[16] with a way of doing things, it quickly communicates
[17] to lots of other places, we can see this becoming a
[18] problem two, three, four, five times this size, and
[19] that's a very big problem.

[20] And so I wonder if any of you have any
[21] comments on — in one sense we dealt with it in the
[22] audit process. You know, we came to a conclusion,

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[1] and you could argue, okay, the system worked. But
[2] our concern is that there is a substantial amount
[3] of money potentially out there, and there were
[4] vigorous arguments on the part of the audited
[5] committees here that no, they hadn't done anything
[6] wrong, and so we always have problems, the
[7] commission always has problems when we are doing
[8] this after the fact rather than before, and isn't
[9] there something we could do to sort of let people
[10] know that hey, you guys can't do this, you know,
[11] that yes, there may be situations in which it
[12] doesn't have to be name for name, on which some
[13] delay, you know, in the use you give names now and
[14] get uses later on, may be appropriate, but you
[15] know, this situation was way out of bounds, and
[16] can't we come up with something better than, well,
[17] yeah, you've got some leeway, but this one went too
[18] far?

[19] MR. SPIES: I would just note that if you
[20] are going to do that after-the-fact analysis years
[21] later, no matter what standard you use, you can
[22] probably show that it wasn't a good deal for

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[1] somebody. I mean even if they buy it from a list
[2] broker, years later you could go back and say,
[3] look, this didn't have the return that they were
[4] expecting —

[5] COMMISSIONER MASON: But that's my point.
[6] So the after-the-fact analysis isn't particularly
[7] satisfying, either, because you know, there could
[8] well have been a case — in other words, we had the
[9] uses and the Campaign for Working Families could
[10] have been right. It could have been reasonable for
[11] them to expect Bauer to last through at least the
[12] first primary and get 50,000 names instead of 25.

[13] MR. SANDLER: Well, Commissioner, I
[14] understand the — it's always difficult to look at
[15] the facts and circumstances after the fact, but the
[16] idea that the kind of criteria you're talking about
[17] could reasonably measure arm's length, fair market
[18] value transactions is simply not the case.

[19] I would like to just briefly pass on
[20] comments from the major list broker organization
[21] that is used by the national party committees, who
[22] is extremely concerned, extremely concerned about

[1] these regulations, and said in regard to what you
[2] are talking about that one of the many things the
[3] FEC does not recognize is that the rental
[4] transactions conclude when the mailer pays the list
[5] donor, usually within 60 to 90 days.

[6] Exchanges, however, are considered much
[7] more open-ended. Start-up organizations are often
[8] advanced names on exchange with the understanding
[9] that when the organization builds its donor list,
[10] the other party will be able to receive donor names
[11] in return, often in many smaller increments. And
[12] quite often not until a year or more after the
[13] organization received names under the initial
[14] exchange agreements.

[15] This is very common, and it is actually
[16] rare that two organizations would exchange exactly
[17] the same number of names and mail them within a
[18] similar period. It would be well within industry
[19] standards that these people exchange hundreds and
[20] hundreds of lists — rent and exchange hundreds and
[21] hundreds of lists every day, 90 percent of which
[22] don't involve political, Federal political

[1] of course, with the particular facts of that
[2] enforcement proceeding, I can absolutely conceive
[3] of circumstances based on nothing more than the
[4] facts you have given in which the finding would
[5] certainly be unjustified by any standard industry,
[6] you know, commercial understanding of what these
[7] things are worth. Absolutely. Again, not
[8] commenting on a particular enforcement matter, not
[9] knowing any of the — what appears to be an
[10] extensive record.

[11] **MR. ELIAS:** And I can't comment on the
[12] specifics of it either, because I'm not familiar
[13] with it. But one of the facts that you cited,
[14] which struck me, is that these entities apparently
[15] did use a list broker. In other words, they didn't
[16] for this transaction, but there was an established
[17] fair market value.

[18] In other words, at least on our side here,
[19] we are not disputing that lists should be exchanged
[20] on a fair market value basis or rented on a fair
[21] market value basis. The question is how much
[22] regulation should go into how that is determined

[1] committees at all, maybe 95 percent of which do
[2] not.

[3] It would be well within industry standards
[4] to allow political committees the same amount of
[5] flexibility as commercial mailers or other types of
[6] nonprofit organizations with respect to how the
[7] exchange is repaid.

[8] I mean, again, in the case of the DNC, if
[9] we are not allowed that kind of flexibility, it is
[10] going to be extremely problematic to do what the
[11] DNC needs to do to acquire — you know, to use its
[12] existing list, acquire names from other
[13] organizations and committees and so forth to do
[14] what it's supposed to do on the BCRA.

[15] **COMMISSIONER MASON:** I understand. I'm
[16] just trying to communicate and by that get any
[17] comments you have on, you know, whether, you know,
[18] this sort of finding, which the commission did make
[19] in the course of this audit, was justified, and to
[20] go further in how we help you advise your clients
[21] to stay out of this type of problem.

[22] **MR. SANDLER:** Being completely unfamiliar,

[1] and how much flexibility should be allowed in how
[2] that's determined.

[3] Obviously one of the touchstones is always
[4] going to be, well, if you rent your list to the
[5] National Rifle Association at \$113 a thousand, then
[6] that's a pretty good indication of what the fair
[7] market value is. So that strikes me that in that
[8] particular case, just that fact would have been
[9] significant.

[10] **COMMISSIONER MASON:** Well, but this was a
[11] list exchange, and Mr. McGahn, if you don't want to
[12] comment, I won't try to put you on the spot, but
[13] there was news coverage of the fact that the NRCC
[14] was exchanging names with Judicial Watch, and that
[15] Judicial Watch had built up a large balance owed.
[16] This was reported in Roll Call, and that at some
[17] point the NRCC said, hey, you can't use our list
[18] anymore until you pay us back, which certainly
[19] seems reasonable on your part.

[20] But that gets to the idea that, you know,
[21] in that case and by Mr. Sandler's assertion in the
[22] normal commercial marketplace, it is not unusual to

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[1] have name exchanges going on where large balances
[2] are built up and owing, and maybe sometimes those
[3] never get paid back on a one-for-one basis.

[4] I'm told my time is up, but I'm just
[5] trying to explain our problem.

[6] **CHAIRPERSON WEINTRAUB:** Let me try going
[7] at this a different way. I hear you saying that
[8] the party organizations generally use list brokers
[9] and, you know, that certainly simplifies life, but
[10] to the extent that we have to make some kind of
[11] judgment as to whether fair market value was
[12] received in a nonlist broker situation, what sort
[13] of factors should we be looking at?

[14] **MR. ELIAS:** Let me just clarify one thing.
[15] The House and Senate committees at least on the
[16] Democratic side use list brokers regularly. I'm
[17] not sure that, especially with exchanges, that that
[18] is the rule at all. In fact, I'd say it's the
[19] exception. And even with some rentals, if we are
[20] renting — if we have an arrangement with the
[21] candidate, we will not always go through a list
[22] broker. There are times when it will be done, so

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[1] that experience may be a little different.

[2] You know, I would look, though, to, you
[3] know, if the Democratic Senatorial Campaign
[4] Committee has a value that they assign when they do
[5] go through a list broker, you would expect that
[6] they would use that same valuation if they were to
[7] rent it without a list broker. So that would be a
[8] criterion I think you would look at.

[9] You know, there are a lot of facts and
[10] circumstances that go into this: who the candidate
[11] is, how likely their — how valuable their names
[12] are to this particular party committee. And just
[13] to reiterate, I think the direction Joe was going
[14] in, that flexibility ought to be built in. It's
[15] not saying that there shouldn't be an examination
[16] of whether it was a fair exchange or fair market
[17] value was paid, but I don't think there is an
[18] exhaustive list of criteria you can put down on
[19] paper and say this is it.

[20] **CHAIRPERSON WEINTRAUB:** Anybody else want
[21] to comment on that?

[22] **MR. McGAHN:** Is that factors in a

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[1] regulation or factors in the enforcement process?

[2] **CHAIRPERSON WEINTRAUB:** Either one.

[3] **MR. McGAHN:** There's a difference.

[4] **CHAIRPERSON WEINTRAUB:** All right, in the
[5] enforcement context, then. Since you agree that
[6] there will be circumstances in which we will have
[7] to address it in that context.

[8] **MR. McGAHN:** Right. Well, then ultimately
[9] you want to see if anybody is getting a
[10] contribution that they shouldn't, it's excessive,
[11] so —

[12] **CHAIRPERSON WEINTRAUB:** Well, we know
[13] that, but how do we get there?

[14] **MR. McGAHN:** I'm trying to answer the
[15] question. I mean I think you look for consistency.
[16] In the list of intangibles that we have already
[17] talked about, if you have a situation where it
[18] stands out as being off-the-chart cheap or
[19] off-the-chart expensive, I think you have an issue
[20] there. Otherwise, it's very tough to articulate
[21] consistent factors because it's a fact-intensive
[22] inquiry, I think.

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[1] **CHAIRPERSON WEINTRAUB:** All right, let me
[2] try this one.

[3] I gather none of you are too enthusiastic
[4] about the mailing list rulemaking in general, and
[5] it has been expressed both here and earlier
[6] today — and you will be happy to hear, Mr. Elias,
[7] you are entirely consistent with Mr. Bauer on that
[8] point.

[9] **MR. ELIAS:** Good. I was going to ask at
[10] the end how I did.

[11] **CHAIRPERSON WEINTRAUB:** That the dangers
[12] and the risks are of overregulating and confusing
[13] the regulated community even more than they are
[14] already confused. And, really, that is not our
[15] goal, appearances to the contrary sometimes.

[16] Let me just ask you what I asked them.
[17] Are there issues besides the — I'll take it as a
[18] given that you would include the mailing list, but
[19] is there anything else that we are looking at today
[20] in any of these rulemakings, including the phone
[21] banks that none of you commented on, I think, or
[22] testified on, that we should just drop it and say,

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1) sorry, there's no need to do this, we made a
2) mistake, we're just going to close it down right
3) here, we don't need more regulations?

4) **MR. ELIAS:** I'm going to raise again, I
5) have my questions of whether or not this is the
6) right moment in history to revisit the aggregate
7) limit issue.

8) **CHAIRPERSON WEINTRAUB:** That's a timing
9) issue more than a —

10) **MR. ELIAS:** No, I mean — I don't mean
11) whether it should be effective 30 days or just
12) January 1, 2005. With everything that is going to
13) be going on when the Supreme Court finally rules on
14) their case — and I am not sure that January 1,
15) 2005 people are going to be picking up their legal
16) memos and figuring out that the aggregate limit
17) rule has changed again. And I think you are going
18) to snare a lot of people in the middle of them
19) trying to comply with the rest of McCain-Feingold
20) that I guess if I had my druthers, you would put
21) that on the back burner and deal with it some point
22) down the road when the water is a little quieter.

[1] oddly enough, supported the opposite alternative,
[2] the charter rate all the time. Nobody bit on one
[3] that I tossed in there, because when I used to deal
[4] with members, you know, incumbent members, they
[5] always used to complain a lot to me about how, oh,
[6] it's all inconsistent, we have to deal with one set
[7] of rules for the ethics purpose and another set of
[8] rules for campaign finance purposes, and wouldn't
[9] it be better if they were all consistent.

[10] So, you know, I tossed in alternative B
[11] there in an effort to accommodate that. I guess
[12] it's natural that you would prefer alternative A
[13] because it's cheaper for your clients, but anybody
[14] want to comment on advantages or disadvantages of
[15] alternative B?

[16] [No response.]

[17] **CHAIRPERSON WEINTRAUB:** No.

[18] Anybody want to comment on the — and I
[19] think, Mr. McGahn, you have already addressed this
[20] to some degree. You know, if we go with
[21] alternative A, you know that, you know, we're going
[22] to get the editorials and we're going to get the

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[1] But —

[2] **CHAIRPERSON WEINTRAUB:** So we made a
[3] mistake and we should just live with it at this
[4] point on that one?

[5] **MR. ELIAS:** Yes.

[6] **CHAIRPERSON WEINTRAUB:** Any other
[7] recommendations for things you don't want us to do?
[8] I'm giving you an opportunity here, guys.

[9] **MR. SPIES:** Well, that's a different
[10] question, I think.

[11] [Laughter.]

[12] **CHAIRPERSON WEINTRAUB:** In the context of
[13] the rulemaking.

[14] **MR. SPIES:** I think Mr. Bauer hit the nail
[15] on the head when he said it depends on what you are
[16] actually going to do with it.

[17] **CHAIRPERSON WEINTRAUB:** That's what they
[18] said earlier. All right.

[19] Let me ask you a question about travel.
[20] We've got the alternatives, and not surprisingly,
[21] all of you support the, you know, first class all
[22] the time alternative, and Mr. Shor and Mr. Noble,

[1] people on the reform side who are going to say it's
[2] a giant benny for all the politicians because in
[3] fact when you charter a plane, when Fed Ex sends
[4] their plane across the country because a member of
[5] the House or the Senate asked them to fly them out
[6] there, it costs them a whole lot more than first
[7] class airfare. So why should we let them incur all
[8] that extra cost and not make the candidate pay for
[9] it?

[10] Anybody.

[11] [No response.]

[12] **CHAIRPERSON WEINTRAUB:** Oh, man.

[13] [Laughter.]

[14] **CHAIRPERSON WEINTRAUB:** The silence is
[15] deafening. You don't even want to address the
[16] argument?

[17] **MR. ELIAS:** First of all, I don't think
[18] there is a way to calculate the actual cost. I
[19] mean I think that's actually a straw man. I
[20] understand the reform community argument perhaps
[21] that it ought to always be charter, and that has
[22] some practical problems, too, but the straw man is

[1] pay actual cost, because that's a metaphysical
[2] number. I mean you'll have Arthur Andersen
[3] and — perhaps a bad example.
[4] [Laughter.]
[5] MR. ELIAS: You'll have accountants and
[6] tax lawyers arguing for the end of time as to what
[7] the actual cost of flying the plane is.
[8] CHAIRPERSON WEINTRAUB: Well, wouldn't the
[9] charter rate be a closer approximation than first
[10] class?
[11] MR. ELIAS: Not necessarily. I mean why?
[12] Why would it? I mean charter rate has nothing to
[13] do with what it costs Fed Ex to fly that plane. It
[14] may be a higher number, generally; not always, but
[15] generally; but it's not necessarily going to be
[16] closer. I mean it's not — how much Acme Charter
[17] charges to charter a plane is not based on what it
[18] costs Fed Ex to fly a plane.
[19] CHAIRPERSON WEINTRAUB: So couldn't you,
[20] you know, calculate how much the gas costs and the
[21] pilot's salary and, you know, throw in a little
[22] something for depreciation of the plane and — I

[1] mean it just strikes me as that it is something you
[2] could calculate if you wanted to go for actual
[3] costs. I know that's not one of our alternatives,
[4] but since you say it can't be calculated, I'm not
[5] sure that's right.
[6] MR. ELIAS: I don't think it can be
[7] calculated with precision, and, you know, when
[8] you — with all due respect, when our clients
[9] complete FEC reports, they can't just put in round
[10] numbers. You know, it costs approximately \$4,000
[11] for the plane. I don't mean to be flip about this,
[12] but you know, when you say the gas costs, is it the
[13] gas costs — you know, these planes, as I
[14] understand it, oftentimes get fueled and then they
[15] will fly a bunch of legs and they may refuel here
[16] and there. Are we supposed to have them, you know,
[17] track on their little odometer or whatever and
[18] figure out what the average gas mileage they have
[19] received — they have had over the last few
[20] flights? I mean how exactly — or do we require
[21] that they gas up — it's like returning a rental
[22] car, you know, it comes with a full tank, has to be

[1] returned with a full tank? I mean —
[2] [Laughter.]
[3] MR. ELIAS: — there isn't — there are
[4] just a million permutations, and there isn't any
[5] way to pin down with precision on a
[6] flight-by-flight basis what a plane costs.
[7] CHAIRPERSON WEINTRAUB: That's an
[8] interesting theory. You gas up — you know, they
[9] have to return the plane with a full gas tank.
[10] We'll consider that one.
[11] All right, I'm not getting a lot of help
[12] from you guys. I'll see if Commissioner Toner has
[13] any better luck.
[14] COMMISSIONER TONER: Thank you, Madam
[15] Chair.
[16] Well, I wonder where the Arthur Andersen
[17] corporate plane is today.
[18] [Laughter.]
[19] COMMISSIONER TONER: And I'm sure
[20] candidates somewhere are missing it.
[21] [Laughter.]
[22] COMMISSIONER TONER: Thank you, Madam

[1] Chair, and I want to thank all the panelists for
[2] being here. Your testimony is very helpful for us,
[3] and I just want to follow up on a couple things
[4] that you guys have touched on.
[5] First of all, Mr. Sandler, I want to make
[6] sure I understand your position on the mailing list
[7] side of the equation. You were talking about the
[8] touchstone ought to be fair market value, if we're
[9] talking about list rentals, list sales. Is it your
[10] position that if you have fair market value paid,
[11] that's really the end of the analysis? That that
[12] would mean that there is no contribution taking
[13] place based solely on the fact that fair market
[14] value price was paid?
[15] MR. SANDLER: Where list value is the same
[16] as exchanged, yes. That is our position.
[17] COMMISSIONER TONER: Is it your position
[18] that that should be the case regardless of the
[19] nature of the entities entering into the
[20] arrangement, i.e., whether or not they are
[21] politically allied with each other, or they are a
[22] national committee and a state party or whatever

1) the relationship is, that the price ought to be the
2) touchstone regardless?

3) **MR. SANDLER:** Yes, that absolutely is our
4) position, and the idea that national and state
5) parties, for example, couldn't exchange lists on a
6) fair market value because of, you know, the nature
7) of their relationship would be extremely troubling.

8) **COMMISSIONER TONER:** Or a House or Senate
9) campaign and a national committee — in other
0) words, I just want to make sure I understand, that
1) if fair market value is paid, it shouldn't matter
2) whatever political relationships might exist
3) between the contracting parties?

4) **MR. SANDLER:** That's true. And certainly,
5) in any event, the idea that a group is allied, I
6) mean is the commission to measure whether a group's
7) ideology is in keeping with the Democratic Party
8) platform and therefore they support it? I can't
9) imagine getting into that as a regulatory matter.

0) **COMMISSIONER TONER:** Does the rest of the
1) panel concur with that analysis?

2) **MR. SPIES:** Hundred percent.

1) **Mr. Sandler,** do you have a sense of that
2) empirically?

3) **MR. SANDLER:** This is not an arrangement
4) that's common, or I'm familiar with, having been
5) done by the Democratic National Committee, but I
6) can certainly say that a candidate might sign a
7) fundraising mailing and might, you know, engage in
8) a list exchange with, you know, a national party
9) committee and it might not be one for one with the
10) same uses, because it might depend on whether
11) they're unique names or whether — you know, how
12) the list has performed and a host of other factors.
13) And that we are very concerned that the commission
14) not get into.

15) **COMMISSIONER TONER:** Do other members of
16) the panel have thoughts on this? Because what I'm
17) trying to get a better sense, and again
18) empirically — I'm not making any judgments about
19) what we ought to do about it. Is it — should we
20) be exploring or thinking about any assessments on
21) whether or not these signatures for names, when
22) they do happen in the marketplace, the signing

1) **COMMISSIONER TONER:** Mr. McGahn, Mr.
2) Elias?

3) **MR. McGAHN:** Yes.

4) **MR. ELIAS:** Yes.

5) **COMMISSIONER TONER:** I also wanted to
6) follow up on one aspect of list rentals or list
7) exchanges, and that is — we've talked about it
8) during the session — someone will provide their
9) signature to an organization in return for
0) receiving the new addresses that are responsive to
1) the person's signature. Names for signature,
2) basically. And the question I have — I'm
3) interested in an empirical matter based on your
4) experiences with your clients and otherwise.

5) When those arrangements occur, is it
6) common for the person who has lent the signature,
7) provided the signature and then is getting names
8) back, is it more common for that person to have
9) ownership of the names outright, to be able to use
0) them as he or she sees fit? Or is it more common
1) for restrictions to be placed, i.e., maybe they can
2) only use the names once, or some specified time?

1) party gets outright ownership of the names that are
2) responsive to the signature, or rather is it more
3) limited ability to use the names? Mr. Spies?

4) **MR. SPIES:** From our perspective it's
5) relatively common that we would put limits on how
6) they can use the names. In other words, they could
7) only use them for their own political committee.
8) They couldn't put them back out on the market.

9) **COMMISSIONER TONER:** Is it common to place
10) limits on the number of times they could use the
11) names that are responsive to the signature?

12) **MR. SPIES:** No.

13) **CHAIRPERSON WEINTRAUB:** Not common to
14) place limits?

15) **MR. SPIES:** I mean that's from our
16) perspective, not yours.

17) **MR. McGAHN:** First, let's not get
18) sidetracked on this. The signature-for-names deals
19) is, as Joe said, or as Joe alluded to, rare, and
20) that's my word, not his. But it's not the common
21) practice. It happens in unique circumstances, and
22) generally it is a deal that is negotiated and there

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[1] are limitations placed on the use of the names, in
[2] my experience. There are times, rare, where it's
[3] just you get the names, anything goes, but
[4] generally there are limitations imposed in the
[5] contract.

[6] So it's not this free-for-all. Once the
[7] negotiation process reins in the use of the names
[8] so there are limitations that are built in. So
[9] there may be — at the RNC maybe they do have a
[10] different system than we have, but in my experience
[11] it's a rare contract to begin with, and even then
[12] there's going to be limits on use of the names.

[13] **MR. SPIES:** Just to follow, I was not in
[14] any way implying there aren't limits on the use of
[15] the name. It's an extensive contract you sign.
[16] It's just you were asking then particular
[17] questions.

[18] **COMMISSIONER TONER:** Let me ask just as a
[19] sort of a general matter, do you think it would be
[20] appropriate for the commission to conclude in a
[21] rulemaking that in this signature-for-names
[22] arrangement it would be impermissible for the

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[1] signing entity to get full ownership of the names,
[2] but instead they could only use it a certain number
[3] of times? Would it be appropriate for us to create
[4] that kind of a rule, regardless of what the
[5] contract might say?

[6] **MR. McGAHN:** No.

[7] **COMMISSIONER TONER:** Why not?

[8] **MR. McGAHN:** Because you are entering into
[9] what is essentially a negotiated deal between
[10] private entities. Now the situation Commissioner
[11] Mason brought up with a Presidential campaign of
[12] matching funds, I think that's a little bit of a
[13] different situation.

[14] **COMMISSIONER TONER:** Because public funds
[15] are involved?

[16] **MR. McGAHN:** Right. And it also brings up
[17] the leadership PAC intersecting with Presidential
[18] campaigns, not necessarily the list issue. But
[19] aside from that, what people negotiate I think is
[20] what they ought to live with so long as you are not
[21] creating a situation where a contribution results
[22] or you're playing fast and loose. But that sort of

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[1] thing is already against the law, so you don't have
[2] to make it against the law again, although
[3] sometimes the government does that, make something
[4] into law multiple times.

[5] But, no, I would think that would not have
[6] to be in a regulation, should not be in a
[7] regulation.

[8] **COMMISSIONER TONER:** There's been some
[9] discussion about list brokers, how prevalent they
[10] are in terms of list rentals and list exchanges.
[11] Do you think that we should think about creating a
[12] safe harbor, that any prices that are charged by a
[13] list broker or any arrangements that are done
[14] through a list broker, between political
[15] committees, should we think about creating a safe
[16] harbor that that's permissible?

[17] **MR. SANDLER:** Yes, Commissioner, that
[18] would be our view, and again, most of the exchanges
[19] are not done through list brokers. Some of them
[20] are. But in the case of a list rental —

[21] **COMMISSIONER TONER:** List rental, right.

[22] **MR. SANDLER:** — where it's handled

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[1] through a list broker in the normal course of that
[2] broker's business, it doesn't seem — we just fail
[3] to see the occasion for the commission to start
[4] second-guessing people who are in this business.
[5] And inherently, at arm's length — I mean obviously
[6] we're not talking about a list broker in some way
[7] related to a political committee. We're talking
[8] about people who are listed, you know, in the
[9] industry directory, in the business, and who are
[10] recognized as making a market in these lists.

[11] **COMMISSIONER TONER:** Does the rest of the
[12] panel concur with that judgment?

[13] **MR. ELIAS:** I would only add one
[14] modification to what Joe said, which is that in
[15] those instances — and this particularly comes up,
[16] I think it's fair to say, with the House and Senate
[17] committees, at least on our side, where we will do
[18] list rentals with candidates. They will not
[19] necessarily go through a list broker, but they are
[20] consistent with the prices paid if they had gone
[21] through a list broker. I don't think this
[22] should — I don't think this rule should turn into

a subsidization of the list broker business. I don't think it should be mandatory that every transaction go through a list broker, but I do think it's an important touchstone that if you are doing it on terms that would be the ones that a list broker would use, I think it ought to be a safe harbor.

MR. SPIES: I addressed this in my — mentioned the safe harbor concept in my comments, and I think if the commission feels the need to have sort of set standards, if you feel that's an imperative, then doing it as a safe harbor is the way to go.

But I was concerned throughout the proposed rulemaking about these presumptions you were talking about, and I would trust that a safe harbor would be a true safe harbor and not be included with any sort of presumption that if you didn't use a list broker, you weren't at fair market value.

COMMISSIONER TONER: I think my time is expired. I have couple more questions, but I will

[1] between reasonable pricing for a list and what
[2] might constitute a veiled contribution to a
[3] committee does not take into account the often
[4] fluid pricing arrangements that take place in the
[5] list industry. A list is worth whatever a mailer
[6] is willing to pay for it, and this is equally true
[7] whether the transaction is an exchange or rental.

[8] This very simple concept can lead to a
[9] variety of arrangements between two parties,
[10] including discounted pricing often to compensate
[11] for duplication of names between lists, or
[12] substandard performance, unequal exchange
[13] agreements — for example, two-for-one exchanges
[14] when one list is perceived to be worth more than
[15] another — discounted multiple use agreements, so
[16] much off the base price for subsequent uses, volume
[17] discounting, et cetera.

[18] Price negotiation is ubiquitous and it
[19] would be misleading if not dangerous to make
[20] assumptions about the validity of any transaction
[21] based solely on the price attached to it they are
[22] talking about in the SDRS and similar directories.

refer them.

Thank you, Madam Chair.

CHAIRPERSON WEINTRAUB: Mr. General Counsel.

MR. NORTON: Thank you, Madam Chair, and thank you, panel, for coming today.

I think the testimony is clear that with respect to list rentals, those are overwhelmingly, at least a majority of those transactions are done through list brokers, at least currently. The question I had is given that, and even when that the fair market value is then known to the committee, could it ever be commercially reasonable for the committee to rent the list to someone directly, not through a list broker, for less than what the list broker has obtained for the

R. SANDLER: Yes, absolutely, and I would like to see in that — again I would like to pass on the comments of the Democratic Party's list broker directly addressing that, and their advice to us in the laudable intent of trying to differentiate

[1] That's from the people we rely on as our
[2] experts.

[3] **MR. NORTON:** I wanted to follow up with
[4] you, if I could, Mr. Sandler. You read a passage a
[5] little bit earlier, too, and you mentioned, I
[6] think, that the list broker, the very large list
[7] broker from whom you got these comments was very
[8] distressed by some of the things the commission was
[9] proposing doing, and I wonder whether you knew
[10] whether they had been interested in submitting
[11] comments in this rulemaking and whether under other
[12] circumstances, for example, additional time, they
[13] would submit comments to inform the commission.

[14] We're talking today about creating a safe
[15] harbor for list broker transactions, and we have a
[16] couple of passages you've read to us that as far as
[17] I know aren't part of our record. Is that
[18] something that you discussed with the list broker?

[19] **MR. SANDLER:** We took their comments into
[20] account. It's reflected in, you know, different
[21] language in some cases more directly responsive to
[22] the commission's questions, but — in the NPRM, but

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[1] they — I'm not sure that it's really worth the
[2] commission's time to do it, but I'm certain that
[3] the list industry would be willing, you know, and
[4] able to weigh in on these concerns if the
[5] commission would find it useful.

[6] **MR. NORTON:** Mr. Elias, I just wanted to
[7] follow up on an issue I think the Chair was asking
[8] you about, and that is the moving parts comment
[9] that you made early on. You've mentioned a couple
[10] of times that you think the time isn't right for
[11] biennial limits, and I guess I haven't heard you
[12] specifically address mailing lists. You've
[13] suggested that it might depend on what the rule
[14] looks like.

[15] I think the one thing we know is that it's
[16] a complex issue. Whether it's a complex rule or
[17] not remains to be seen, but my question to you is
[18] whether you think the time is right for the
[19] commission to do that, or whether there is so much
[20] saturation of new regulations and uncertainty that
[21] the commission ought to defer dealing with that
[22] issue now.

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[1] **MR. ELIAS:** I feel less strongly about it
[2] because it affects fewer people and the people who
[3] it affects are sophisticated actors in the
[4] political process. That doesn't mean that — and
[5] I'll answer your question directly in a second, but
[6] part of the reason why I have mentioned this
[7] biennial, annual limit issue several times is
[8] because it affects virtually every donor and
[9] certainly every major donor, and that's a big pool
[10] of people.

[11] **COMMISSIONER MASON:** Who I take it you're
[12] concluding are not sophisticated?

[13] **MR. ELIAS:** You'll notice that neither I
[14] nor any of my clients petitioned the commission for
[15] the rulemaking on mailing lists. So we certainly
[16] weren't hungering for it at this particular moment
[17] in time.

[18] You know, I don't perceive that there is
[19] an enormous vacuum out there. I mean I have
[20] actually learned some things today about potential
[21] practices in the future, but by and large my
[22] clients have operated, I think, in a fairly vanilla

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[1] fashion. That's not suggest that anything I have
[2] heard is not vanilla, but it's been fairly
[3] straightforward. They've gone to a list broker,
[4] they rent their lists through their list broker.
[5] They occasionally rent lists or exchange lists
[6] outside of a list broker, and if they do it, they
[7] generally peg it to, you know, considerations which
[8] are fairly objective and which are hard fought.

[9] I mean, you know, Senate candidates in the
[10] DNCC, they tussle over how many names and what the
[11] conditions are. So I don't think it poses the same
[12] logistical problems that the other rule does. And
[13] I'll leave it at that.

[14] **MR. SANDLER:** I do want to echo Marc's
[15] comments that we, too, in the Democratic National
[16] Committee, found it puzzling as to why the
[17] commission was undertaking this at this particular
[18] time. It may be that there are open enforcement
[19] matters obviously that we are not aware of, or this
[20] Bauer one, I guess perhaps insufficient attention
[21] has been paid in terms of the commission's
[22] concerns. But in our experience, this is not an

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[1] area in which any abuse has surfaced or there's any
[2] pattern or frequency of any kind of people using
[3] these transactions as a means to make disguised
[4] contributions, you know, in-kind contributions one
[5] way or the other.

[6] So, again, obviously you have more
[7] complete information about what's out there, but we
[8] were puzzled, like our colleagues in the Senate and
[9] House committees.

[10] **MR. NORTON:** That's very helpful. Thank
[11] you.

[12] Thank you, Madam Chair.

[13] **CHAIRPERSON WEINTRAUB:** Mr. Staff
[14] Director.

[15] **MR. PEHRKON:** Thank you, Madam Chair.

[16] Mr. Spies, Mr. McGahn, Mr. Elias, Mr.
[17] Sandler, thank you for coming.

[18] One of the areas I'd sort of like to poke
[19] around in is recordkeeping, and Mr. Sandler, you
[20] very explicitly laid out, if I understood you
[21] properly, that in the case where a list broker is
[22] used, it would be burdensome to maintain these

[1] records because they are maintained electronically
[2] by the broker.

[3] Does your organization maintain an
[4] electronic copy? Or are all the records kept by
[5] the broker?

[6] **MR. SANDLER:** For transactions that are
[7] handled by the broker — well, obviously when you
[8] say — rental income is — of course has to be
[9] reported to the commission and to the IRS. I mean
[10] it's not a contribution, it's other receipts and so
[11] forth. But of course a record is — you know, a
[12] record is kept of that.

[13] In terms of the status of lists, you know,
[14] exchanges, who owes who what, I think that
[15] information is generally maintained by the list
[16] broker.

[17] **MR. PEHRKON:** I was thinking more of the
[18] rental agreement itself, with the list broker.

[19] **MR. SANDLER:** There are not individual
[20] agreements entered into, as I understand it. The
[21] terms are just kind of e-mailed back and forth.
[22] It's understood what the —

[1] **MR. PEHRKON:** So there's sort of a
[2] standard in the — there are e-mails which clarify
[3] or explicitly sort of identify —

[4] **MR. SANDLER:** Right. And I'm sure copies
[5] of those are maintained by the — when you're
[6] talking about rental of lists, you know, of
[7] fundraising lists or direct mail lists.

[8] **MR. PEHRKON:** Because, I mean, why I'm
[9] going down this one was you should not be required
[10] to maintain a copy of either sale or rental
[11] agreements in that particular case, and what I'm
[12] trying to find out is are there such other things
[13] as sale or rental agreements and are they — and if
[14] I understand you, you're saying they're sort of
[15] standard terms industrywide.

[16] **MR. SANDLER:** That's right.

[17] **MR. PEHRKON:** And then each one is
[18] specifically modified off of that. Am I accurately
[19] understanding?

[20] **MR. SANDLER:** Yes, that's — yeah, that's
[21] my understanding.

[22] **MR. PEHRKON:** Okay. Whereas if you don't

[1] use a list broker, you have explicit rental or sale
[2] agreements?

[3] **MR. SANDLER:** Yes. The DNC does. If the
[4] DNC rents or exchanges a list directly with another
[5] organization, there will be a written agreement.

[6] **MR. PEHRKON:** Is this the practice?

[7] **MR. McGAHN:** Basically, yes. If it's a
[8] nonlist broker exchange, we have a standard form
[9] contract that we develop terms and conditions
[10] that's signed and kept, and generally with the
[11] broker, the broker maintains the details. There
[12] may be an umbrella contract with the broker, but I
[13] don't really see many of — it sounds very similar
[14] to what Joe is describing.

[15] **MR. PEHRKON:** So if in terms of an audit
[16] or enforcement action, the terms of the contract
[17] would be maintained by the list broker? If we
[18] wanted to take a look at the rental agreement,
[19] would that be available through the broker to us?

[20] **MR. SANDLER:** If it was handled through a
[21] list broker?

[22] **MR. PEHRKON:** Yes.

[1] **MR. SANDLER:** Yes.

[2] **MR. PEHRKON:** Okay. Mr. Spies, does that
[3] your correspondent with your —

[4] **MR. SPIES:** Right.

[5] **MR. PEHRKON:** Okay. That's all for now.
[6] Thank you.

[7] **CHAIRPERSON WEINTRAUB:** Okay. We have
[8] time for another quick round if people have more
[9] questions.

[10] Commissioner McDonald, do you have
[11] anything else you want to add?

[12] **COMMISSIONER McDONALD:** Well, just a point
[13] of clarification with Marc. So you would be
[14] representing vanilla, and I gather Don and Charlie
[15] would be French vanilla, is that —

[16] [Laughter.]

[17] **MR. SPIES:** Freedom vanilla.

[18] **MR. ELIAS:** You asked the question earlier
[19] why they control the House and the Senate.

[20] [Laughter.]

[21] **COMMISSIONER McDONALD:** That wasn't me, by
[22] the way. I want to be clear about that.

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[1] [Laughter.]

[2] COMMISSIONER McDONALD: Guys, I'm not
[3] going to get into this California matter, I can
[4] assure you.

[5] The one thing that did strike me going
[6] back to a response to the Chair about the travel
[7] business, and I must say again I tend to take the
[8] position that alternative A is fine, but I hope
[9] that we are not suggesting that you can't measure
[10] and have a pretty good idea of what it costs to
[11] travel.

[12] Now I would confess to you that the
[13] airlines haven't had the best of luck, and maybe
[14] that makes your point more compelling, but even
[15] before the horrible tragedy of 9/11 airlines, I
[16] will confess, routinely were going out of business.
[17] But I would think that there is some measure that
[18] you could use. I'd hate to think that people who
[19] owned airplanes and companies didn't have a pretty
[20] good idea what it was going to cost them,
[21] depreciation and all aside. I just have to think
[22] that they have some measure. I don't think they

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[1] might be able to function and stay in business.

[2] But I appreciate all the comments that
[3] have been made, and it has been helpful to us. I
[4] think Commissioner Mason is right, we have had to
[5] grapple with some of these matters, and we are not
[6] trying to put them out there willy-nilly. These
[7] are actual things that we have faced, and just in
[8] closing say that I think our problem is always the
[9] same and I don't think your problem is ours, so we
[10] appreciate that. But the problem is we either put
[11] out too many explicit things and are not quote
[12] flexible enough, and then when we are flexible
[13] enough, and if we proceed, the comment normally
[14] is — which is understandable — that, well, you
[15] didn't tell us that.

[16] So it is kind of a Catch-22, and the only
[17] thing I think that we're trying to do is try to
[18] have some ability to serve notice so that the
[19] latter criticism — because I do think for a
[20] regulatory agency, notice is clearly the
[21] cornerstone.

[22] I thank all of you very much for coming.

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[1] **CHAIRPERSON WEINTRAUB:** Thank you,
[2] Commissioner.

[3] Mr. Vice Chairman?

[4] **VICE CHAIRMAN SMITH:** I don't have any
[5] questions.

[6] **CHAIRPERSON WEINTRAUB:** Commissioner
[7] Thomas?

[8] **COMMISSIONER THOMAS:** Just quickly. I had
[9] wanted to get a question probably for Joe, maybe
[10] for Marc, who might represent some state party
[11] committees. Others are welcome to comment as well.

[12] But I wanted to get at this question of if
[13] a state party committee that can use both soft and
[14] hard money to develop a very valuable list then
[15] starts trying to make it available and generate
[16] some revenue using the list, in that context, would
[17] you say it is appropriate for the commission to
[18] require that the proceeds somehow be allocated so
[19] that the proceeds are split and part goes into the
[20] soft money account and part goes into the hard
[21] money account? Is that a legitimate approach for
[22] the commission to take in that context?

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[1] **MR. SANDLER:** We were trying to figure out
[2] how — there are situations in which that is
[3] handled now, but offset income is sometimes split,
[4] you know, back into the two accounts. Again, this
[5] is only in the case of state parties where it was
[6] allocated.

[7] I don't know what the current practice is
[8] with respect to, you know, the list rental income.

[9] **MR. ELIAS:** I don't know how it would
[10] change. Actually as you were asking the question I
[11] was thinking how does this work if some of what the
[12] list is for is — some is all hard and some is
[13] hard, soft, and some is all soft. I'm not even
[14] sure I know how a state party tracks that. So the
[15] answer is I was hoping Joe would know.

[16] [Laughter.]

[17] **CHAIRPERSON WEINTRAUB:** We were, too.
[18] Commissioner Mason.

[19] **COMMISSIONER MASON:** Just on that point,
[20] it strikes me to the Libertarian Party AO, our
[21] answer had been we just put it all in the
[22] nonfederal account, and that sort of took care of

1] the problem. And so, you know, in essence,
2] following the pre-BCRA advice, perhaps the state
3] parties are still putting it all in their
4] nonfederal account and it's not an issue.

5] Two questions, and perhaps you can handle
6] them fairly quickly, and really to all four
7] panelists.

8] We had in the Libertarian Party advisory
9] opinion and previous advisory opinions language
10] saying that in order for a committee to rent a list
11] and have the income not count as a contribution,
12] the list had to have been developed in the normal
13] course of their operations primarily for their own
14] use. And this is typical, I know, but would you be
15] willing to have that sort of requirement included
16] in any regulation?

17] **MR. SANDLER:** Yes, I think we would. That
18] doesn't mean — there may be situations in which i
19] a list is developed, and there's all kinds of
20] things happening in this field, and it doesn't get
21] used, or used a lot by a committee. But if it's
22] the idea that it was developed by the committee for

(1] go ahead and include that?

(2] I'm intrigued by the safe harbor idea, and
(3] I understand your reservations about not wanting to
(4] flip that into, you know, a suspicion if you don't
(5] use a list broker, but do you think it would be
(6] reasonable for the commission to require some sort
(7] of contemporaneous record about how a committee
(8] arrived at a fair market value, not necessarily
(9] that you used an outside appraiser, but at least
(10] some indication, okay, this is how we arrived at
(11] this price and require them to keep that as a
(12] record in cases where they didn't use a broker or
(13] they didn't use something like the SRDS guide?

(14] **MR. SANDLER:** To keep a record of
(15] how — yes. Without the need for an independent
(16] appraisal in each case, to require that, you know,
(17] if it's not through a broker, there's some kind of
(18] written documentation and somebody can explain, if
(19] called upon, what the basis for it is, and then
(20] that's documented somewhere, certainly that's
(21] reasonable.

(22] **MR. McGAHN:** I would be opposed to a per

1] he purpose of being used by that committee, either
2] for voter contact or fundraising or one of the
3] other committee's functions, certainly that would
4] be a reasonable requirement. But rather than for
5] fundraising purpose, there is an asset to be rented
6] or exchanged.

7] **COMMISSIONER MASON:** Any others? If you
8] don't like the idea there on the Republican side,
9] how is your chance to say, because we've got two
10] votes for it, one of which was from Mr. Hoersting.

11] **MR. SPIES:** Well, that seems like a
12] reasonable standard, but my question would be why
13] you need a standard.

14] **COMMISSIONER MASON:** Well, the answer to
15] that is that's what we've been saying in advisory
16] opinions consistently over time, and so if we are
17] going to have a regulation —

18] **R. McGAHN:** But if it's already in the
19] why do you need a reg?

20] **COMMISSIONER MASON:** If that were it, my
21] answer would be there is no reason. But if there
22] are other reasons to have a regulation, should we

(1] se requirement if what you mean by that is if you
(2] don't fulfill the obligations of that requirement,
(3] it's a separate violation and in the enforcement
(4] process you don't have much of a defense. I think
(5] it certainly, though, would be a relevant factor in
(6] your deliberations. I mean it's certainly a
(7] relevant consideration, but to make it a part of
(8] the requirement that if you do not satisfy it, then
(9] you are in a whole other rubric of legal problems.
(10] I would be opposed to that.

(11] **MR. SPIES:** I agree with Don. I mean I
(12] would advise anybody it would be wise to keep those
(13] records, and it's going to help them in an
(14] enforcement proceeding, but I would be concerned if
(15] that became a new regulatory mandate.

(16] **CHAIRPERSON WEINTRAUB:** I hope we are not
(17] beating a dead horse, at least not too much, but we
(18] are obviously struggling with some of these issues.

(19] Charlie, you said on page 2 of your
(20] comments on the mailing list that it's clear that
(21] it's possible for party committees of the same
(22] political party to determine what the fair market

[1] value is for a list. So how do you do it? If it's
[2] clear that you can do it, how do you do it?
[3] **MR. SPIES:** The same way anyone else
[4] would.

[5] **CHAIRPERSON WEINTRAUB:** Which is?

[6] **MR. SPIES:** Well, you're going back to
[7] your old question about what factors —

[8] **CHAIRPERSON WEINTRAUB:** Exactly.

[9] **MR. SPIES:** — anybody should be using to
[10] determine fair market value, and I think you look
[11] at what the value is in — I mean that's
[12] repetitive, but you look at what the value is in
[13] the marketplace.

[14] **CHAIRPERSON WEINTRAUB:** Fair market value
[15] is fair market value?

[16] **MR. SPIES:** Well, yes. I mean certainly
[17] you look to list brokers. That's a great factor.
[18] But I also think there's — I wouldn't want to be
[19] locked into that, because there's lots of other
[20] factors, and the different candidates are using
[21] them, what their perceived value is going to be,
[22] the number of times they are using them, what

[1] **MR. ELIAS:** What would be the point? If
[2] they got the exclusive — if the person signing got
[3] the exclusive list, use of the list, why would you
[4] in the organization want them to sign your piece?
[5] I mean that strikes me as counterintuitive.

[6] **MR. McGAHN:** I might be missing something,
[7] but I don't think I've seen that.

[8] **CHAIRPERSON WEINTRAUB:** You haven't it?

[9] **MR. McGAHN:** I don't think so.

[10] **CHAIRPERSON WEINTRAUB:** Okay. Well, with
[11] that, Commissioner Toner?

[12] **COMMISSIONER TONER:** Thank you, Madam
[13] Chair.

[14] Focusing on the travel regulations, which
[15] I guess I understand it may be the only thing we're
[16] doing today that you don't violently object to.
[17] Maybe we're one out of four and batting .250 here.

[18] Starting with the proposal in the
[19] regulation about a seven-day window after the
[20] travel, does everyone on the panel support that in
[21] principle? Mr. Sandler and Mr. Elias, do you —

[22] **MR. SANDLER:** We on behalf of the

[1] universe they are mailing it to, how — what the
[2] restrictions are on their use of the names. These
[3] are all relevant factors.

[4] **CHAIRPERSON WEINTRAUB:** Okay. We talked
[5] before a little bit about the list for names, in a
[6] situation where somebody signs a fundraiser for a
[7] political committee and gets some kind of use of
[8] the names in exchange, and what I have heard you
[9] say so far is that that's not all that common. And
[10] when it is and when it does happen, it's usually
[11] the subject of hard bargaining.

[12] Are you aware of any situations, any of
[13] you, where someone in exchange for signing a
[14] fundraising letter for either a party committee or
[15] a PAC or any political committee, got unrestricted
[16] use of the list that was generated?

[17] [No response.]

[18] **CHAIRPERSON WEINTRAUB:** No? Nobody has
[19] encountered that situation.

[20] Ever encounter a situation where somebody
[21] got exclusive use of the list? Are you scoffing,
[22] Mr. Elias?

[1] Democratic National Committee have not taken any
[2] position on the proposal.

[3] **COMMISSIONER TONER:** Okay. Mr. Elias?

[4] **MR. ELIAS:** If you wanted to go to 30, I
[5] wouldn't object.

[6] **MR. McGAHN:** Ten is a nice number.

[7] **COMMISSIONER TONER:** Do you think it's
[8] appropriate for the commission to have a bright
[9] line after-the-fact payment period?

[10] **MR. SPIES:** Yes.

[11] **COMMISSIONER TONER:** Mr. Spies.

[12] **MR. SPIES:** I think this is an extremely
[13] helpful change.

[14] **COMMISSIONER TONER:** Why do you think it's
[15] helpful? Why do you think it's necessary, why do
[16] you think it's appropriate?

[17] **MR. SPIES:** I had to sort of laugh at one
[18] of the — not laugh, but one of the commenters
[19] earlier I don't think had been involved in a
[20] campaign situation or with, you know, the repayment
[21] situation, where you literally do have people
[22] running to the planes trying to get the check paid

ahead of time because the manifest isn't necessarily settled until right before they leave. And it is very common to have extra staffers go on the plane or have one less person or have changes up until the last minute, or even if it's a complicated itinerary of people getting off the plane, missing the plane, not getting on. That's very common, and the prepayment is very difficult to do. And to switch it so that you could pay basically for all practical purposes immediately after the fact, seven, 10 days, I consider that to be immediately after the fact, but that would be a tremendous administrative help, and I don't see what the problem with it would be.

The best the gentleman on the last panel came up with was that you wouldn't be able to determine the price after the fact, yet he had never tried to make a determination in the first place, and I don't see any reason — I think in five minutes of a phone call you could determine what the price would have been.

COMMISSIONER TONER: Mr. McGahn, do you

[1] think it helps. There are corporations who have
[2] planes who used to avail them to elected officials,
[3] but no longer do so because the rules got too
[4] complicated. Even though the rules really haven't
[5] changed, in their mind this payment-up-front stuff
[6] and how many people are coming and it's difficult,
[7] they don't want to deal with it. The more you
[8] simplify, in a weird way, the more entities may let
[9] people use planes and therefore the more entities
[10] the less, there's only a handful of entities using
[11] certain planes. So there isn't this perception
[12] that there's only a couple planes being used.

[13] So getting rid of the payment-in-front
[14] rule and going with a reimbursement system makes
[15] sense in a whole lot of ways.

[16] **COMMISSIONER TONER:** At least we know the
[17] Arthur Andersen plane is not being used anymore.

[18] Mr. Elias, in your comments you advocate
[19] that we should apply these rules beyond just
[20] candidates to political parties, I believe you
[21] mention in your papers, and perhaps political
[22] committees in general. Could you discuss your

concur in that judgment?

MR. MCGAHN: Yes. Yes, I think it would simplify things. Culturally we — everyone has the mindset you need to pay up front, for the most part. There are some people who don't understand that, though, because in other uses of corporate and commercial planes, you can pay, reimburse, that sort of thing. The air travel is different, and it does throw some people for a loop. It tends to throw the people who are doing it for the first time a loop more than the people who are sophisticated political players.

That being said, though, you do need somewhat of a bright line on the tail end. You don't want to change the culture to the point where you think people can just slow-dance their reimbursement. So the seven days or 10 days or whatever the day is, I think does need to be in place for that reason. Otherwise you could have an open-ended system, which sort of defeats the purpose of making sure people pay for their travel. Every time you can simplify these rules, I

[1] views on that?

[2] **MR. ELIAS:** Sure. And I'm not sure if it
[3] was an oversight or not an oversight in the
[4] drafting, but as a practical matter, I don't think
[5] I'm telling any tales out of school.

[6] **CHAIRPERSON WEINTRAUB:** We'll never tell.

[7] **MR. ELIAS:** Yeah. I think it's fair to
[8] say that the national party committees currently
[9] operate under the existing rule, and I don't see
[10] any reason why if Speaker Hastert flies for his
[11] principal campaign committee one set of rules would
[12] apply, and if he flies for the NRCC a different set
[13] of rules would apply. I mean it just — it seems
[14] to me that either the use of corporate airplane
[15] under certain terms and conditions is or is not a
[16] contribution, regardless of whether it's for a
[17] candidate committee or for a national party
[18] committee.

[19] **COMMISSIONER TONER:** Would you be
[20] supportive of a rule that would also apply the same
[21] rule if Speaker Hastert were flying for a state
[22] party or for a political action committee?

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[1] **MR. ELIAS:** Yes.
[2] **COMMISSIONER TONER:** In other words, all
[3] political committee travel at the Federal level?
[4] **MR. ELIAS:** Correct.
[5] **COMMISSIONER TONER:** One rule across the
[6] board.
[7] Do any of the other commenters have views
[8] on this, on this position? Should we seek to apply
[9] it across the board?
[10] **MR. SPIES:** Yes.
[11] **MR. McGAHN:** Yes.
[12] **COMMISSIONER TONER:** Thank you, Madam
[13] Chair.
[14] **CHAIRPERSON WEINTRAUB:** I'm glad you asked
[15] that, Commissioner Toner. I meant to ask the same
[16] question.
[17] Let me just do one quick follow-up. Mr.
[18] McGahn, is there any particular reason other than
[19] more is better for 10 days over seven days.
[20] **MR. ELIAS:** I think in fairness to Mr.
[21] McGah, he was negotiating. That's my 30 days.
[22] **CHAIRPERSON WEINTRAUB:** Okay.

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[1] [Laughter.]
[2] **MR. McGAHN:** No, I think 10 just stands
[3] out. It pops up in the law more in other areas.
[4] Seven is kind of — 10 days gives you a little bit
[5] more time with long weekends, which we see a lot of
[6] here in Washington.
[7] **CHAIRPERSON WEINTRAUB:** That's right. We
[8] wouldn't want to do it on anybody's long weekend.
[9] **MR. McGAHN:** Right.
[10] **CHAIRPERSON WEINTRAUB:** I just have
[11] visions of people, you know, this issue of people
[12] having to write the checks at the last minute. I
[13] know I use my computer to write my checks, I use
[14] Quicken, you know, and I have visions of people
[15] dragging their computers to write their check at
[16] the last minute.
[17] But I digress. Mr. General Counsel, do
[18] you have any follow-up questions?
[19] **MR. NORTON:** I don't. Thank you, Madam
[20] Chair.
[21] **CHAIRPERSON WEINTRAUB:** Mr. Staff
[22] Director?

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[1] **MR. PEHRKON:** No, Madam Chair.
[2] **CHAIRPERSON WEINTRAUB:** In that case let
[3] me once again thank all of you for showing up today
[4] and submitting yourself to all this. And, really,
[5] your comments have been very helpful. Don't assume
[6] that we have made any determinations as to what
[7] we're going to do. We really will take it very
[8] seriously, everything that you said.
[9] This meeting is adjourned.
[10] [Whereupon, at 1:12 p.m., the public
[11] hearing concluded.]

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