FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON REPORTING CONTRIBUTIONS

BUNDLED BY LOBBYISTS, REGISTRANTS

AND THE PACs OF LOBBYISTS AND REGISTRANTS

Wednesday, September 17, 2008

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

DONALD F. McGAHN II, Chairman
STEVEN T. WALther, Vice Chairman
CYNTHIA L. BAUERLY, Commissioner
MATTHEW S. PETERSEN, Commissioner
ELLEN L. WEINTRAUB, Commissioner
CAROLINE C. HUNTER, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel
JOHN GIBSON, Chief Compliance Officer
ROSEMARY C. SMITH, Associate General Counsel
AMY L. ROTHSTEIN, Assistant General Counsel

WITNESSES:

TIMOTHY JENKINS, Coalition for Tax Equity
JOSEPH Sandler, ESQ.
DON SIMON, Counsel to Democracy 21
MARC ELIAS, ESQ.
CRAIG HOLMAN, Public Citizen
PAUL RYAN, Campaign Legal Center
CHAIRMAN McGAHN: The special session of the Federal Election Commission for Wednesday, September 17, 2008, will please come to order. I'd like to welcome everyone to the Commission's hearing on the proposed rule regarding the disclosure of information about contributions bundled by lobbyists, registrants and their PACs. Today we'll discuss the notice of proposed rulemaking on lobbyists and registrant bundling, which was published in the Federal Register on November 6, 2007.

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

I'd like to thank all the people who took the time and effort to comment on the proposed rules and in particular, those who appear as witnesses at this hearing, to give us the benefit of their practical experience and
expertise on issues raised by the proposed rules.

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

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

For each panel, we like to have at least one round of questions and a second, if time permits, from the Commissioner's general counsel and the staff director. The format I would -- I prefer is more of a free forum. I don't, particularly in this case where I think the comments have very well -- very much framed up the issues, when we get an issue drilled down, so I'll recognize commissioners
as we go. I don't like to do the divided up by commissioner, because once we get on a topic, it's awkward sometimes for witnesses to go back when another commissioner wants to revisit the topic a half hour later.

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

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

Commissioner Weintraub.

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

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

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

But the bill's advocates in Congress made certain compromises in order to get this provision passed, and without those compromises the bundling disclosure provision probably wouldn't have passed. And without that statutory mandate, we probably wouldn't be here today, because I've been working on this for five years and I've never managed to launch a rulemaking yet until we had that statutory mandate behind us.
So I think it's important to note that we're here to implement the statute and I anticipate a lot of discussion at this hearing about the meaning of the precise words adopted in that statute. The result may not be perfect in my eyes or perhaps anybody else's, although maybe for different reasons, but it will advance the goal of transparency. And I'm optimistic that the result will be one that all of us here and the law's advocates in Congress will all be able to be proud of.

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

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

I am here on behalf of the Coalition for Tax Equity, which is an association that we formed in early 1990. It's comprised of corporations and trade associations active in the federal public policy arena. Over the years the coalition has been very involved in the high profile and
controversial debates in the areas of the gift rules in the mid-nineties and the various Lobbying Disclosure Act provisions that started in the mid-nineties and were amended in 1998. Most recently we were actively involved with member offices and the leadership with the HLOGA on the gift and LDA provisions.

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

While there are several areas that you all sought comment on, I want to focus on two provisions today in the limited five-minute time. The first is how you define the
scope of designations or other means of recognizing or "giving credit" for purposes of establishing who is a bundler, and that's really first and foremost irrespective of this issue of the threshold. But -- so you sort of have the two tiers and that's the first one. And then the second is how are you going to allocate credit for bundling when you have the very, very common situation of multiple fundraisers involved in a single event?

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

As noted in the written testimony, the first item is pretty straight forward and it's already a well-established concept in the whole conduit and intermediary
area. I think you could embody that or fold that into the bundling regulations by basically not including the last exception to that definition, which is essentially when you become a designated agent of a candidate committee.

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

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

The second item is far more complicated and I think potentially the scope of extensive confusion and legal entanglement, and at this level, which is how else do you assign credit? I urge the Commission not to just give instructive examples, which is noted by one of my colleagues
here today, but instead to be as prescriptive as possible, to cite to as many examples as you can in the regulations to essentially eliminate ambiguity. And I frankly think it should have established kind of a de facto safe harbor if you're outside the confines of those definitions.

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

You're a recordkeeping entity. It's about accuracy. In my written testimony, I cite to examples where the record could be incredibly misleading, where you have 20 people raising $5,000 versus this three at 20. So I urge the Commission to, in the absence of designations or other objective criteria, you have multiple fundraisers. I urge the Commission to basically split that up evenly and do the
math and if you don't trip the 15,000, you're not a bundler. That 15,000 was there for a reason.

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

CHAIRMAN McGAHN: Thank you. Mr. Sandler.

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

I just want to quickly address three points raised by the NPRM. I'll be happy to answer any questions after that. First with respect to reporting frequency, it appears that there's a consensus among the commenters that -- and the sponsors too, for that matter -- that monthly filers should be required to file quarterly. And the reason is,
otherwise you're going to miss a lot of disclosure because for monthly filers, if they were required to file monthly, and that was the covered period, a number of bundlers would not meet the applicable threshold.

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

But we agree with the point made by Mr. Simon and some of the other commenters that the threshold should be applied on a semi-annual basis so that -- and to take an example from Don, that if somebody raised $20,000 in the first quarter, $5,000 in the second quarter, they should be required to disclose the $5,000 in the second quarterly report. They should only be required to file a quarterly report, but they should be required to disclose the $5,000. We think the Commission has the authority to do that by defining the covered period for purposes of the threshold as a semi-annual period.
And then the third point with respect to -- listed employees of registered entities, this is a tricky issue and absolutely have thought about this some more since we submitted our comments more than a year ago. On the one hand, we have the situation, which we didn't really address and contemplate in our comments, where the CEO of a company, a company that has retained an in-house lobbyist and where hires an outside lobbying firm, raises contributions for a candidate or party committee and is credited with that, but in the typical case, the CEO themselves is not going to be an individual -- the listed registered lobbyist because they won't have triggered the 20 percent threshold under the Lobbying Disclosure Act.

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

On the other hand, we are talking about a
reporting system here. There has to be some objective
criteria. There -- of course, every individual who has
bundled contributions, when they reported, they have to list
their occupation and employer. The mere fact, and the
sponsors make this clear, that somebody's employer is a firm
that retains lobbyists doesn't mean that they should be --
they should be reported.

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

Those are the main points we wanted to make and be
happy to answer any questions after Mr. Simon's remarks.
CHAIRMAN McGAHN: Thank you. Mr. Simon?

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

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

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

In this vein, one of the most important and long overdue reforms is disclosure of bundling by lobbyists.
Bundling, as we all know, is an established practice in Washington and is surely one of the most significant ways in which lobbyists provide help to congressional and presidential candidates.

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

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

Now there is simply no doubt as to what your guidepost could be in writing the implementing regulations. In an unusual statutory provision, Congress took care to tell you not just to write regulations, but how to do it.
Section 434(i)(5)(D) instructs that the Commission "shall provide for the broadest possible disclosure of lobbyist bundling that's consistent with the law."

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

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

Senators Feingold and Obama were the principal Senate sponsors of the separate bundling legislation that was included in HLOGA and Representative Van Holland was the
lead author of the bundling language in the House bill. The
floor statements by these three lead sponsors provide clear
and explicit guidance on a number of the questions before
you.

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

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

So too the statutory touchstone for when
fundraising constitutes bundling is whether a candidate
gives credit to the lobbyist for raising a certain amount of
money received by the candidate. Credit is credit and it
doesn't have to be formalized to be real.

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

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

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

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

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

MR. SIMON: To me, and I think again, this is clear in the discussion of this provision by the sponsors, crediting is knowledge. If the member knows that a lobbyist
has raised $100,000 for him, he's gotten that money, then it's not required, as I think is clear in the floor statements I just read.

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

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

MR. SIMON: Yeah, I do.

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

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

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

MR. JENKINS: I actually -- I actually agree that where there's a record or designation, and that includes a
list that the candidate committee representative might maintain, that that probably meets the statute. And I think if you're a host or a co-host on an event, if you host a fundraiser in your entities, if you're a corporation or an association, at your venue, or in your home if you're a registered lobbyist, in your personal residence, to me that -- that should be credit.

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

That $15,000 threshold means something and in case I don't get a chance to deal with the legislative history, it's very important that the legislative history I would sort of characterize as a legislative history wish list. Those members' approaches were directly rejected in the final package. The bill that came out of the Senate that was the Obama -- that Obama authored had the lobbyists
disclosing on their quarterly reports and it had the word "aggregate" included in the statute.

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

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

MR. SIMON: Could I respond to that? I mean, it's -- one always wants to denigrate the legislative history that doesn't accord with your position, but this is legislative history as much as any other floor statements by
the lead sponsors and authors of a provision prior to enactment of the final bill.

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

But people raised the very good point that the lobbyist wouldn't necessarily know if the money was received by the candidate and he certainly wouldn't know whether the candidate was giving the lobbyist credit for having raised the money. And I think that was the principal reason that in the final law the reporting obligation was shifted from the lobbyist to the candidate, because the candidate does know exactly those two things, whether he's received the money, and the candidate knows whether he is crediting those funds to the lobbyist. So that was the reason for the shift.
But again, if you go back and read the floor statements made by the principal sponsors on the final bill before enactment, they talk about these issues and they reaffirm that on these sorts of questions we're discussing in terms of fundraising events and co-hosting and so forth, the final bill as adopted was to reflect the intent that they stated.

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

MR. SIMON: No, that's a fair question. I think your job here is to set a standard and I think you have the
right to expect the members to comply with that standard. There are lots of provisions of the campaign finance laws where there's always the possibility for secret exchanges where it would be hard for the Commission to know exactly what was going on and hard in that sense to enforce the law.

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

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

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

MR. SIMON: Right.

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

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

CHAIRMAN McGAHN: So do we -- do you agree with
the thought that the statute does not mandate that we write
a reg that reaches out to non-written crediting, or does the
statute mandate that we -- that our reg does cover?

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

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

If you sign up to be on the steering committee and
in order to be a steering committee member you have to agree
to raise $10,000, I think that's sufficient in terms of a
record. But the old slap on the back because you walk by a
member of Congress and say hey, you'll be glad to know I'm
going to raise $20,000 for you, so what? I mean, I may or
may not do it.

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

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

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

MR. SIMON: Let me say two things. I think recognize -- recognition is knowledge. I think that's what the word means. The root of recognition is cognition, which is knowledge. But let me make another point. Joe said
before that in the years since he filed the written comments, he's thought about this more and actually, I had one additional point on this that I did not include in our written comments, but I think it's a useful analogy here in a very closely related area.

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

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

So the Commission took the concept of earmarking, the statutory term "earmarking," and I think appropriately expanded it to include implied or expressed, oral or written forms of earmarking. So if somebody gives a check to a political committee and says -- and just says, I want this
check to go to Candidate A, it's never written down, that's an earmarked contribution.

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

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

    MR. SIMON: I recognize the point between the difference between contribution limits and exposure, but I think this is important disclosure and I think if you say
that unwritten forms of crediting and recognition are outside the scope of the disclosure responsibility, you are really walking into the teeth of not only direct statements by the principle sponsors in both houses on this specific point, but you're also walking into the teeth of the statutory directive, because I do not think that you're then providing for the broadest possible disclosure. I think -- I think that just gets the Commission into trouble.

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

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

So I think that while Don certainly has the intent of the statute right, in reality, the committees that are --
and candidates that are responsible for this are going to -- are going to keep track of it, do in fact keep track of it, and that's just how it works in real life.

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

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

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

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

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

CHAIRMAN McGAHN: Actually just one final question on this point before -- I don't want to hog up the whole time. But let's just, if you can indulge me, assume the subsection that says needs to be the broadest possible
reporting -- assume Mr. Simon -- was not in the statute, so let's just focus on the records designations or other means of recognizing that a certain amount of money has been raised by the person language, that standing alone, can that be read more than one way, meaning, can that be read to mean written only versus written and oral communications?

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

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

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

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

    MR. SIMON: Yeah, I think --

    CHAIRMAN McGAHN: Means is a mental note?

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

    CHAIRMAN McGAHN: Okay.

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

    The Senator Obama provision that emerged from the Senate used the word "formal" or "informal" credit in lieu of the language that emerged, which is record designations or other means of recognizing. So I think irrespective of this expansive interpretation language, which is then of course, qualified by "consistent with the law or the statute," irrespective of that, I think there is -- there is some significance to the transition from what the authors originally wrote and where it ended up, and I think the fact
that informal credit is just not subject to enforcement, or
as you suggested, it's very difficult to enforce and would
require multiple subpoenas potentially, I think you have to
look at the evolution of the House and Senate bills and the
final product as Commissioner Weintraub said, recognized
that it was a compromise.

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

   CHAIRMAN McGAHN: Commissioner Weintraub.

   COMMISSIONER WEINTRAUB: Yeah, I'd like to follow-
up on the same line of questioning, because I think that you
started out with one of the key issues that is a source of
controversy amongst the witnesses. I was actually pretty
gratified when I read the comments because overall there was
a lot of agreement from the commenters that in general the
proposed rule pretty much does what it needs to do to
implement the statute. Even you, Mr. Simon, I think were
basically happy with it, although there's a couple of issues
where you disagree with some of your other -- from the other
I'd like to get back to the practicalities of this. Maybe I should start with just asking Joe, and maybe Tim also -- I was thinking that this was more of a Joe question, but you may also have some insight in this -- how does this work in practice? What do committees do in order to track bundling and why do they do it? Do they feel a need to do it? Does it help them raise more money to do it? And as you said, are people fighting over the credits so that there actually is a lot of interest in maintaining these kinds of accurate records?

MR. SANDLER: Yes, there's -- both for party committees and candidate committees there's a significant interest in -- on the part of the raisers to be credited for what they've raised, for their efforts with the committee, and also there's a significant incentive on the part of the candidate committee or the party committee to give credit. So as a practical matter -- and the system is not -- the system is not perfect and committees may have to adjust, make it more precise and come up with some objective -- more objective criteria internally to make this work in response
But basically, in most contribution systems that are maintained by candidates and party committees, there is a means of recognizing when somebody's -- somebody has raised a contribution other than or should be credited with having raised the contribution other than a staff member or a consultant to the committee.

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

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

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

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

MR. SIMON: If I just may add one point to that. I have no doubt, as I said before, that that's a fair description of common practice. I guess the concern I have is whether the imposition of a new disclosure requirement changes the status quo such that it might then drive at least some bundling to not be written down or that there might be some incentive to not write it down, specifically
in order to avoid the disclosure requirement if the
Commission's rule allows that, and that's why the
Commission's rule shouldn't allow it, and then I think you
probably preserve the fact that it's -- in the normal course
it would be written down.

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

It just doesn't seem likely to me that you could
maintain that kind of information in your head. There may
be a few random people who could do that, but I know I
couldn't. So what's the real concern? Are you concerned
that there will be individuals that just won't want to
disclose that particular individual, so they'll make sure
they don't have a record of that person? Or do you think
MR. SIMON: Let me make a couple points. One is, you're describing big league presidential level bundling programs, and that's fine, but bundling occurs in congressional races, it could be much smaller amounts of bundling in a given campaign, and they're not all necessarily as formalized as the extreme presidential bundling activities.

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

I just don't think the Commission should implement a rule that signals that's okay, and I think that's the
concern here.

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

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

    MR. SIMON: Or the lobbyist.

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

    MR. SIMON: Or the lobbyist might say, yeah, I told him about it, and then you have pretty good evidence that the member knew.
COMMISSIONER WEINTRAUB: You're right, that would be good evidence, but --

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

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

And they say, okay, how do you know that? Well, I ran into these guys on the street and they said I raised all this money for you. And you put those members under oath and they're going to be telling the truth, they don't
remember that conversation. I mean, let's assume these facts to be true. And then all of a sudden this guy, who's the outside bad actor, is going to essentially remember conversations that may or may not have happened, but no reasonable person on the other side is going to remember and they're going to use that lack of reporting to beat that public official over the head.

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

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

You know, I'm not quite sure what to say about your specific hypothetical. I mean, that just goes to the credibility of the person, the lobbyist under investigation,
and the credibility of the information they're giving as part of a plea bargain or whatever. But I think if there's -- if there's good evidence that the lobbyist told the member and the member therefore knew, the member then had a disclosure obligation.

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

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

That's -- you know, that is something that the
campaign is going to know about and I think using the knowledge standard does not necessarily sort of open up the loophole that Mr. Simon is suggesting it does.

CHAIRMAN McGAHN: Mr. Vice Chair.

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

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

But is that going to be enough? Is knowledge
enough if there's no writing?  I'd ask maybe Mr. Jenkins.

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

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

   Here it's a pretty tightly regulated regime and so
I think the wink and the nod days are sort of over in terms
of whether you can slide $50,000 into a candidate. And I'll
go back to the institutional imperative, which is, you're
only regulating lobbyists and entities that essentially
employ or retain them through their PACs.
Those are -- those are folks that are all about getting the credit versus the guy back at home who went to college with you, and this is -- a lot of Obama supporters are people like that. They don't have the direct interest in the Washington policy debate, at least not as direct an interest. So I just think that you've got an institutional incentive there or sort of a structure where this sort of stealth bundling is probably just a complete non sequitur.

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

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

So I didn't mean to imply that there is anything wrong about it. It's just people haven't necessarily finalized it to the same degree they do here because by the way we live, it isn't done. So in those particular cases, I'm interested to know if knowledge is enough, even though -
MR. JENKINS: Well, I'll try to answer the question, but I think first the threshold issue is whether the person you're talking about back in Nevada is a covered entity, if the person is a federal registered lobbyist.

COMMISSIONER WALTHER: Let's assume --

MR. JENKINS: They are.

COMMISSIONER WALTHER: There's lobbyists in Nevada too.

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

COMMISSIONER WALTHER: Let's talk about the federal.

MR. JENKINS: Yeah, okay. Let's assume that situation. I think in the case where there's a conversation and the lobbyist says to the member, I'm going to -- I have raised $10,000 for you, then I think in the enforcement context, if that member is under oath, that member says, well, I remember him saying that, that may impose a higher standard of burden on the member to actually go do the due
diligence to make sure it's something that would be disclosed.

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

COMMISSIONER WALTHER: Thanks.

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

There are many instances, I think, where the member doesn't actually know necessarily who raised what because they hire professional fundraisers to do that and professional fundraisers, frankly, track everything under the sun, not to give credit so much as to know who gave what and who met who where and oh, this person gave money at that event and therefore, maybe we can -- ask later.
They have all kinds of elaborate kind of schemes to -- and I don't use scheme in a bad way, but just spreadsheets and all kinds of things, records that aren't necessarily housed at the campaign and the campaign folks may not necessarily know about all of that. It's the routine sort of documents that fundraisers keep beyond like their own lists and their own system to keep track of their own work product versus what they may give to their campaign clients.

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

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

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

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

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

Is that something that ends up resulting in a crediting because the fundraiser has been writing something down a certain way in their own internal documents and then -- to take a hypothetical, let's say they have an event at a
lobbyist's house and they just call it, let's say lobbyist is Joe Smith, Joe Smith event, and there's all sorts of people who show up and the lobbyist doesn't even know really who's at his event in his house because it's really a fundraising event for the campaign.

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

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

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

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

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

CHAIRMAN McGAHN: Commissioner Petersen.

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

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

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

And let's further assume that the total amount that comes in as a result of this lobbyist's efforts exceeds the applicable threshold during the covered period. Now if these come in from -- and again, the candidate made a point
that they do not want to -- that they're not going to reward this sort of activity, they're not going to -- you know, there aren't going to be any special titles or designations. In fact, maybe according to this candidate, they're going to be disappointed that maybe their whole campaign is going to be based on this I don't want to feel beholden to any big -- any big interests.

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

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

And I would say the same thing here. I think it falls within the statutory definition. I think he knows, he
recognizes that the money was raised by the lobbyist and I think if he wants to avoid the obligation to report it, he should just return the check.

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

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

COMMISSIONER PETERSEN: Okay, just a couple of other quick questions. Just going to a couple different areas. Going back to covered period, Mr. Sandler, when I originally read your remarks regarding covered period, I had originally thought that maybe you were arguing that -- that you were taking a position that would have been quite a bit different than Mr. Simon's position, but it sounds like now
that while you do not believe that there needs to be an aggregate semi-annual report that a committee would have to submit, that you would still -- that the semi-annual period is still a relevant period for determining whether the applicable threshold is triggered?

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

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

MR. Sandler: I don't have any firm, detailed idea
about that, but I think that it would be appropriate to draw
them at the senior levels of a company in terms of its
officers and the people who are part of the government
relations operation of the company would be -- would be a
logical place to draw the line.

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

COMMISSIONER PETERSEN: Mr. Jenkins -- agency?

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

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

So in the CEO situation, there are a lot of CEOs
out there that are very politically active and just because
they are CEOs of a company that have people who are engaged
in lobbying, I don't think that necessarily is justified by
the four corners of the statute. So I agree that the agency
concept needs to be embodied in this, but I think it needs
to really be more in the context of are you truly doing it
as a volunteer or are you doing it within the context of
your employment?
And I think some of that issue, maybe you can look back at your -- at your Freddie -- Freddie Mac settlement. I think some of those issues came out there a little bit too. So I agree the agency has to be covered, but not necessarily as broadly.

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

MR. JENKINS: I think it -- the fact -- if somebody is acting in the shoes of another -- and I think the contribution in the name of another is a good corollary that was drawn in somebody's testimony -- but I think if you're acting on behalf of that registered lobbyist -- the short answer is, it's not in the statute. But if you're acting on behalf of the registered lobbyist, at the direction of a registered lobbyist, if you're the PAC supervisor or the PAC coordinator, not a registered lobbyist, but you essentially are the name and the face of the PAC, then I think that should be -- that should be disclosed.
CHAIRMAN McGAHN: Commissioner Weintraub?

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

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

COMMISSIONER WEINTRAUB: Thank you.

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

MR. JENKINS: I disagree and the reason I disagree is that under the Lobbying Disclosure Act, they intended to capture those folks in the gift rules -- so actually it may be in the Senate now, gift rules. Those gift rules say that it's prohibited for a member or staffer to accept a gift from a foreign agent, a registered lobbyist or any entity that employs or retains either and the interpretation there
is anybody who works for him. And we don't have that additional language in this statute.

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

MR. JENKINS: The registrant itself.

COMMISSIONER WEINTRAUB: Registrant.

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

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

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

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

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

COMMISSIONER WEINTRAUB: But that would make it
meaningless.

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

MR. JENKINS: That's correct.

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

MR. SIMON: If I could make one point in that context. Several of the comments deal with this point. I think it's important to surface it. There are prohibited sources, prohibited sources in that they can't make contributions and they can't facilitate contributions. But
there are -- those same prohibited sources can bundle.

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

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

    CHAIRMAN McGAHN: That would be the registrant?

    MR. SIMON: The registrant.

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

    MR. SIMON: Right, exactly. Exactly. So the registrant, a lobbying organization, which is a corporation,
can nonetheless be a bundler under the LDA.

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

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

CHAIRMAN McGAHN: Thanks. Commissioner Hunter.

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

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

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

MR. SANDLER: Well, the intent -- I think that the letter from Senator Obama, Senator Feingold, Congressman Van Holland does capture what the intent of the law is and basically what they're saying is that just because -- just
because somebody works for a lobbying entity doesn't mean he or she is acting on the entity's behalf.

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

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

COMMISSIONER HUNTER: I think though, as Mr. Jenkins I think suggested, it's conceivable, at least in my mind, that many CEOs are not acting on behalf of their
corporation. They may want to open their home and host an event and they may not even want to be credited for the contributions because they're doing it in their personal capacity.

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

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

I think if you can tie it back to this notion of is it truly volunteer versus if it's something you're doing because you're being directed to do it or it's within your
employment capacity, so back to the Freddie Mac situation, your fundraisers were regular order. And while there may have been a personal relationship, that -- to basically make the case that that was part of the employment context I think is -- was pretty easy to do in that situation.

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

COMMISSIONER HUNTER: Thank you.

CHAIRMAN McGAHN: Commissioner Bauerly.

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

We have a fundraiser that raises $150,000. There are 10 hosts, so each of them, if we -- there are two ways to attribute that credit, either 15,000 each, which would
require disclosure, or 150 each. If we take the second
approach, it seems to me that the end result would be the
public would -- might have an inaccurate view of how much
money the lobbyists were actually involved in if that
campaign raised $2 million total. If we used the $15,000
for each lobbyist approach, there would be $150,000
attributable to that set of bundlers, which would reflect
the actual amount that came in the door for the campaign.

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

    So is this something we should be concerned about?
If it something we should be concerned about in writing this
rule, how do we provide the information to the public in the
most usable way? Because I think that is the goal here is
disclosure to the public and providing them, in my view,
with accurate information about the role that lobbyists are playing in this campaign.

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

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

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

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

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

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

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

COMMISSIONER BAUERLY: Can I interrupt you, because my question isn't -- I understand what your view is on which one. But what does -- what is the public supposed to do with this information, because it appears to be out of -- it doesn't reflect real dollars. And one of the things that I might want to do as a citizen is understand on a percentage basis or how much in proportion a campaign is
receiving from lobbyists. That might be something I want to
do and this isn't going to give me that answer.

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

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

    MR. JENKINS: Thank you for asking the question.
If you follow that interpretation, that $15,000 threshold
has zero meaning. There's no point in having it in the
statute. Essentially what the statute should have said is,
no matter what, if you raise more than one and if you bundle two or more contributions, you've got to disclose it. So let's take your numbers and let's use some other easy numbers and let's say everybody on the 50 lobbyists, that each raised $2,500, that's a real example. There are tons of those, where people in their personal capacity, and it's sometimes personal money they're raising, that means that it's going to be disclosed as 50 times $100,000.

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

I just -- I've seen it. They take numbers that are apples, oranges and pears and they lump them all in together and put them in as an apple. That $15,000 was a product of compromise. It was in neither the House nor the Senate bill and the requirement that the candidates disclose it and not the lobbyist is very material as far as accuracy.
The LDA does not mandate accuracy. You round to the nearest $20,000. You do the best you can on specific issue areas. They took it out of there and they put it in your accounting regime, so you cannot go that direction unless you basically want to make that $15,000 a completely meaningless provision.

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

They included a statement in their summary of this bundling -- for section 204, the bill dealing with bundling. They say an event hosted by a registered lobbyist may trigger the disclosure requirement if the committee credits
the lobbyist with the proceeds of the fundraiser through record designation or other form of recognition.

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

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

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

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

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

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

Then the campaign's going to file a report under penalty of perjury that says they each get 30 -- they each
are credited with 30,000. That seems to be kind of an inconsistency there. How do we deal with that situation, a million dollar event or 11 lobbyists or any of these other situations that are very real situations, but something that actually does happen, somebody shows up with more checks than the other two guys and the other two guys are essentially going along for the ride and are not being credited by the campaign for be it $20,000, they're only being credited for five?

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

CHAIRMAN McGAHN: Thank you.

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

The co-hosts are sharing in the publicity of the event. Their names are associated with the event. I just think the clearest public record will be created by not
getting into a kind of subdivision of the amounts prorated among them by some methodology, but just attributing the full amount to all of them.

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

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

MR. SANDLER: The sponsors also made it clear that this actually -- this system is to be based on the money
that's actually brought in. I mean, I think in the situation you mentioned where people host an event and the - - to be on the host committee they had to say write or raise 15 and somebody falls short, you're not going to be credited for it.

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

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

MR. JENKINS: With all respect, that never happens. If it's a $30,000 event, the books don't reflect $60,000 worth of receipts. And I think your example, Mr.
Chairman, is a great one; very clear what the disclosure should be there. The person that raised $20,000, where there is a means of recognizing that, there's a tracking mechanism, that person gets disclosed as having bundled $20,000, and the other 10 doesn't show up until or unless those lobbyists do more fundraising within that reporting period and they trip the 15,000 as individual lobbyists.

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

That's -- you track the evolution of the statute, that signals unequivocal intent. And to do it -- to do it - - I mean, how you're going to say for the 3,000 times 30 equals 90, we're not going to disclose that, but we are going to disclose 10 times three equals 30 as 30. That's
just inconsistent. And you have to be accurate and from the public record standpoint, it will be incredibly misleading, notwithstanding memo entries and asterisks and all that. Nobody reads those.

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

MR. SIMON: Could I just briefly respond?

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

MR. SIMON: I think it would be a surprise to Senators Feingold and Obama that they lost on this legislation. I think there is a way for the Commission to design the form to make it clear how the money works, to make it clear in the case of fundraising events that there's
shared responsibility, and to make it clear that the amount attributed to a fundraising event should not be double or triple counted. I think that's really just a matter of draftsmanship and how the forms are created.

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

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

I just have a practical question about that. How
does the reporting committee know when the individual is acting as a volunteer or acting on his or her own behalf, or acting on behalf of the registrant, particularly in the example that you give in your comments, which has to do with an administrative assistant who is sort of pressed into taking action, taking fundraising action on behalf of the registrant?

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

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

MS. DUNCAN: Thank you.
CHAIRMAN McGAHN: Mr. Vice Chair.

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

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

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

MR. GIBSON: I don't.

CHAIRMAN McGAHN: Okay, thank you, Mr. Gibson.

Why don't we hold the record open for a week for supplemental comments in the event that people have things to follow-up on, whether it's a suggestion on how to report or to address actually that concern, because that was one on
my list, what if you have one lobbyist and a bunch of other
hosts, does that still mean the lobbyist is automatically
credited or can it be prorated? Because for me it's more
practical how we implement this statute.

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

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

(Recess)

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

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

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

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

MR. ELIAS: Well, I'm going to be brief and not
use my full five minutes hopefully and answer the questions that you all have. Let me first repeat at the outset that I'm here only as a private citizen, as I said to someone earlier, petitioning my government for redress of my grievances. And I'm not here on behalf of any client. I have a number of --

COMMISSIONER WEINTRAUB: We'll be here all day.

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

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

To add to this pressure, I have two former Senate staffers who were present during the consideration and
passage of this very piece of legislation and one commissioner who has made it a good chunk of her professional life trying to move towards bundling disclosure more generally. So I will be brief in my introduction, but it is truly a pleasure to be here today and particularly to be here today testifying on an issue that is really a blank canvas.

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

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

What I understood Congress to be doing, from my vantage point, was something very, very simple, which is
that at the end of the night, at the end of the night of a successful fundraiser, or the end of a quarter of a successful fundraising period, or an unsuccessful fundraising period, a member of Congress or a candidate would sit back with their finance director and they'd say, gee, this was a good quarter, this was a good event, how did we raise the money?

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

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

Well, let me step even further back, how we wound up with this legislation. We wound up with this legislation
because the Bush Campaign did something very clever, and I say that as the former general counsel to the Kerry/Edwards Campaign. It was clever and successful, which is it came up with a very, very sophisticated system of tracking who was raising money for it and then it gave them titles and it gave them codes.

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

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

No one ever questioned whether or not the Ranger or the Pioneer had a right to be reported or tracked a certain way, always from the standpoint of the Bush Campaign. Why? Because if the Bush Campaign believed you raised $250,000, that's what mattered, right? In the eyes of the public and the eyes of disclosure, what mattered was
what does the officeholder or the candidate believe the lobbyist has done for them?

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

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

And I think that rather than focus as much as people have on who is the co-host of an event, we ought to go back to that -- the principal of what was in the final bill, which is who gets credit for the money raised.
Thank you. I took in fact my full five minutes; I apologize. I'll be happy to answer any questions.

CHAIRMAN McGAHN: Mr. Holman.

MR. HOLMAN: Hello. Do I begin?

CHAIRMAN McGAHN: Yes, Mr. Holman. Sorry.

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

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

First of all, I want to emphasize how important this issue is. The public has never really had a very good clue as to what sort of role lobbyists have been playing in the fundraising game until now. With the new LD-203
reports, for instance, we find that there's about $200 million being brought in in the first half of this year just by lobbyists and registrants through various activities, which is far more than what most of us expected.

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

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

With the 2008 campaign, it's been a lot more like pulling teeth trying to identify who the bundlers are. While Obama has provided us with fairly systematic records, McCain has provided us with general records and only after we keep asking him, in your opinion, in your knowledge, do we -- have we properly identified who your bundlers are?
Just to show you how important this is, at this point, we've identified more than 3,000 bundlers involved in the presidential campaigns and they tend to often times, which is what we're looking for, is a mutual benefit that bundlers get with the presidential campaigns. We identified that of all Bush bundlers, 24 percent of them have received some form of governmental appointed -- appointment within the Bush Administration.

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

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

But it also appears that the McCain Campaign doesn't really assign this tracking number that the Bush
Campaign is known for. Instead, we would have to go and winnow through McCain's web page to try to identify what he labeled as chief fundraisers, major fundraisers for the campaign. And we would post those major fundraisers using the title concepts that the -- that this NPRM recognizes as perhaps an appropriate means of recognizing who the bundlers are.

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

So just to address that one issue, it is imperative that you go beyond any kind of traditional written records. You even go beyond the Bush Pioneer tracking program, because that will not always be accurate. There are in fact campaigns that are using a much more informal system of fundraising and it is the campaign that knows who their bundlers are and without necessarily a paper trail.
There are other issues that I hope we can address in the question and answers, but I see the time period's running out. And by the way, I'm very delighted with the draft of the NPRM. I mean, this is something that I found getting very close to hanging on to the spirits and the letter of the new law.

CHAIRMAN McGAHN: Mr. Ryan.

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

To this end, Congress included in the legislation itself a direction to this commission as to how it should proceed in crafting these regulations that we're here to discuss today. The Commission shall provide for "the broadest possible disclosure" of the bundling activities described in the statute.
This unusual statutory directive to the Commission is not simply legislative history. This is the law itself. This directive must guide the Commission in this rulemaking process.

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

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

For the reasons that are detailed in the written comments we submitted, the Campaign Legal Center supports the third proposal, which would require committees to report both semi-annual and quarterly information at the end of each semi-annual period. Further, we suggest in our written
comments that the Commission modify this third approach by also requiring a committee to report an aggregate amount bundled within a calendar year by any given bundler where a report on that bundler would otherwise be required by the statute.

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

The NPRM raises three important questions regarding the definition of bundled contributions. The first regards employees of lobbying organizations who are not registrants themselves. The Campaign Legal Center is of the view, and we state this in our written comments, that lobbying -- lobbying organizations engage in reportable bundling when an employee bundles money as an agent for the lobbying organization, even if that employee is not a registrant himself or herself. The statutory trigger is whether contributions are credited by the committee or candidate to the registering organization.
The second issue regarding the definition of bundled contribution relates to the treatment of fundraising events, and this is an issue that was discussed extensively in the first panel. The NPRM raises the question of how the reporting requirements should be applied where there are multiple lobbyists who co-host a fundraising event.

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

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

The third issue that I want to raise is the definition of -- within the definition of bundled contributions, the meaning of the phrase, designations or
other means of recognizing. A bundled contribution is one where the recipient candidate or committee credits the funds to the registrant through records designations or other means of recognizing that a certain amount of money has been raised by the registrant.

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

As detailed in our written comments, the three principal sponsors of this provision, Representative Van Holland in the House and Senators Feingold and Obama, pointed out that crediting the lobbyists simply means that the recipient candidate or committee knows that the contributions have been raised by the lobbyists. And indeed
the root of the word "recognizing" is "cognoscere", which is
the Latin for the verb "to know." That's what's at the
heart of all of this.

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

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

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

CHAIRMAN McGAHN: Hopefully just related to the
rulemaking.

VICE CHAIRMAN WALTHER: Ah shucks. Going to the
issue of a couple of points you made, I tend to really
sympathize with the fact that proration seems quite
arbitrary to me. I mean, I recognize that it's a way to
show that it was shared somehow, that it seems in a number
of ways it could be quite arbitrary, so to be comfortable
with the allocation or the subjective decision of the
recipient on how that would be done, but I'm wondering, would you have any problem if there was a second column there? It wouldn't necessarily say they're credited with raising it, but it would be informational to show it was part of an event that raised 150,000?

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

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

Sometimes they get listed as a co-host because frankly, the event isn't going well and adding their name adds some heft to an event that isn't raising much at all. And sometimes they get added as a co-host because they are
themselves prominent. So you might add a prominent trial lawyer as a co-host if you're doing a trial lawyer event to make it look like yea, trial lawyers, come give money because look who's the co-host, much in the same way you might list a senator as hosting an event.

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

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

But they provided the home. All the money is being raised by people who aren't on the invitation at all.
So I just -- I think that this keying off of kind of what's on the invitation and who's listed as host, is frankly a bit off -- off the path of frankly what Congress was trying to get at, and what I think frankly would be more accurate disclosure.

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

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

COMMISSIONER WEINTRAUB: I'd never do that.

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

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

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

CHAIRMAN McGAHN: Congratulations. How does it feel?

MR. ELIAS: The gentleman -- but the gentleman to my left should be thrilled, because if campaigns don't track what lobbyists have raised, presumably they're happier, because then there's no credit being given to lobbyists. Lobbyists have no sway over the campaign. Nothing gets reported, but everyone -- the campaign doesn't know the lobbyists raised it. There's a total break between money and lobbyists.
CHAIRMAN McGAHN: Marc, the flip side though is really as a practical matter, real campaigns and even the ones who aren't real, but are convinced by consultants that they're real, hire professional fundraisers who track all kinds of stuff, not because they're necessarily crediting, because they need that information to know who to go back now --

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

The fact that you used the word "credit" to me connotes something more than that, and I think the Commission ought to engage in some probing as to what it is it means to credit a contribution to someone.
MR. HOLMAN: Could I offer a response a little bit since I was brought up in here?

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

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

It's just he's not using the system, to my knowledge, where each of these financial chairs are assigned a number and the number gets written on the memo check. It's just more McCain's knowledge of who's bringing in the money for him.
So this -- he is keeping track of this. Bundling is as much, if not more, important in the McCain Campaign than it was in the Bush Campaign. McCain does have 850 bundlers that we've been able to identify, and he's --

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

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

CHAIRMAN McGAHN: Let's not -- let's not -- one point of frustration I've always had at the Commission --

presidential is that that is illustrative to all other campaigns and I always come at it from sort of the smaller campaign perspective. So I understand McCain may or may not be tracking and all that, and if that helps me understand what the smaller campaigns go through, then keep going. But let's assume arguendo McCain's tracking somehow and how he tracks would be something that would be crediting.

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

CHAIRMAN McGAHN: Great.

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

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

I presume that is the Bush style of Pioneer crediting in which a lobbyist actually walks in with $20,000 worth of checks that are credited specifically to that lobbyist. If there's a written trail that identifies specific lobbyists, then that ought to be the method that's being used. But in most of these fundraising events, you
just have sort of ambiguous list of hosts that are hosting a fundraising event and people show up and write a check to the general campaign or the fundraising event itself.

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

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

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

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

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

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

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

So then you say okay, the broadest possible
disclosure. If somebody's acting as a team, the fundraiser, otherwise they don't need to have a fundraiser if they're going to walk in with five checks and 10 checks. They're there to help each other raise money and maybe not only at that event, but in the future.

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

MR. ELIAS: A couple of things. One is the statutory language is to do it as broadly as possible, consistent with the terms of the statute. So I read the statute as requiring the disclosure by campaigns of contributions credited to them through designation or other means of recognition.
And if it's not credited to them, then it's -- we can be -- we can be as expansive as we want. We can say we're going to be as expansive as possible. But if it does not meet that threshold test, which is why I think a definition of crediting is so important, if it does not meet that threshold test of having been credited to them, then we're just talking about a different statute. We're talking about a statute that they could have written, which by the way, the prior panel is correct, was in the original version of the bill, which was replaced in its entirety with a different bill, which was event based.

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

So to me, again, I think there's a relatively simple way to deal with this and I think we keep complicating it because we keep looking at it from the perspective of a lobbyist, and I would tell everyone to take
a step back and go back to what this is trying to do, which is, what does the campaign believe? What do they think? Do they believe that lobbyist A raised 20 and lobbyist B raised 25? Maybe they're right, maybe they're wrong. It doesn't seem to me it matters. What matters is what they believe, because that's who's going to get the juice, right? That's what you're trying -- you're trying to figure out what lobbyist is getting the juice with the member and the one that's going to get the juice is based on what the member and the campaign believes happened.

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

CHAIRMAN McGAHN: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I wanted to ask Mr. Ryan about that, because I think -- I really appreciated your opening comments, Marc, because it went to something that I've been thinking about, which is what's our charge here? Is our charge to tell people how to
credit the lobbyists or to find out how the committees are
crediting the lobbyists and make sure that that is
accurately reported to the public?

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

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

Vice Chairman Walther raised some very good points
during the first panel about how in much of the country
these fundraising practices may be much less formal than we
are used to here in Washington, D.C., specifically with
respect to the co-hosted fundraisers for example. In the
comments, the written comments that were submitted by the
principal sponsors of this legislation, they address this
issue and express explicitly their concern on page six of the comments from Senators Feingold, Obama and Representative Van Holland.

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

Perhaps this is not something that we got into in our written comments, what I'm about to say, but perhaps you could even invite reporters to, and the candidates and committees reporting to, elaborate on that list of co-hosts with what they perceive to be the specific -- specific
dollar amounts that each of the registering co-hosts were responsible for.

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

COMMISSIONER WEINTRAUB: Where does the statute say that?

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

MR. ELIAS: I never said that.

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

MR. ELIAS: But that's different than Senator
Obama and Senator Feingold; they're not sitting to my left.

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

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

MR. RYAN: No, we don't.

MR. ELIAS: Again --

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

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

And Senator Feingold, for example, states -- stated explicitly on the floor of the Senate that when two or more lobbyists are jointly involved in providing the same bundled contributions, as for instance in the case of a fundraising event co-hosted by two or more lobbyists, then
each lobbyist is responsible for and should be treated as providing the total amount raised at the event.

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

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

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

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

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

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

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

COMMISSIONER WEINTRAUB: Let me -- let me go back to something that you were talking about before, Marc, and
that's -- and the chairman was talking about it -- because I'm not sure I get this. The difference between tracking and crediting.

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

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

MR. RYAN: I would point to the fact that the House and the Senate took this burden upon themselves. It's been stated earlier here today, I'll repeat it, they changed
the onus of the reporting to themselves from the lobbyists
and they certainly have the option of not asking, not
accepting bundled contributions from individuals who might
be put out in some way by the very fact that their names
would then be reportable on the public record.

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

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

Although we can say Congress put the burden on
them essentially, them being themselves, that's not the same
as being able to drag in the AFL-CIO. My concern is, is
once you go out there, it's sort of -- it's a jurisdiction
of the Commission issue, and then we get into discovery and all kinds of things and I can imagine a situation where if we go that way, and then we have to get to the bottom of whether or not a report's accurate or what really happened somewhere, trying to take discovery out of a union hall seems to me very problematic, First Amendment concerns, rights to associate, that kind of thing.

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

MR. RYAN: I think this may be an instance where there's a fork in the road. I don't know if we can accommodate both the interests that I've articulated and simultaneously address all of the concerns of the AFL-CIO.
But again, I would point to the statutory language itself that urges the broadest possible disclosure to the extent the decisions -- the hard decisions need to be made, and this will make -- and inevitably they will be and have to be. This commission should error, if you want to call it that. I wouldn't call it error. I would call it, the Commission should choose the broader disclosure path.

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

MR. RYAN: Right.

CHAIRMAN McGAHN: That kind of concept.

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

CHAIRMAN McGAHN: No, I didn't think you would.

But that's kind of what I think of. When you flip a coin, which way is it going to go? And you're saying, when it flips, we should go in favor of more regulation.

MR. RYAN: Congress said that.

CHAIRMAN McGAHN: There's a distinction though.

Is it our discretion because of the way the statute's
structured? Are you saying the statute mandates this or is it something that we actually have a decision to make? Because under the APA, there is a difference when the court looks at this kind of thing, whether it's something that we have to do versus part of our decision making. I think that's part of where Commissioner Weintraub was going. At least -- at least that's kind of how I heard -- what I took from some of her questions.

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

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

CHAIRMAN McGAHN: Sure.

MR. HOLMAN: I don't think neither the campaign, the candidate, nor the Commission should be placed in the position of the burden of determining the relative weights of who organized, brought in more money at general fundraising events. The purpose of this law is disclosure only. It's not to restrict anything. It's not to forbid
any fundraising events or activity. It's to disclose who are the lobbyists who are most involved in the fundraising campaign and pass that threshold of bundling activity.

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

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

CHAIRMAN McGAHN: Thank you.

MR. ELIAS: Can I add one point to this? Because you're right, our purpose is addressing you today. I just want to a) reiterate that I'm here testifying on my own behalf, not on behalf of any of my clients. That said, I
have never said that the -- that Senator Obama or Senator Feingold or for that matter, Senator Reid, who was, and I think deserves a fair bit of credit, was in fact the sponsor of this legislation. Go on Thomas. Look it up. This was the Leaders bill. This was put in as S-1, which was his right, and he fought hard for this bill.

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

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

When I say that the old bill went out the window, the old bill would have been real rough justice. It would have been a bunch of lobbyists at the end of every quarter
sitting down as they got ready to submit their lobbying
disclosure forms saying, geez, how much money do you think
we raised last quarter? This is a much more rigorous bill.

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

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

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

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

COMMISSIONER WEINTRAUB: Feel free to suggest one.

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

If it means something, we ought to say what it means. It's the operative word in that provision of the statute, so we ought to define it. I suppose I could imagine a scenario where a contribution comes into a compliance person, that it is tracked for purposes of
putting it on the FEC report, but there is no -- there is no recognition given to the person who raised it. It wouldn't be in an event context. It would be in some other context where there's no recognition given to the lobbyist, there's no -- there's no credit, there's no -- there's no credit to them.

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

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

MR. ELIAS: These gentlemen may have an idea.

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

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

CHAIRMAN McGAHN: Okay.

COMMISSIONER WEINTRAUB: I want to take advantage of the time to --
CHAIRMAN McGAHN: Good, okay. That's right, we can talk after this is over.

COMMISSIONER WEINTRAUB: That's right.

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

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

CHAIRMAN McGAHN: Yes.

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

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

MR. HOLMAN: Well, I'll quickly join in. I mean, I don't mean to be attacking McCain. I'm not attacking McCain by the way. I mean, McCain has been participating in
our disclosure program and letting us know how accurate our
list is, striking names off, adding names to the list.

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

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

    Sometimes it's just going to be an expectation
that you've got someone who's good at fundraising and so
they're part of your team out there fundraising. Otherwise,
you've really discussed most of the types of designations
that I am familiar with at this point. However, there is
that one caveat that on some occasions, a campaign just
knows that this person is responsible for hosting
fundraisers and bringing in a lot of money.

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

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

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

CHAIRMAN McGAHN: Let's let the vice chair.
VICE CHAIRMAN WALTHER: One more question maybe to Mr. Holman. You seem to be the advocate for the pro rata approach, if I'm not mistaken.

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

VICE CHAIRMAN WALTHER: Do you think the credit could come in a number of different ways? Knowledge, I can see the argument that knowledge means that there's credit, but then if they're to monetize it and somebody walks into a fundraiser and the whole idea of the fundraiser is to get George to come because he really knows one of the main hosts, and to get to know the candidate, and so when the person walks in he says -- George the person being sought -- I'm one of the general partners of a partnership and there's 100 partners in this thing and we report as partners and I think we're all going to be able to max out for you.
So then at the end of the thing, the money hasn't come in right away, but the fundraiser has been a success. Now what do you think should be done in a case like that if the person -- if the candidate wants to really give credit at that point on an unallocated basis not pro rata?

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

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

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

And I do know that checks do roll in after a fundraising event, but if it's clear and obvious to the campaign that these checks are coming in because someone planned on showing up at the fundraising event, didn't make
it, sent in a check because of it, whoever were the co-hosts
and registered lobbyists and registrants ought to be given
equal credit for those contributions for disclosure
purposes, let's emphasis this.

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

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

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

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

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

(Pause)

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

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

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

And to sort of go full circle to what Mr. Elias said out of the gate, if we're trying to codify essentially a disclosure of what's already happening, is this going to force campaigns to change and put in more sort of people or less people or better lines of communication or whatnot as to who really is on point to know what the committee knew?
And before I get done my very run-on sentence that doesn't make any sense at this point, what about the professional fundraisers hired to house a whole -- a whole other set of records and they track everything for their own purposes, not for crediting, but for their own desire to raise more money irrespective of some concept of credit or what an elected official may or may not want to know for those purposes? How about we start with you Marc; you may understand what --

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

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

I want to make sure there is a way that we're not going to have a standoff with treasurers and campaigns that won't sign the forms because they believe it to be untrue. And I realize it may be administratively more convenient for you all to say let's just go 100, 100, 100, or 50, 50, 50, whatever pro -- wherever you do it. But I think that there is a fundamental issue here which is that this is going to be so disjointed from reality in the minds of these campaigns that I think you need to find a way that they are not in fact certifying that in fact those people raised that money, because in fact -- or bundled those funds, because in fact, they won't have in many, many, many, many instances if we go that route. I think it is much better to have them certified as to what they believe the truth to be and go forward.
The only other thing I want to make, which goes to part of your point, is in my comments -- and it was at the very end, so I don't fault anyone for not having read them -- I objected to the Commission's urging people to keep more records. You have a recordkeeping requirement; my clients are familiar with it. You've put out policies over the year clarifying it. I don't believe you can urge. If you want to -- my clients are not required now to come up with a tracking system. They're not -- they're not required now to hire a person to administer a credit system.

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

MR. HOLMAN: Marc's response, I think, drives home the point how important it is that the Commission reduce the amount of discretion as possible when it comes to
determining what gets reported at what amounts. If you're going to allow the type of discretion that Marc is urging when it comes to hosting fundraising events, you're going to get that kind of debating and just worry on behalf of treasurers and accountants as to how much do I award this host, how much do I award that host, is it accurate, as opposed to having more of a bright line test of just awarding each host an equal amount based on how much was brought into the fundraising event.

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

This schedule is going to make it very clear that the numbers being recorded here are not the numbers that count towards the campaign budgets. They're not the numbers that are going to be double counted in itemized receipts and contributions. This is for disclosure purposes only so you
can get an idea as to how much lobbyists and registrants are playing a role in the fundraising of these campaigns. It's a different level of accountability. It's not that type of accountability.

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

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

MR. ELIAS: Can I ask a question? What if they don't host? What if they are featured guests? What if
they're listed as attending? What if they're listed as part of the host committee, but not as a host? What if it's a special host? I mean --

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

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

CHAIRMAN McGAHN: Don't give us any ideas.

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

CHAIRMAN McGAHN: We're taking notes.

MR. ELIAS: It is --

COMMISSIONER WEINTRAUB: How about color, should we --

MR. ELIAS: At the risk of -- I feel like I am the most reform minded here because I actually think the public has a right to know what actually happened. I don't think campaigns ought to be able to hide behind putting 100 people
on an invitation and they're reporting the same number for 100 people, whether it's 100 percent, 50 percent, 100th of a percent. They're obscuring from reality the truth.

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

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

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

MR. ELIAS: I -- Bush.

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

MR. HOLMAN: If you do that system of having 100 hosts and you allow the campaign to divvy it up among those
100 people, you are going to undermine the entire disclosure regime. There are going to end up being pro rated 1/100th of how much money was brought in and we'd lose the entire intent of this law.

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

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

MR. RYAN: No, I agree with that point. I wanted to make one point with respect to your perjury concerns and that is that I think there is a way to design the reporting
forms themselves to accurately reflect what's being reported
so as not to be raising perjury concerns for those who have
to sign those reports saying, for example, in the schedule
that is used for reporting of co-hosted fundraisers, this is
the -- this line is the total amount of funds raised at this
coop host -- this fundraiser, fundraising event co-hosted by
registrants for whom the candidate's required to disclose
bundling contributions, instead of saying -- having the
language in the form be able to be misinterpreted as each
one of these candidates -- or each one of these lobbyists
raised this amount of money. I think it's a question of
wording.

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

In all fairness, I think we are dealing with --
we're weighing two different competing interests and Marc
has described the situation in which the information maybe
isn't quite as accurate, depending on how you do it as it
might be.
But Craig articulates the other end of the spectrum, which is no disclosure, because you have the attribution spread out among such a large number of lobbyists and none of them meet the $15,000 threshold. And my concern articulated earlier regarding the possibility or even probability perhaps that campaigns would change the way they look at these events and structure these events so as to not require disclosure of their lobbyists because they may not want to be that closely affiliated --

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

MR. RYAN: Certainly. Yes, and you can draw the line in a way that will make it pretty easy for people perhaps to evade disclosure completely or you can draw the line elsewhere and require what -- depending on how it's drawn, could result in misinterpretation or over-disclosure, or if you have, as Senator Feingold suggested and we
reiterated in our comments, a part of the co-hosted
fundraising reporting, including a listing of all of their
co-hosts or even going one step beyond that and while
attributing the total amount to each of those co-hosts, also
allowing the campaigns to use their own recordkeeping to
attribute what they believe was a specific amount to those
cohosts within the context of this schedule that says
everyone, every co-host was responsible for the total dollar
amount.

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

CHAIRMAN McGAHN: Sure, go ahead.

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

But I oppose the opposite, which is we just take
it all and we attribute it to everybody. I'm arguing for
the third way, which is we try to get as close to the
reality of who got credit for each check. So I don't -- I
don't -- just so you know, I don't want the Commission to misinterpret. I don't support the pro rata approach either.

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

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

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

But here is the flip side. Suppose that Jack Abramoff actually did raise $100,000 and you want to dilute that. You say well okay, we'll just say, well really, even
though we know that he's the guy that brought in all the money, we're going to add all these -- this is great. We're adding all these other co-hosts and then it looks like he didn't do as much, he wasn't as significant a figure in our fundraising operation as he really was.

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

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

COMMISSIONER WEINTRAUB: All right, fair enough.

Second question, I want to go back to the issue of who speaks for the registrant, because you had said earlier, Paul, that if a non-lobbyist is acting on behalf of the registrant and the registrant's getting credit, then that should be disclosed and that seems reasonable, except how do we know when they're acting on behalf of the registrant?

I come at this from a real point of confusion because I'm struggling to find a way to get content to this requirement that the registrant's bundling has to be
disclosed, because I don't think I've ever seen an
organization listed as a bundler on any of these voluntary
disclosures; am I wrong about that?

MR. ELIAS: It could be, sure. I believe that --

list files bundling disclosure reports that are an
organization.

COMMISSIONER WEINTRAUB: Oh, okay.

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

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

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

I was here for the first panel and I was intrigued
that Mr. Sandler was advocating broader disclosure in this
context than we, the Campaign Legal Center, did in our
written comments. But I think without consulting with my
colleagues, I'm going to stick to our approach we advocate, which was rely agents -- require any agent of a registrant be covered by the statute.

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

COMMISSIONER WEINTRAUB: Give you an opportunity to weigh in.

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

Obviously the organizational context, there has to be some way of looping it in because corporations only act, or for that matter, any organization, only act through its -
- through its officers, employees and in that sense, agents.
So my caution about agents is actually less around the
organizational situation.

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

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

MR. ELIAS: The other concern I would have, which I'm sure my colleagues will share -- they may not share the solution, but they'll share the concern -- is that I don't
think the Commission wants to open up a suggestion that
corporations are now permitted to bundle contributions. I
mean, the fact is it is -- it has been in fact -- I believe,
Commissioner, you wrote eloquently in that matter involving
an energy company from Kansas City. I forget the name of it
--

    MR. HOLMAN: Westar.

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

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

    MR. ELIAS: I agree with that, but I don't think
we want -- I don't think there should be a suggestion that it's opening up some -- what had been impermissible, today is not permissible.

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

The Secretary of the Senate, the Clerk of the House in their Lobbying Disclosure Act guidance and their HLOGA guidance have suggested that if a lobbyist is on the board or perhaps is the treasurer, that that would be an indicia of control. Should we -- although their -- the example they use makes it a little bit ambiguous. Should we defer to that? Should we come up with a different definition and if so, what would it be? Anybody?
MR. HOLMAN: We all want to answer, I think.

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

MR. HOLMAN: The Commission's already tackled issues like this very, very well in a tried and true sense. The Commission's definition of affiliation, for instance, has three indicia that I think could be used. The entity directs or participates in the governance of the organization, the entity hires or fires within the organization, or the entity does an ongoing fundraising role within the organization. That would seem to be an appropriate definition of control to me.
MR. ELIAS: I like the idea of tying to the Commission's existing regulations if possible. I realize, as Paul does, that there are probably limitations there. But I believe the fewer competing definitions for the same words that appear in the statute is good, although I haven't looked at those regulations recently, so I don't know what that -- where that leads us.

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

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

Because remember, most of these are not corporate -- most of these non-connected PACs are unincorporated
associations and they don't really have a true governing board. The board is very often just there for public consumption, not for actual governance purposes.

CHAIRMAN McGAHN: General Counsel.

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

CHAIRMAN McGAHN: Take all the time you need.

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

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

MR. HOLMAN: Okay, Paul could have answered this
probably better. I would stick to the -- I reiterate the agency's standard. I mean, it's a matter for the Commission to determine. If there is some sort of red flag that draws your attention to the role of a CEO who is not a registered lobbyist and his or her role in the fundraising, you know, you've got to apply the principles of the agency standard in determining whether or not that CEO was working on behalf of the organization or the registrant, or on behalf of a lobbyist. That is something that you've got to determine in an audit process.

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

MR. ELIAS: I'd say a word about -- we talked a lot about various pieces of legislative history. Senator
Reid, who as I mentioned, was actually the technical primary sponsor of the legislation, along with Senator Feinstein, who was the chair -- is the chair of the Rules Committee, which had jurisdiction over the lobbying disclosure pieces -- you're going to correct me when I get this wrong -- and Senator Lieberman, who is chair of the committee that had jurisdiction over -- I have this backwards.

COMMISSIONER PETERSEN: Senator Lieberman had the LDA.

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

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

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

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

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

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

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

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

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

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

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

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

    MR. HOLMAN: Once again, I want to reiterate, that type of discretion and this type of reporting regime would undermine the entire disclosure element of the law. You
can't provide that type of wide leeway in discretion and just leave it an entirely discretionary disclosure system. And that is what Marc is proposing.

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

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

I don't think that's true at all. I think you'll get one of two effects. You'll either get very robust accurate disclosure, which would be a public policy good, or you'll have campaigns genuinely distance themselves from lobbyists. What's wrong with that? That's good, right?
It will be the opposite of gamesmanship. It will be -- it won't -- you won't be able to put 100 people down, which allows you to stay close to lobbyists. You'll have to make a choice, are you willing to accurately disclose what lobbyists bundled for you, or are you going to distance yourself from lobbyists and not let them bundle for you?

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

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

COMMISSIONER WEINTRAUB: Mr. Chairman?

CHAIRMAN McGAHN: Yes.

COMMISSIONER WEINTRAUB: You might want to --

CHAIRMAN McGAHN: Explain to them about the --

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN McGAHN: That's right. In the first panel we indicated that the record's going to be held open for a week in the event you want to file supplemental
comments or flesh anything out that happened here today, particularly if you have any idea what the reporting form would look like, that may -- that may help. That's one way to sidestep the pro rate versus reality debate and all that. Maybe there's a way that someone could creatively figure out a report -- that's something that I'm looking for -- or whatever else you may wish to submit, it will be open for a week.

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

With that, the meeting is recess -- is adjourned. Thank you.

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

CERTIFICATE OF REPORTER
I, JENNIFER O’CONNOR, the officer before whom the
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JENNIFER O’CONNOR