FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON PARTICIPATION BY FEDERAL CANDIDATES AND
OFFICEHOLDERS AT NON-FEDERAL FUNDRAISING EVENTS

Tuesday, March 16, 2010

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

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

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel
ROSEMARY C. SMITH, Associate General Counsel
DAVID ADKINS, Office of General Counsel
ALEC PALMER, Acting Staff Director
WITNESSES:

TOM JOSEFIAK, on behalf of the National Republican Congressional Committee

PAUL RYAN, on behalf of the Campaign Legal Center

JOHN PHILLIPPE, on behalf of the Republican National Committee

SEAN CAIRNCROSS, on behalf of the National Republican Senatorial Committee
## CONTENTS

<table>
<thead>
<tr>
<th>WITNESSES</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOM JOSEFIAK, National Republican Congressional Committee</td>
<td>7</td>
</tr>
<tr>
<td>PAUL RYAN, Campaign Legal Center</td>
<td>12</td>
</tr>
<tr>
<td>JOHN PHILLIPPE, Republican National Committee</td>
<td>17</td>
</tr>
<tr>
<td>SEAN CAIRNCROSS, National Republican Senatorial Committee</td>
<td>21</td>
</tr>
</tbody>
</table>
CHAIRMAN PETERSEN: Good morning. The special session of the Federal Election Commission for Tuesday, March 16, 2010 will please come to order.

I'd like to welcome everyone to today's hearing. This morning we will be discussing the Notice of Proposed Rulemaking on the rules governing federal candidate and officeholder participation in non-federal fundraising events. The NPRM explored possible modifications to these rules and response to the decision of the United States Court of Appeals for the District of Columbia Circuit in Shays III.

I'd like to thank all those people who took the time to -- to -- to comment on the proposed rules and particularly those who have been willing to testify at this morning's hearing. And let me also thank the Office of General Counsel, whose efforts on this have been immeasurable, including our General Counsel, Tommie Duncan, our head of Policy Division, Rosie Smith, David Adkins, Amy Rothstein, and I know that I should also mention on this and other Shays III rulemakings, Bob Knop, Jessica
Selinkoff, and I know that there have been others whose names I may be forgetting, but your efforts have been truly appreciated throughout this whole process.

Today’s format will be as follows. We will have one panel consisting of four witnesses that will last for 90 minutes. Each witness will have five minutes to make an opening statement and we have a light system. When it starts -- the green light starts flashing, that means you're within your last minute. Once the yellow light comes on, you're within your last 30 seconds, and when the red light comes on, that means the five minutes has -- has been reached.

After the witnesses have an opportunity to give their opening statements, the balance of the time will be reserved for questioning by the Commission. We will have at least one round of questions from the Commissioners, the General Counsel and the Staff Director, and if time permits following the first round, Commissioners may ask follow-up questions.

So without further ado, we will invite our witnesses to take their places at the witness table. Our panel this morning consists of Tom Josefiak, a former
Chairman of the FEC, representing -- speaking here on behalf of the National Republican Congressional Committee; Paul Ryan, on behalf of the Campaign Legal Center; John Phillippe, on behalf of the Republican National Committee; and Sean Cairncross, on behalf of the National Republican Senatorial Committee.

Why don't we start with Mr. Josefiak and then we'll work our way across the table? And when you're ready, feel free to begin.

STATEMENT OF THOMAS JOSEFIAK, ON BEHALF OF THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

MR. JOSEFIAK: Thank you, Mr. Chairman, members of the Commission. I appreciate the opportunity to participate in this hearing today to discuss the role of the federal candidate and officeholder and their participation in non-federal fundraising events on behalf of the National Republican Congressional Committee.

I should point out that Jessica Furst, their General Counsel, would have been here today, but she has a commitment out of town and could not be here.

In the immediate post-BCRA era, a statute that limited federal candidate and officeholder solicitations
for non-federal candidates, and a statute that prohibited
federal candidate officeholder non-federal solicitations
for party and other non-federal committees unless it was
defederally clean, and a statute that explicitly allowed for
federal candidate officeholder attendance and speaking at
party events, regardless of the amount of non-federal funds
being solicited by others, it appeared fairly clear to many
of us how this new law would be applied based upon the
succinct language in the statute itself and the initial FEC
regulations.

With respect to non-federal candidate
solicitations, the Cantor Advisory Opinion provided
additional clarification on how to avoid a prohibited soft
money solicitation by federal candidates and officeholders,
simply include the so-called Cantor disclaimer. Namely
that language required the federal candidate was to say the
candidate was not soliciting funds outside the federal
limits and prohibitions.

With regard to other non-federal fundraising
events, the same rule appeared to apply with the
Commission's issuance of the RGA Advisory Opinion. I
emphasize appear since after that opinion the Commission's
position has become at best confusing with the issuance or failure to issue guidance and numerous other AOs and MURs. Our written comments spell out that history and I would respectfully request that those comments be made part of the record.

As our comments also suggest, we support alternative two, with certain modifications, as the best approach to give guidance to the entire regulated community in one place at one time, applying the same rules with some clarity. We respectfully submit that this approach is consistent with the Shays III decision. Shays III only addressed the very narrow question in the Commission's regulations, which allowed federal candidate officeholders to say anything at a party event, including soliciting non-federal funds, nothing more, nothing less.

We would encourage the Commission to go back to the basics and affirmatively and simply state that the federal candidate officeholder prohibitions only apply to their own personal federal, non-federal fundraising solicitations and not the solicitations by the sponsoring organization. Then the Commission should clearly define what is a federal candidate officeholder solicitation and
what is not.

For example, signing a fundraising letter is a direct ask. However, being on a host committee, if the host committee members are expected to raise certain amounts of money, could be viewed as a “implicit ask” under the Commission's regulatory definition of solicitation. However, being listed as a featured speaker, guest, honored guest or listed without any title would not be viewed as a solicitation by the federal candidate officeholder irrespective of whether their consent to be on the pre-event publicity is given, which as a practical matter is most, if not all of the time.

Federal candidates and officeholders don't generally allow their names to be used without knowing how it will be used and to make sure that the use is legal. Invites don't say Senator X invites you to attend the Republican Party of California's Lincoln-Reagan Dinner, but rather something like the Ohio Democratic Party invites you to attend its annual Jefferson-Jackson Dinner with honored guest President Barack Obama. Clearly that example is a solicitation by the host sponsor and not the federal candidate officeholder and merely giving consent to appear
on the invite as the honored guest should not change that fact.

We also would respectfully submit that if the federal candidate officeholder activity does not meet the definition of solicitation then no disclaimer of any sort would be necessary, including the statement “that the federal candidate officeholder is not soliciting non-federal funds.” That seems to us to further highlight the solicitation issue to the recipient and generate further confusion to the recipient as to why this is being said.

The idea here is if I'm saying well I can't solicit your contributions or I'm not soliciting contributions, if I'm getting an invitation that says the Republican Party of California is cordially inviting you to attend our event, why is he saying that? Is there some subtle message there that I'm supposed to be soliciting because he's asking for it in an indirect way?

It seems analogous to me to the Commission's regulatory ban on corporations stating in company newsletters sent to all employees and to the public that the company is prohibited from soliciting them for corporate PAC contributions or "I can't legally solicit you
for your PAC contribution" since that kind of statement, by
the Commission's own regulations, is viewed as a
solicitation. I think those are the kinds of
considerations the Commission needs to look at and I
commend the Commission for its efforts and again, we
wholeheartedly support with modifications alternative two.

Thank you, Mr. Chairman, and I would be happy to
address any Commission's questions.

CHAIRMAN PETERSEN: Thank you, Mr. Josefiak. Mr.
Ryan.

STATEMENT OF PAUL RYAN ON BEHALF OF
THE CAMPAIGN LEGAL CENTER

MR. RYAN: Thank you, Mr. Chairman. Good
morning, Commissioners. Thank you for giving me the
opportunity to be here this morning. I think by contrast
to many of the rulemakings, or I think it's fair to say
most of the rulemakings the Commission engages in, this one
seems quite simple by comparison. The Commission's charge
in this rulemaking is to repeal the invalidated portion of
your regulation that permits federal candidates and
officeholders to solicit non-federal funds at state,
district, and local party fundraisers. We believe -- the
Campaign Legal Center believes that alternative one is the simplest if most straightforward way of doing that.

This is also a rare occasion in that often times we hear complaints from members of the regulated community across the board that federal campaign finance regulations are too complicated and too long and sometimes the Campaign Legal Center is at the end of that criticism saying the Campaign Legal Center wants complex or increased complexity in the regulations. This is one instance in which the Campaign Legal Center is advocating taking the shorter approach, which would eliminate half a page in the new Code of Federal Regulations. So I want to take the opportunity to note that somewhat rare occasion or rare event.

Again, alternative one is the simplest, easiest way to do this. Alternative one, my understanding of it is that it would basically in essence amount to applying the definition of “to solicit” at 300.2(m) to determine whether or not any particular activity by a federal candidate or officeholder, whether it be occurring at a state, district, or local party fundraiser or elsewhere is a solicitation.

Regardless of which of the three alternatives, and the Campaign Legal Center doesn't oppose any of them,
this Commission chooses -- I think the analysis really
boils down to two questions. First, is a federal candidate
or officeholder making a solicitation, period, or question
mark, I should say, and second question, if so, is that
solicitation for non-federal funds or is it limited to
federal funds?

Alternatives two and three, as I understand them,
would answer these questions in slightly different ways in
different contexts, mainly looking at the pre-event
publicity or print materials, invitations to those events,
state, district, and local party or other non-federal
fundraising events.

Under alternative two, if a federal candidate or
officeholder authorizes the use of their name in a position
specifically related to fundraising, it’s treated as a
solicit in the pre-event publicity materials. That package
of materials is treated under alternative two as a
solicitation and it’s prohibited if that invitation or pre-
event publicity material solicits non-federal funds, or in
other words, that -- if the federal candidate or
officeholder is identified in a position specifically
related to fundraising, there's no disclaimer cure for
that. It's simply the solicitation itself has to be limited to federal funds.

However, under alternative two, if a federal candidate or officeholder is identified in a position not specifically related to fundraising, then a disclaimer could be used to make clear that in the event that someone else in that publicity material is making a solicitation, that it's not being made by the federal candidate or officeholder. I think that approach is consistent with the definition of “to solicit" at 300.2(m). That definition of “to solicit" treats printed material seemingly differently than live materials.

There's -- included explicitly in the definition of to solicit is a communication that provides a method of making a contribution or a donation regardless of the communication. That constitutes a solicitation under the definition that this Commission has adopted and that would seem to encompass these types of pre-event listing materials.

Under alternative three by contrast, any invitation identifying and authorized by a federal candidate or officeholder that solicits funds is prohibited
if the -- if the invitation solicits non-federal funds.
There's no disclaimer cure for any of these and regardless,
it doesn't make that distinction between in a position
specifically related to fundraising or some other position.
And again, I think if the Commission decides that they
don't want to try to draw that line between what positions
are and are not specifically related to fundraising,
alternative three is an acceptable way to implement the
statute.

But back to the second question. Is the federal
candidate solicitation a solicitation of non-federal funds?
There seems to be agreement among commenters that there are
basically three types of solicitations, explicitly
soliciting federal funds only, explicitly soliciting non-
federal funds, or general non-specific solicitations that
don't specify an amount or a source of those funds and the
issue in this rulemaking seems to be trying to figure out
that middle category, the general non-specific
solicitations.

The Cantor AO correctly required disclaimers for
general solicitations. That's one aspect of the Cantor AO
that there was a majority of the Commissioners in agreement
with. Alternatives two and three both correctly require 
disclaimers for general solicitations, although some 
commenters here today and in written form are urging the 
Commission to dispose of the disclaimers for general 
solicitations. We respectfully urge the Commission not to 
do so, to retain those disclaimers.

And I'll stop there. I'm happy to answer any 
questions you might have to the best of my ability. Thank 
you very much.

CHAIRMAN PETERSEN: Thank you, Mr. Ryan. Mr. 
Phillippe.

STATEMENT OF JOHN PHILLIPPE ON BEHALF OF THE 
REPUBLICAN NATIONAL COMMITTEE

MR. PHILLIPPE: Thank you Mr. -- thank you, Mr. 
Chairman, Madam Co-Chair, Commissioners. Thank you for the 
opportunity to be here today representing the RNC and all 
the state and local parties that are affiliated with us. 
Hopefully today I can help shed some light on how these 
rules in practice really do affect the grassroots leaders 
out there, the people that are the lifeblood of our party 
that have to deal with these rules every day.

From the RNC perspective, we deal with federal
candidates and officeholders quite a bit, but you've got some other witnesses up here who can testify specifically with respect to them. But with respect to the parties, I need to tell you so many of these rules that we deal with are so confusing to the people out there and the blank stares, the awkward silences on the phone I get as I try to explain some of these rules, which just seem to conflict with common sense on so many occasions, I just can't tell you how often I deal with that.

And so one thing I really appreciate and want to commend the Commission for with this rulemaking is that you have opened the door to the pre-publicity, pre-event publicity. Is this working all right? Is that better -- on the pre-event publicity because I think there's so much confusion there. And the Commission has appropriately recognized that based on some of the past AOs and you didn't have to do that because as you point out in the rulemaking and the NPRM, Shays III doesn't address it. You didn't have to go that far. Alternative one doesn't go that far, which is one reason we oppose alternative one.

Because these rules regarding pre-event publicity in practice are what -- what really matter. These are the
things that when we're dealing with campaigns and with parties, approving invitations, that sort of thing, these are really where solicitations are made and we need to be clear about what constitutes a solicitation and more so, what constitutes a solicitation by a federal candidate or officeholder.

Because frankly, once you're at the event, it's very rare that solicitations are ever made regardless. So it is appropriate that you've opened the door to revisiting the guidance and the rules regarding pre-event publicity. And clarity really is an important thing in these rules and it's very important to state and local parties, especially those who can't afford high price election attorneys to give them guidance.

A couple principles I would like to just point out and hope the Commission recognizes and would be happy to discuss, first is that I do not believe that a solicitation can be imputed based on somebody's defined role in an event. A solicitation is an act and I think the regulatory definition of solicitation recognizes that. So whether you're listed as an honorary chair or a member of a host committee, or a featured speaker, unless you are...
actively engaged in the act of soliciting, you are not
soliciting, and just having a certain title doesn't --
doesn't make you -- doesn't bestow that solicitation upon
you.

Often members of host committees are members of
host committees because they solicit money and it is that
act of soliciting that should be covered, but not simply
being named as a member of a host committee, and that would
apply to any other titles as well.

I'd also like to address another principle, which
is that motive for appearing at an event shouldn't be
relevant. If -- if a speaker, if a federal officeholder
wants to speak at an event, because that person's presence
will result in the event raising more money, that doesn't,
therefore, make that a solicitation, and I think
alternative three would say that that is a solicitation.

For one thing, that's not always the motive for
appearing at events and I think we and other commenters
point that out. But even if it is, federal candidates and
officeholders are allowed to do a lot of things that make
it more likely that an event will raise money. They're
allowed to be involved in the planning and finance
strategy. So just because that’s their motive or just because it might have the effect of leading to raising more money, that doesn’t make that a solicitation.

In any case, I’ll be happy to answer any questions about -- about our comments, about my comments here today or reaction to other comments. But I would like to at least say at the outset that we do oppose alternative one because it does -- it isn’t comprehensive enough. We oppose alternative three because it does too much in regulating political speech. And we support alternative two with some modifications to reflect the principles that I’ve laid out.

CHAIRMAN PETERSEN: All right, thank you very much, Mr. Phillippe.

Mr. Cairncross.

STATEMENT OF SEAN CAIRNCROSS ON BEHALF OF THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE

MR. CAIRNCROSS: Good morning. Good morning, Mr. Chairman, Vice Chair, members of the Commission, on behalf of the NRSC, I appreciate the opportunity to testify today. My committee, our members are frequently invited to attend and appear at non-federal fundraising events and so we have
a real interest in this rulemaking.

Frequently these event invitations will cross my desk and so if I could put it simply, a clear and comprehensive rule in this regard would be a relief. So I am here today to support alternative two. It comports with Shays. It is clear. It is workable, and so long as the Commission adopts affirmative safe harbors related to event invitations, conduct at events and rules or -- excuse me roles and titles, federal officeholders and candidates assume related to those events, this will provide clarity in an area that has provided campaign attorneys with a headache for some time.

The bottom line on this rulemaking is very brass tacks. Can my client appear on this invite? Can my client go to this event? These are -- alternative three, which leaves open to the wind the question of how many people properly constitute a fundraiser and turn potential feature guests into Hamlet, don't necessarily lend the clarity to this -- to this rulemaking that's necessary. And alternative one, which leaves large swaths of fundraising - non-federal fundraising untouched, also don't provide that clarity, and the practical effect of that is federal
officeholders and candidates will be limited in their involvement with these events more so than Congress intended, and that certainly shouldn't be, I think, I would submit, the goal of the regulations.

Returning to the practical nature of the rulemaking, my real concern is clarity with respect to invitations or pre-event publicity. After all, that is where the questions here arise. My experience mirrors John's and likely others on this panel. Conduct at events, direct solicitations by federal candidates or officeholders at these events is rarely an issue.

And so here alternative two really provides a clear, analytical framework. Does the invite solicit funds? If so, does the candidate solicit the funds? Okay, if so, how much is he or she soliciting? Is it within the limits and prohibitions of federal law? If yes, proceed. If no, hard stop, you can't do it. Does the candidate appear on the invitation, but the solicitation is made by somebody else? If yes, great, go for it.

And that brings me to a point that hopefully we can lend some clarity or help the Commission clarify today, and that is, does the appearance by a candidate on an
invite that doesn't constitute a solicitation by the
candidate, but where the invite solicits money outside the
limits and prohibitions of federal law require some sort of
Cantor or RGA-style disclaimer.

Logically it doesn't seem to make sense that it
would. Either a featured guest is a solicitation or it's
not and I would urge the Commission to avoid the temptation
to split that issue, which I think would just create
confusion down the line. The simplest, most direct way for
the Commission to address that point is just to remain
logically consistent. It's either a solicitation on the
part of the candidate or officeholder or it's not. I think
you will find that that goes a long way towards solving
much of the question that has risen in this context.

And finally, just to emphasize clear, affirmative
safe harbors with respect to invites, conduct, and roles
related to events are absolutely crucial. The negative
safe harbors are one thing, but the affirmative safe
harbors actually allow action. We know we're safe if -- I
know my client will be safe if they appear as a honorary
chairperson or a featured speaker and we know they won't if
they appear as whatever other role the Commission may deem
a solicitation.

Whatever those rules are, they just need to be clear so that we have this finally in a comprehensive manner that we can advise. I think doing so will allow members to participate in these events, as Congress intended them to do, and while it may not eliminate the need for campaign attorneys, it certainly may save some billable hours to the candidates and members.

Thank you.

CHAIRMAN PETERSEN: Thank you, Mr. Cairncross, and thank you to all of our witnesses for your opening statements. We will now turn to questions from Commissioners. I'll go first.

Mr. Cairncross, I just want to follow-up on a point that you just brought up about if a federal candidate is mentioned as a featured guest on pre-event publicity but it -- but it does not constitute a solicitation by the candidate but some other person, that you don't think that there should be disclaimers.

You mentioned that you are supportive of alternative two. Alternative two in -- it does contain a provision that talks about solicitations by someone other
than a federal candidate or officeholder and it says that that's okay, but it does say that any such publicity must include a clear and conspicuous written statement that the solicitation is not being made by the federal candidate or officeholder, in other words, a disclaimer of some sort.

Notwithstanding your overall support with alternative two, do I understand that you would change that language?

MR. CAIRNCROSS: Yes, I think that's a logical inconsistency in the language and I think those sort of inconsistencies lead to open questions concerning what activity actually constitutes a solicitation and leaves open the door for an argument in a later context that appearing on an invite in some context where everyone thought they were protected and thought they were operating within the bounds of the law gives rise to either some negative attention or, you know, would engender a response or, you know, complaint being filed.

CHAIRMAN PETERSEN: Let me ask the other witnesses. Mr. Phillippe, do you agree with that, that that should be modified?

MR. PHILLIPPE: Yes, absolutely. That's one of
the modifications we would -- we would certainly recommend
with respect to alternative two. It's just there's nothing
to disclaim if -- if the -- if the federal officeholder
isn't making a solicitation.

CHAIRMAN PETERSEN: Mr. Ryan, do you have
thoughts on that?

MR. RYAN: Yeah, I definitely think that the
disclaimer requirement in the proposed rule alternative two
should be retained. I think that looking at the definition
of “to solicit” is a great starting point. That definition
states that a solicitation is an oral or written
communication that construed as reasonably understood in
the context in which it is made contains a clear message
asking, requesting, or recommending that another person
make a contribution, donation, transfer of funds or
otherwise providing anything of value.

But the rule goes on to provide a specific
element of what constitutes solicitation. It lists the
following types of communications, constitutes
solicitation. The first example is a communication that
provides a method of making a contribution or donation
regardless of the communication. This includes but is not
limited to providing a separate card, envelope, or reply device that contains an address so on and so forth to return a contribution to the requesting organization.

I think it's entirely reasonable for the Commission to conclude that there is some uncertainty when someone receives an envelope in the mail that says featured guest, federal candidate X or -- you know, honorary chairperson, federal candidate X, that that could be reasonably construed as a solicitation and the Commission is proposing alternative two to try to separate -- separate out some categories of what is definitely a solicitation in that context, being signing a solicitation, for example, and examples that the Commission thinks are not so clear and don't need to be per se deemed solicitations.

I think the disclaimer helps make that infinitely clear to the recipient of the solicitation, to the general public. So again, I would urge the Commission retain those disclaimers.

CHAIRMAN PETERSEN: Mr. Cairncross, you have a comment?

MR. CAIRNCROSS: Yeah, if I could just put it another way. I think that it may make sense if the
Commission were to say, look, in an invite that says
Senator -- Senator Dodd asks you to -- to contribute to
this organization and then the ask was a non-federal ask
over and above the amounts of federal, then I think the
disclaimer makes sense.

The federal candidate officeholder isn't
soliciting money. The candidate may not be asking for that
money, although the invite, somebody else on the invite is.
Then you’d have a logically consistent set of materials.
But if they were to just appear -- and I am not suggesting
you do that. I’m just saying as a matter of consistency
that would make -- that would make sense.

CHAIRMAN PETERSEN: Mr. Josefiak?

MR. JOSEFIAK: That's exactly the point. The
prohibition is a solicitation by the federal candidate
officeholder, not a solicitation by the third party who's
having the event. And going back to my example, the Ohio -
- the Democratic Party cordially invites you to attend the
Jefferson-Jackson Day Dinner with our honored guest,
President Barack Obama. President Barack Obama isn't
soliciting a contribution. The Democratic Party of Ohio
is, and to put that kind of language in there goes back to
my example. Why is it there?

It's clear to me as the recipient that the Ohio Democratic Party is putting on this event and they're raising money and they've got Barack Obama, the President of the United States, as their honored guest. That's what it means to me, but when I see this other language, what does it mean? Inside the Beltway it may be a safe harbor for us folks, but out there it just confuses people, well why is he saying that, because he's not asking me for any money? The Ohio Democratic Party is asking me for this money. So I think that's sort of the distinction you've got to draw here as to where you're going to require additional information be put on there.

But if at the end of the day that's going to be your safe harbor and Sean and John can go to their folks and say, hey, you know, this is what you got to do and you won't -- you won't get into trouble, maybe that's an alternative. But I think that's -- that's kind of language that you add to things that just confuse people, confuses state party folks that are bringing these folks, and if they don't have it, they're going to have trouble.

And the last thing you're going to do is want the
President of the United States or any Senator or Congressman to get pulled into an enforcement case because the party didn't do what it was supposed to do even if the candidate's committee had reviewed that invitation, would have no idea whether those rules were being met or not, because they really look to the parties to know what those rules of engagement are.

So I think the more you can eliminate that kind of extraordinary language the better off you are because unless you are soliciting, there is no reason to put that kind of language on there.

MR. PHILLIPPE: Mr. Chairman, could I just --

CHAIRMAN PETERSEN: Mr. Phillippe?

MR. PHILLIPPE: -- follow-up quickly --

CHAIRMAN PETERSEN: Sure.

MR. PHILLIPPE: -- with a practical concern that we deal with a lot of times? I would just suggest that the Commission not assume that there's no harm to putting disclaimers on either -- I mean, take a cost benefit approach. If the -- if there is no real benefit or if it's just a very small benefit, consider the fact that you jumble these things up with five different disclaimers and
it decreases the impact of any of them.

Not only that, what it also does from the perspective of the folks who are putting on these events and designing the invitations, it makes these things really hard to design and you've got different font requirements and it makes them more expensive because they've got to get bigger paper and sometimes that increases the mailing costs.

So there is actually a practical cost of requiring all these things and so to the extent it really isn't required because an officeholder or candidate isn't doing a solicitation, don't assume that there's -- there's no cost to actually requiring something that doesn't have any benefit.

CHAIRMAN PETERSEN: Mr. Cairncross?

MR. CAIRNCROSS: My only final point on that would be if it were ever to get to that phase, a court is likely to try to read the regulations to give effect to the wording in those -- in those regulations and if there's a disclaimer that's required based upon your appearance on the invitation, then at some point your appearance on that invitation constitutes a solicitation, would I would think
be the natural reading of that.

And so unless the invite says this is not a solicitation by federal candidate or officeholder X, to the extent that anyone misconstrues this as a solicitation, which it isn't, then they're not soliciting above the limits and prohibitions of federal law, which strikes me as unnecessary and unwieldy, and I think -- I think they ought to -- the Commission ought to remain consistent.

CHAIRMAN PETERSEN: Mr. Ryan?

MR. RYAN: I'd just like to address that last point and go back to the -- what I proposed as the analytical structure for this whole thing. A, is the solicitation being made? B, is it a solicitation for non-federal funds?

I think the Commission's regulations defining solicit establish that a communication that gives you a method, a concrete method of making contribution is a solicitation and we move on to the second question, when a federal candidate or officeholder authorizes their name to appear in that solicitation, the question becomes, is that federal candidate or officeholder making a solicitation for non-federal funds? The disclaimer is what limits the
solicitation, which is being made, there's no doubt about it, a solicitation to a legal, permissible solicitation of not -- of federal funds.

I think that's a reasonable approach. We're hearing from everybody what candidates really want is clear guidance. I think this disclaimer gives you that road map.

CHAIRMAN PETERSEN: Just -- I just have a minute or two left. I just wanted to quickly address the issue that was addressed most in detail in Mr. Cairncross’ comments from the NRSC regarding safe harbors. I guess the first general question I have is do you believe that we need -- you go through and provide many examples of what you think should be statements that could be kind of model statements that could be put into a safe harbor. Do you believe that we should have -- that those should actually be in the rule itself, or do you think that those -- that that could be adequately addressed by including such examples in the -- in the explanation and justification for the rule?

MR. CAIRNCROSS: I'm not sure there is much in it either way. I think it wouldn't hurt to have them in the regulation itself, but I think at the very least, they
ought to be in the -- in the E&J. And I certainly look to the other panelists and ask if anyone else has anything to add to those. But those -- those, at least in my experience, are the -- are the most common sort of introductory or general statements of thanks that federal candidates and officeholders make during an appearance at one of these events.

CHAIRMAN PETERSEN: Mr. Josefiak?

MR. JOSEFIAK: E&J is fine, but unless you’re sitting at this table or the other lawyers in Washington, D.C., E&Js are irrelevant. When you’re talking, as John did, about the state party folks and you’re looking for clarity, this is an opportunity. I mean, there may be others, but you may not limit them. But to give people an idea, if you’re going to create these safe harbors, what they are. Put them in the regulations. Make the regulations stand alone, because again, we read the explanation and justification, but a lot of folks don’t, and they’re going to look to the regulation.

If there’s any uncertainty in that regulation, that’s where the issues are going to be. And so I would strongly recommend, particularly in this case where you’re
going to have a lot of non-federal entities throughout the
country using this regulation when they're looking for
federal candidate participation or officeholder
participation, that it be put in the regulation as much as
you can, any of this information, and not the explanation
and justification.

CHAIRMAN PETERSEN: Okay, thank you. I've
reached my time. Vice Chair?

VICE CHAIR BAUERLY: Thank you, Mr. Chairman.
I'd like to return to an issue that Mr. Cairncross raised
about trying to identify the roles or the titles that are
being used when a federal candidate or officeholder is
present on an -- on an invitation. And one of the areas
that we identified in the NPRM was what does it mean to be
on a host committee? The NPRM reaches one conclusion and
commenters have suggested that's good, bad, or otherwise.

Mr. Phillippe, I think you said in your testimony
this morning that members of a host committee may raise
funds, but they don't have to, and in your written comments
said that this designation is not meaningful because in
your experience that federal candidates, when they
participate on host committees, they're not really doing
the fundraising, unlike other host committees might -- host committee members might be doing.

One of my questions for you and for the rest of the panel is -- is how do we -- you suggest to us that motive isn't something we should consider, but shouldn't we consider what the general public or someone receiving this invitation that says this person is serving on a host committee might view that as, because that's part of a -- if in general host committees are the ones raising the money, and someone is a federal officeholder or candidate, someone who's not sophisticated might not know that federal officeholders generally don't do that kind of work as part of a host committee.

And I just want to make one other reference and I'd like to open it up to all of you to answer because the NRSC in your written comments, you did say that adding the word "honorary" to host committee would be a way to eliminate the appearance that this could -- this would be a solicitation, which suggests that in your view, being on a host committee might be viewed by some as a solicitation at a minimum. So I'd like you to -- if you could just sort of further explain that.
And then again, ask for others to comment on how do we deal with this particular title and role? Because I think it is one that we've obviously identified in the NPRM as something we've -- we've proposed to address in a certain way and there's been some comment about this when it seems to be one of the more -- I think featured guest is something perhaps we can all find some consensus around. Apparently host committee is not one we can, so.

MR. CAIRNCROSS: Sure. Well I certainly don't think host committee or honorary host committee is worth hanging -- hanging up the rulemaking over. I don't have a strong feeling one way or the other. I think our suggestion on the honorary was an attempt to sort of bridge the gap to the extent that one exists.

I still think that soliciting is -- I mean, that's an active. You're making an ask, so unless you're saying please contribute or there is something specific about the federal candidate officeholder reaching out and attaching themselves to that, to requesting those funds in some way, that it's not a solicitation and that host -- even host committee membership wouldn't -- wouldn't hit that threshold.
But like I say, if honorary host committee is a way for the Commission to get there and gives us some clarity on what we can -- in what we can say, then I think that's fine.

VICE CHAIR BAUERLY: Okay, Mr. Phillippe?

MR. PHILLIPPE: One concern I have is that I just disagree with the notion that a title, having a specific title or being listed as having a title any way makes the person who has that title thereby soliciting. Again, as I pointed out, they might be soliciting as a role that they might need to solicit to get that title.

Often -- often times you will have say a host committee of six members where five of them have to go out and say raise $10,000 for an event, but we'll put this federal officeholder on there just because it's an honor or maybe it will make it more likely that people will contribute. But again, just -- just their presence on there does not make that a solicitation even if it does make it more likely that someone will contribute.

I've got a problem with alternative two where you talk about being listed as a host -- member of a host committee or as a title, having a title in some other
fundraising capacity, because that opens it up to complete subjectivity again and you don't know -- you don't know what titles we're talking about.

So I would just step back and say there needs to be a clear line that simply having a title associated with an event cannot constitute a solicitation. You have to go back to the definition of what solicitation is and is there an ask or is that federal candidate or officeholder making an ask or isn't -- or aren't they, and focus on the actual action that they are taking and not what title they're given.

VICE CHAIR BAUERLY: Could I ask you, both Mr. Philippe and Mr. Cairncross, to respond to the -- what -- solicit you keep saying is active, but we obviously, as part of the definition of “solicit” have -- that can happen in a written form, which is less active, I would -- could argue. So appearing on -- on a piece of paper that has a, you know, come to this fundraiser, here's the host committee, here's the dollar amount required to get in the door.

So what -- what would be required, in your view, to have your person be actively soliciting on a piece of
paper versus obviously in some sort of phone call or personal communication?

MR. PHILLIPPE: In my view, they would either need to sign the solicitation or have their signature on it or there needs to be a verb such as, Congressman Jones asks you to attend to contribute, asks you to donate or perhaps even on the response card it might say yes, Congressman Jones, I will attend for $5,000, you know, something outside the federal limits. Like -- like that would potentially be a solicitation because there is a verb there. It is written, so in that sense, it's not active. It's not going out and talking to somebody. But there is some action that's being taken.

They are claiming ownership. That -- that ask is coming from the officeholder instead of the third party, where in almost all these cases it's a third party state party or candidate making the solicitation and just citing that officeholder as having a role. That is -- that is a solicitation by the party. It's not a solicitation by the individual listed.

VICE CHAIR BAUERLY: But if we could -- so take the state party. So use my example, please, which was a
host committee of which a federal candidate or officeholder is a member of the committee, is inviting you to this event and here's the response card with a dollar amount on it. So in your view, that's not a solicitation?

MR. PHILLIPPE: If it -- if it says the host committee invites you to attend and Congressman Jones is a member of the host committee, then yes, that could be deemed a solicitation. But just having an invitation that says the state party is having this event and here is the host committee, that would not be a solicitation by the federal candidate or officeholder or by any member of the host committee.

VICE CHAIR BAUERLY: Mr. Cairncross would you --

MR. CAIRNCROSS: I -- I -- I agree with that, but like I say, I think two things. One, I think it would be - - well first, I think it's rare that a federal candidate or officeholder were to appear on the invitation as a host committee member one way or the other in practice, and that the overwhelming majority of these -- of these invites are going to be featured guests or honored speaker or honorary so and so.

And two, to the extent that you're a member of
the host committee, and typically the host committee members are donors to the event, they're not necessarily -- they're listed not necessarily because they're making the ask, but they're listed because here are the people who have contributed to sponsor this event. They are -- they are hosting it.

VICE CHAIR BAUERLY: Right, raise or give usually a dollar amount sort of --

MR. CAIRNCROSS: Or have -- have -- have given. And so if the host committee is, you know, and the federal candidate or officeholder was a member of that committee and they're saying the host committee asks you to attend this event and fund so and so, then I think that would trigger it, because it has that language where the -- those people, one of whom would be the federal candidate or officeholder, is reaching out and making that ask, I say actively, but I mean, that's in an active sense versus just appearing on the invite and not -- not being connected to the ask directly.

VICE CHAIR BAUERLY: Mr. Ryan?

MR. RYAN: I just want to dispute the notion that what is being proposed here, at least I don't think that
the correct approach to this is, as Mr. Phillippe put it, determining that a solicitation is being made on the basis of which title is being given. I don't think that's what's going on here. I think the correct approach is to say that if there -- what -- what makes it a federal candidate or officeholder solicitation is their authorization to have their name used on a communication that falls clearly within the scope of this Commission's definition of “to solicit,” a -- a printed communication that contains a reply device, to be specific.

Once you're in that universe of okay, a federal candidate is making a solicitation because they've authorized the use of their name on a communication that constitutes a solicitation under existing rules, you're talking about what I refer to as question number two, is this a specific solicitation for non-federal funds? Is this a general non-specific solicitation? Or is this a specific solicitation for permissible federal funds?

And I think the way I understand alternative two it is to say that there are certain instances in which we're going to deem these printed solicitations as being in the first category and explicit solicitation for non-
federal funds, and that is, if the federal candidate or 
officeholder signs the communication, the ask, or if the 
federal candidate or officeholder serves on -- in another 
capacity directly related to fundraising.

By contrast, I think that the Commission is 
proposing alternative two to treat other types of uses of a 
candidate's name authorized by that candidate on this 
invitation as a featured guest, for example, as a general 
solicitation and a disclaimer can clarify in the context of 
a general solicitation that yes, there is a solicitation 
going on here, but be clear, the federal candidate or 
officeholder is only soliciting federally-permissible 
funds, or in the -- I mean, that's my approach to the -- 
the whole issue. It's not someone being deemed to have 
made a solicitation based on what -- what title they're 
given.

VICE CHAIR BAUERLY: Mr. Chairman, I think my 
time is up, but if I may, I think Mr. Josefiak had 
something to add to this conversation.

MR. JOSEFIAK: Definitely. Obviously I dispute 
Mr. Ryan's position that just allowing your name to be put 
on an invitation is a solicitation. But I think part of
the challenge the Commission has in this overall issue of
host committee and what that means and what is a
solicitation and what is not is that it's part of the post-
BCRA culture from the very beginning when the Commission
looked at this and made that decision that A, being on a
host committee was viewed as a solicitation and whether
that was based on empirical evidence based on host
committees. And we've heard today there are many different
types of host committees, but maybe the Commission took the
position giving the benefit of the doubt that it could be
-- was taking that position.

And we've lived with that from the very
beginning. We've actually told, you know, members and
officeholders and candidates that were federal candidates,
you know, you're never to be listed as a host committee
because the Commission has in fact viewed that as a
legitimate solicitation, whether that's right or wrong or
if the Commission wants to change that and put honorary,
that's fine.

But when you usually list it in -- in -- in the
fundraising world as an honorary chairman, it means that
that's exactly what you are. They're using your name to be
put up there, but you’re not raising any money like the Chairman would or the Vice Chairman would, so there are some distinctions there. But when I made my example this morning and I talked about the host committee being included, I very specifically said that the host committee was expected to be raising some sort of money.

So you can make those distinctions if you want to, but again, I would take Mr. Cairncross' position, don't get bogged down on whether you're going to treat host committee in this. I think it's more important to look at what is not going to be included in that position and what is and just make your listing so that people have the clarity to know, you know, a host committee member is going to be, but an honorary chairman is not, but a featured guest is not. Just being listed as -- as being a guest at the invitation with no title is not, but you -- it's important, I think, for clarity purposes that the Commission make as much of a bright line distinction as from its perspective what is and was not -- was not a solicitation.

And, you know, I would take into consideration Mr. Phillippe's suggestion that, you know, you be sure that
it really would fall under that category of a solicitation as best you can before you make those distinctions. But I think it’s more important to have that kind of clarity, what is and what is not going forward. Because again, we’re going to be asked many times to approve these invitations and we need to know how a federal officeholder or a federal candidate can be listed on these invitations.

CHAIRMAN PETERSEN: Thank you. Commissioner Hunter.

COMMISSIONER HUNTER: Thank you, Mr. Chairman. Thank you all for coming this morning. It’s nice to hear that we -- we have -- everybody on the panel agrees that at least alternative two is a reasonable approach to take going forward and would provide some needed guidance to the regulated community. And I’m glad to hear Mr. Ryan say he doesn’t specifically oppose alternative two. That helps us a lot.

It would also -- I know this is very optimistic and I’m not going to promise anything, but the FEC is having its party conference here in Washington on May 3 and it would be great, and I think it’s possible, it’s not -- we’re not promising anything, but it will possible to --
I'm afraid to look over at the other side -- I'm still smiling. It would be at least possible to get this rule done by that conference and I really sincerely hope we can do that.

In -- in -- in the spirit -- alternative two was written, you know, with all of the previous AOs issued by the FEC in mind. I mean, it doesn't -- it clearly doesn't start with a clean slate and we've heard some conversation this morning about maybe not liking some of the relics of those AO opinions. But it was written trying to sort of take all of the sordid history of this issue in one place and provide some guidance going forward.

I'm wondering though in the event that we're not able to pass alternative two, I'd like to hear a little bit more detail from the panel about alternative one and what that would mean for, you know, your jobs on a day-to-day basis, not having the specific guidance on pre-event publicity. Sean?

MR. CAIRNCROSS: Sure.

COMMISSIONER HUNTER: Mr. Cairncross?

MR. CAIRNCROSS: Well I think two things. One, I think alternative one doesn't square with the -- with the
logic of the -- of the court opinion, right, because the
only distinction between these non-federal fundraising
events was there was an exemption that was -- or the state
party events were treated as exempt. They could do --
federal candidates or officeholders could say whatever they
want without restriction. And so now that that’s been
removed, I don’t think that serves as any sort of limiting
function on -- on any other non-federal event. All it does
is it -- it is dissolves the distinction.

So now you’ve got everything being -- falling
within the same category and to make -- to -- to not
address the -- the non-party, non-federal events leaves us
in the same question of asking well what - what do we do?
How do we -- can we treat them as the -- as the party non-
federal events are now being treated and are we safe
operating under those regs or do we have to go back to this
-- to the analysis that applies now and with the
uncertainties that exist today, which is the point of this
rulemaking, to try -- to try to clear up.

And if I could just revisit Mr. Ryan’s comments
just briefly. I think that with respect to the disclaimer
question and whether it’s required if you’re not -- if --
if you're appearing as a featured guest, et cetera, I just
think that that muddles the distinction of who's actually
doing the soliciting and the -- I don't think there's any
requirement that a federal candidate being listed on an
invite who is deemed in every other context as not
soliciting, by regulation not soliciting, suddenly be
transformed into a solicitor on the basis of -- on the
basis of the ask and the amount of the ask on the invite.

So anyway, that's a long way around it, but I --
but I think the answer is, there's uniformity that's needed
and the more uniformity, the -- you know, the greater ease
we're going to have with compliance.

MR. PHILLIPPE: Yeah, I agree completely.
There's just -- after Shays III, there's -- there's no
distinction between party events and non-party events with
respect specifically to the pre-event solicitation. I
spoke at the outset and commended the Commission for its
willingness to address that issue and I hope you won't shy
away from that because it has been a very confusing and the
Commission has admitted this, that the development of this
has been murky and confusing.

I mean, this is a -- an attempt to provide some
clarity, so -- so I would hope that you wouldn't shy away from -- from that opportunity. I think if -- if -- if you go with alternative one, we're going to be just where we were. I mean, frankly, the -- the practical effect is there really won't be much change because as Mr. Cairncross and I both -- both pointed out, this really is where all the confusion is and this really is where the practical impact is and that's in -- in the pre-event publicity.

The rules with respect to what you can or cannot say at a -- at an event once you're there, once people have already given money and been solicited, just aren't as important, and so I really would urge you to address the pre-event publicity, otherwise we will be sort of stuck in the same morass that we have been.

MR. RYAN: I'll just restate my position. If my colleagues on the panel who represent Republican Party committees want more campaign finance regulations on the books, again, the Campaign Legal Center doesn't oppose it.

(Laughter.)

MR. JOSEFIAK: On that note --

(Laughter.)

MR. JOSEFIAK: But just going with alternative
one, you're going to get the same request for advisory
opinions which you can't answer. You're going to get the
same complaints filed which you can't decide. Because it's
a very narrow ruling. It only applied to the one section
where the Commission allowed federal candidates and
officeholders to go to a party event and say anything they
wanted, including asking for money, which they never do,
which was -- that's so ironic because nobody goes to an
event that's already got the money in the door and asks
them for money.

They're going to thank them for the contribution,
but not ask them for the money, because it's already there.
That's sort of the ridiculousness of that decision. But
having said that, you go back to where things were. And
part of the problem is from the genesis of this. The first
AO that the Commission addressed was Cantor and Cantor was
dealing with a federal officeholder/candidate raising money
for a non-federal candidate. There is a specific section
in the statute that allowed for that because Congress,
thinking in terms of its own history, was saying, we don't
want to preclude ourselves from having to go and actually
solicit money for these folks.
But it was made very clear it had to be clean money. But it was a -- but it wasn't a limiting factor for everybody else. It was just making it clear you could do that for a non-federal candidate. You have the overall rule that says for a non-federal election you can go out and raise money provided it's clean, for anybody, for any kind of organization. So it's not changing that.

Then you had the RGA opinion, which applied to everything but a party committee. It was a non-candidate committee, but it was a 527 that wasn't affiliated with any party. So you had a rule that seemed similar to Cantor for other kinds of groups. But then that seems to all have fallen apart, so again, you're going to get the same kinds of complaints. You're going to get the same kinds of requests for clarity and AO. So I think this is the opportunity for the Commission, as best they can, to come with that clarity across the board for everyone. And that's why I think, at least three of us think that having alternative two with one rule for everybody with fair -- fairly clearly laid out at one time will give the regulated community the kind of instructions that they need as to how they can solicit non-federal money using federal candidates.
and federal officeholders.

COMMISSIONER HUNTER: Thank you.

CHAIRMAN PETERSEN: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

And thank you to the witnesses and a special thank you to Mr. Josefiak and Mr. Ryan, because you've been before to testify on exactly this same rule, I remember, and it's deja vu all over again.

I guess one of the issues that I've had from the beginning with this particular topic is trying to come up with a cohesive interpretation of a statute that says that federal candidates and officeholders are not allowed to solicit money outside of the federally-permissible amounts in connection with any federal election, in connection with any non-federal election, and then not withstanding that, a candidate or individual holding federal office may attend, speak or be a featured guest at a fundraising event for a state, district, or local committee of a political party.

Now it could have said by the way, when we said you're not allowed to solicit, we didn't mean that you couldn't be a -- that you couldn't attend, speak, or be a featured guest at any event. They -- they -- for whatever
reason, they singled out these party events.

And then we have the solicitation rule, which when we issued the Cantor opinion, solicitation meant ask. So for those of you that say, you know, you should really define the solicitation as the act of asking, we used to have a regulation that said that. It was thrown out by another Shays opinion and we had to broaden the definition of solicitation. So now it means ask, request, or recommend explicitly or implicitly, directly or indirectly, as reasonably understood in the context in which it is made. It's a lot broader than just please give me money now, or please give him money now.

So what I've been trying to do for years is to try and make sense out of all of this. At the end of the day, I understand -- believe me, I get the desire for a clear and uniformed set of rules that everybody will be able to advise their clients on. That is a good goal. I - - I'm with you on that. If we adopt alternative two, are we basically saying that the provision on attending, speaking or being a featured guest at party events is superfluous? Does it have any meaning anymore? What's it doing there?
MR. PHILLIPPE: I think that's what the Shays III court said essentially. I mean it said it was just merely clarifying, and if that is the case, it was merely clarifying language that could otherwise be construed to prohibit these things. If that is the case, then there is no legal import to that with respect to -- to non-party events.

MR. CAIRNCROSS: Yeah. You know, I think that -- I think that it's -- it's always -- Congress wrote the -- wrote the rule. The members know what these things look like, what these invites look like, and they were -- most frequently they're going to Lincoln Day Dinners or Jefferson-Jackson Day Dinners and I don't think there's any question that you could -- there was never a question about whether or not you could raise clean funds, but I think they didn't want to foreclose their ability to appear at their own state party events day in and day out, which they do. And so they -- they took this step to clarify that.

But that's -- that's speculation. I -- I don't have necessarily a basis.

MR. JOSEFIAK: I would tend to agree with that.

I don't think you want to read again the section about
being able to solicit money for non-federal candidates
that's clean any differently from the broader perspective.
If you look at the statute that you can raise money for
non-federal purposes, you can't raise it unless it's clean
for anybody versus going to party events and being able to
speak.

What you have to understand is that you're
dealing with members of Congress. They're on the floor of
the Senate in that particular case looking at okay, what do
we want to make clear in here from our purposes that we
always do? You know, they've always gone to these events.
They've raised money for -- for non-federal candidates.
That's just what they've done, and so they didn't want to
preclude that. They had broader language that allowed for
everything else to go on as long as it was clean, but they
wanted to make it clear in the statute that these kinds of
party activities could continue as long as they weren't
soliciting the contributions and that their -- their
involvement with non-federal candidates could continue as
long as they were raising clean money.

So -- and so I think that the general prohibition
of soliciting for -- for party committees was there unless
it was clean, but they wanted to reemphasize what they
could do for non-federal candidates as long as it was
clean. But I don't think you should read that as limiting
their ability to do things for others, like attending non-
federal events for other kinds of organizations when you
look at the broader language in the statute and then --
which was adopted in the Commission regulations that allow
for that.

I think the problem you have is exactly what
you're talking about. Based on the revised regulation on
the definition of solicitation, what in your mind is viewed
as an implicit solicitation as opposed to an explicit
solicitation. It's easy to know what an explicit
solicitation is, and I think that's where, quite frankly, I
was trying to go with the distinction between the host
committee situation and other kinds of things where you
could draw that line, where it's implicit, because it is
part of a fundraising package as opposed to, you know, it's
not uncommon in a non-political world to have an event with
a celebrity featured speaker to come as a draw. But they
are not viewed as soliciting the money themselves unless
they're specifically asking for it.
You have celebrities that ask for money. You have celebrities that just go to an event because they want to support the organization. So I think you can draw those distinctions, but I think the challenge you have is to figure out where in your head that implicit rule requires you to say it goes over the line.

COMMISSIONER WEINTRAUB: You're right, that is the challenge. Mr. Ryan, do you want to comment on why that provision is in there?

MR. RYAN: I just -- I agree with my co-panelist that it was in there probably under circumstances that Mr. Josefiak described, members on the floor saying this law is going to regulate a lot of our activity. We want to make super, extra clear that we can still show up at these state, district, local party fundraising events and speak. Yeah, and, you know, I think that's why it's in there and I think that at the time that the statute was written, it wasn't certain how this Commission would promulgate its rules defining “solicit,” and this Commission itself, as you alluded to, has had some -- you know, there have been changes in how this Commission has defined “solicit” and I have been involved in prompting some of those changes, I'll
admit with pride, I guess you might call it.

But -- but the definition of “solicit” in past years has been somewhat of a moving target, so.

COMMISSIONER WEINTRAUB: I’m gratified that it appears that there are at least a couple of options that we could adopt that would not immediately generate another lawsuit, so that’s always a -- that’s always a good sign.

Mr. Josefiak, you mentioned packages, and I’ve been thinking about packages also, fundraising packages. You know, sometimes you see these invitations and I’m told that photo ops are big incentives for donors. So sometimes you see these invitations that, you know, for $25,000 you get to come and sit in the huge banquet hall and listen to the big shot make a speech. For $50,000 you get to go to the private reception before or after and maybe get a little bit closer to the big shot. And for $100,000, you get a personal photo op. You get -- you know, I’m making up the numbers, but, you know, let’s -- let’s -- let’s just say it’s a really big shot, and for $100,000, people get to actually have their photo taken shaking the important person’s hand.

Does any of that make a difference? You know, is
-- if somebody -- if a federal candidate or officeholder agrees to be promoted in that way on the invitation, on the -- in the pre-publicity at the event and agrees that part of the package is yeah, I'm going to show up and shake people's hands and they get their picture taken with me and maybe I'll even autograph the picture for them, does that make it more of a solicitation? Should that have -- should we draw those kind of distinctions? Should we care about that? Anybody?

MR. CAIRNCROSS: I -- you know, I think that once you get into drawing those sorts of distinctions based on something other than what the federal candidate or officeholder is asking the individuals to do, it's still the sponsoring organization that's -- that's holding that fundraiser --

COMMISSIONER WEINTRAUB: The federal official is not asking you, but boy, he's going to thank you really sincerely as he's shaking your hand if you come across with that --

MR. CAIRNCROSS: He or she is, but at the same time, those federal officeholders, or particularly candidates, have a lot of reasons to -- to be shaking hands
and taking pictures, and that is, anyone who goes through a line and takes a picture with so and so is going to have that picture on their wall and say, you know, he or she --

COMMISSIONER WEINTRAUB: That's my guy.

MR. CAIRNCROSS: -- took that picture with me and that's -- that's my guy. It's not necessarily tied to any sort of financial commitment one way or the other. It's a --

COMMISSIONER WEINTRAUB: Except you have to make the financial commitment to get the picture.

MR. CAIRNCROSS: But that's on -- that's on the part and that -- you know, that's on the part of that -- that sponsoring organization and I just think -- I just think you're going a little far afield to -- to impute that to the federal candidate or officeholder.

COMMISSIONER WEINTRAUB: Got a different perspective on this, Mr. Ryan?

MR. RYAN: Yeah. I'm going to go back to my earlier point, which is that when a federal candidate authorizes the use of their identity in an invitation, you're talking about a solicitation and I think this Commission could go with alternative three, which says that
type of solicitation has to be limited to federally-permissible funds, period. I think that's permissible construction of the statute.

But we don't -- again, we don't oppose alternative two, which is a little bit less restrictive than that, where the Commission says, yes, you know, I think that's a solicitation, but you can make clear, unless you're really making the ask for non-federal funds explicitly by signing it or serving on the host committee, if instead you're just being the featured guest who is going to be available for picture taking, you can make clear that your solicitation is for federally-permissible funds only.

COMMISSIONER WEINTRAUB: But you wouldn't view that as an implicit ask if the federal official said the only way you're getting your picture taken with me is if you fork over 100 grand for the party or for, you know, whatever entity is the recipient?

MR. RYAN: Well again, I mean, you're talking about looking at the -- the invitation itself and under your scenario, is it get your picture taken with featured guest candidate X or is it, I'm candidate X, federal
candidate X. I am going to be at this fundraiser. Please make $100,000 contribution and get your picture --

COMMISSIONER WEINTRAUB: No, let's assume it's not that. Let's assume it's from, you know, the party or from whatever entity, because we're contemplating a unitary set of rules and it just says, you know, give $100,000 and you get to have your picture taken with the president or, you know, the leader of your party, whoever that is?

MR. RYAN: You know, again, I think that this Commission is proposing alternative two to draw some lines, to say that the question then would be, is getting your picture taken with someone a position specifically related to fundraising? The Commission can conclude that no, it's not.

Am I entirely comfortable with that position? No, but this is a compromise. The Campaign Legal Center came to the table and said we aren't going to oppose alternative two. We understand the Commission's trying to draw some hard lines here and the regulated community very obviously and articulately has expressed its desire for some clear lines.

So what's in alternative two without getting into
oh, should we modify it in some way that we haven't had a chance to review and write comments about? What's in there right now we're all right with. But it -- you know, it creates scenarios in which the bottom line is any participation by a federal candidate or officeholder in a non-federal fundraising event is done by and large to increase the take for the event.

And that's troubling, but the Commission has to draw lines between what's a solicitation and what's a solicitation for federal versus non-federal funds and alternative two will do an acceptable job of that, I think.

COMMISSIONER WEINTRAUB: Mr. Chairman, could I ask one more question? I know I'm over my time.

CHAIRMAN PETERSEN: Sure.

COMMISSIONER WEINTRAUB: Would it make a difference, because we are contemplating a unitary rule that could apply to all kinds of organizations, not just -- you know, it happens that we only have party organizations represented here as, you know, potential beneficiaries of the fundraising, but, you know, we could be talking about 527s or 501(c)(4)s, who now have a lot more leeway on what they can spend money on.
Suppose the candidate or officeholder is the featured guest at a fundraising event for a 501(c)(4) and then the 501(c)(4) turns around and spends the money on independent expenditures -- I suppose it depends on how we define independent. But without any further contact with the candidate or officeholder, they then choose to use that money for independent expenditures that promote that person's election, but specifically and explicitly urge that person's election. Any issues?

MR. CAIRNCROSS: And there's no -- and there's no -- I mean, there's no earmarking of --

COMMISSIONER WEINTRAUB: No, there's no earmarking, but the organization says, you know, come out and hear our good friend Senator So and So and the amount that you have to give in order to hear Senator So and So is soft money amount. It's over the permissible limits. They then take that money and use it to run ads that say vote for Senator So and So. Any issue?

MR. JOSEFIAK: Commissioner, I think that you got a couple issues. Number one, you come down to the solicitation issue, is it or isn't it? If it's a solicitation then obviously you have your 501(c)(4) rules
that limit the ability of a -- of a federal candidate, federal officeholder raising money. That's at the 20,000 range if it's going to be used for election activity.

So you've got that issue. But if it's not a solicitation, you're back in the same game we are now, can someone who's a federal officeholder/candidate go and be the featured guest at an event like this, and I don't see any difference between that and anything else. Is it -- as long as it's viewed as a non-solicitation by that candidate/federal officeholder, I think the same rules would apply.

MR. RYAN: I could think of hypothetical scenarios where I might be troubled by that sort of thing, but at the end of the day, this Commission needs to apply its regulations and there are two different regulations at issue here, or three, and the coordination rules, which we had a nice discussion about two weeks ago, are in the works here.

And -- and it strikes me that the analysis there would be has this candidate or officeholder engaged in conduct that meets one of the conduct prongs within the coordination rule in order to treat that expenditure as a
coordinated communication. And from what you have said in
your hypothetical, it seems that's not the case.

But, you know, I think it's important to look at the regulations on the books and apply them. And here we have separate acts, even though yeah, there's a nexus there, but has Congress regulated that nexus? As interpreted by the Commission, at least based on the details you've given, seemingly not. Should Congress regulate that type of activity in the future? Maybe. Maybe the Campaign Legal Center, if we see a bunch of that, depending on the coordination rules that are adopted by this agency and depending on the rule that's adopted here, the Campaign Legal Center might be lobbying Congress in a year or two saying oh, all this money's being raised for these (c)(4)s. They're spending it on independent expenditures. This is a bunch of baloney. We think congress should regulate. But we're not there yet.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I appreciate the indulgence.

CHAIRMAN PETERSEN: Commissioner McGahn.

COMMISSIONER McGAHN: Thanks, Mr. Chairman. Let me just continue on that, just to -- just to flesh that out
a little bit more. 501(c)(4)s can't do independent expenditures and maintain their tax status, correct, Mr. Cairncross? You were in private practice for a number of years?

MR. CAIRNCROSS: Yeah. Well that's my understanding. But also just to at least explicitly on the -- on the federal officeholder side, but on the -- on the -- just generally, theoretically that scenario is troubling on the coordinated front simply because federal candidates raise federal dollars for our federal committee and our federal committee engages in independent expenditures, in many cases for those federal officeholders.

COMMISSIONER McGAHN: And Congress -- Congress knew all that.

MR. CAIRNCROSS: Of course. Of course they did.

COMMISSIONER McGAHN: And I guess what they tried to do was make you choose between coordinated or IEs and the Supreme Court struck that down in McConnell. Back to the (c)(4)s, I haven't looked at this, and this is actually going to be for you, Mr. Ryan, since you just gave me the signal you wanted to have --

MR. RYAN: Please.
COMMISSIONER McGAHN: -- a nice discussion.

MR. RYAN: Thank you, sir.

COMMISSIONER McGAHN: I think in McCain-Feingold there's limits on the ability of 501(c)s to raise money for certain election-related activities and I haven't looked at it in awhile, but it seems to me if they're raising money specific it ends up being spent on, let's say they're not IEs. Let's say they're issue ads, but they're really, let's say close to the line, for the sake of argument, whatever that line may be, my sense is Congress thought about this and has already -- has already said that that sort of thing is okay and if it turns out it's not okay, you're prepared to go back to Congress and have Congress actually do something about it.

But today it seems like that under current law, Congress has thought about 501(c)s in some form and hasn't really done much. But there is something in McCain-Feingold about 501(c)s' ability to spend money on federal election, some federal election activity, I think. Am I right in that?

MR. RYAN: My recollection, like you, I didn't review those provisions of -- of BCRA in preparing for this

JARDIM REPORTING ASSOCIATES
(703)867-0396
hearing, but -- but I believe that the restrictions are in
regard to federal candidate raising of money for 501(c)s,
not across the board BCRA restrictions on 501(c)
activities.

COMMISSIONER McGAHN: That's -- that's the
hypothetical we're talking about, is ability of a federal
officeholder to raise for 501(c) and is that a problem and
that sort of thing. And I think Congress thought about
that. In certain instances there's a contribution limit.

MR. RYAN: Yeah, that's correct, but, you know, I
want to I think correct one thing that was said by Mr.
Cairncross, which is my understanding of federal tax laws,
that (c)(4)s can permissibly make independent expenditures.
It is the federal ban on corporate expenditures that long
prohibited them from making such expenditures, but tax law
says the (c)(4) can intervene and can in an election so
long as it's not the organization's primary purpose.

COMMISSIONER McGAHN: Right, I guess I was
thinking --

MR. RYAN: (c)(3)s can't do it. (c)(4)s can do
it.

COMMISSIONER McGAHN: (c)(4)s could, but they
couldn't do all their money on IEs.

MR. RYAN: But kept the requirement. Right.

COMMISSIONER MCGAHN: Right?

MR. RYAN: So suggest --

COMMISSIONER McGAHN: Thank you for that --

MR. RYAN: But I'm happy to look back at the
specific (c) -- 501(c) solicitation restrictions in BCRA.
They weren't raised in the NPRM to this. I don't know off
the top of my head. I suspect that they don't warrant any
special treatment within this rulemaking.

COMMISSIONER McGAHN: I thought the limit was
like 20 grand, but I don't know if that was indexed for
inflation or not and I haven't had to look at this in a
long time.

MR. JOSEFIAK: Commissioner McGahn, the rule
exempts raising money for 501(c) organizations from the
prohibition on raising soft money by officeholders and
candidates. There may be other rules, even including the
House and Senate rules that deal with members raising
money. But unless it is specifically designated for
election-related activities, and then it's $20,000, and
what you do if you're a candidate or an officeholder
raising money for a (c)(4), in order to have a safe harbor, you get a letter from the organization saying that it's not going to be doing that.

That's sort of what the -- what the -- what the statute says now and the regulations follow that through.

COMMISSIONER McGAHN: So it seems to me Congress did think through in some level at least a variant of the hypothetical of federal officeholders in raising money.

MR. JOSEFIAK: It was treating as a general rule 501(c)s as being exempt from the ban on soliciting soft money. It wasn't viewed as soft money under BCRA.

COMMISSIONER McGAHN: This question is for everyone, except Paul Ryan, but if you have experience with this, feel free to chime in. We've heard a lot about the need for clear -- clear rules and Mr. Cairncross, you mentioned how much comes across your desk reviewing these invites.

Have you had situations where folks have said, you know what, I just don't want to be involved with local politics, take my name off the invite? Looking at -- has this -- has -- has the mishmash of rules caused some chilling when it comes to participation in local politics
by federal officeholders and candidates?

MR. CAIRNCROSS: Well I think two things. One, it's hard -- it's always hard to determine a negative, so it's unclear how many candidates or officeholders just take themselves out of the running just to begin with. I think that it -- it certainly creates a level of confusion and I -- I frankly can't recall if there's been an instance where somebody has just said well, pull me off of that.

But I know that there has been -- there have been multiple instances where the requirements and just kind of virtually every time it comes up you've got to get on the phone with these organizations. You've got to calm down somebody's campaign committee or the state party lawyer or whomever it is that is dealing with these issues that doesn't deal with it perhaps on a regular basis.

And so I guess my answer to that is it's -- it's hard to know for certain, but it certainly doesn't increase activity.

COMMISSIONER McGAHN: Mr. Josefiak?

MR. JOSEFIAK: I don't know if it decreases it. It causes a lot of angst, but what it does is again goes to Mr. Ryan's position that by consenting to having your name
on there and reviewing it, that is automatically a solicitation. That's where I think the issue is, that no member or officeholder that I've ever dealt with would allow their name to be used without making sure it was legal and that they were not going to allow that invitation to go out unless somebody in a credible position from a legal perspective would review it and say that's going to meet the FEC's muster and we're not going to do that without that.

So there is that sort of limiting effect that unless you get that kind of response, they're not going to want their name on that invitation. But it's a catch-22. If you say by reviewing it you're automatically being viewed as agreeing with the solicitation or soliciting or that sort of thing. It's a matter of trying to make sure that you're not getting yourself and your -- and/or your committee into hot water by violating some of the FEC rules.

COMMISSIONER McGAHN: So maybe a better question would be in the converse, and what I hear you saying is -- is that you're not going to have a federal officeholder say, I don't want to know if you're using my name. That's
just -- that's just -- so the idea of they approved it or not becomes almost an academic exercise because if you go out and use your local congressman's name without permission, there's probably a political price to pay.

MR. JOSEFIAK: Exactly.

COMMISSIONER McGAHN: Because he'll say never use my name again.

MR. JOSEFIAK: That's exactly right.

COMMISSIONER McGAHN: And then if there's exposure, it gets complicated. So it can't be just approval. That can't be the standard.

MR. JOSEFIAK: That's exactly right and that's what I tried to get at this morning, that, you know, I have not -- I don't know of any case where if a member or an officeholder name is used, they're not going to want some documentation that has been signed off from a legal perspective and they're willing to then commit to letting their name used. It's just the way it is.

COMMISSIONER McGAHN: Let me continue down the road of -- the broadly define the time it takes to figure all this out, the various disclaimers, because Mr. Phillippe I think hit on it in his earlier testimony about
disclaimers. Although they sound easy, after awhile it takes up half the page. You got the “paid-for-by.” You might have a “not authorized by.” You got best efforts. Now you have this. You may have state law disclaimers. So you may end up having a whole, you know, page of disclaimers.

Let me -- let me ask a very technical question. Let's say a local party is having a fundraiser in a state where the law requires that local party to state the limits of state law. So it says state law permits you to contribute up to $5,000 corporate money or something, and there are states that have those -- you have to put that in the disclaimer.

But let's say they have a federal officeholder as a featured guest, which also seems to be okay. Does that inclusion of mandatory state language convert what most would say is not a solicitation by that federal officeholder into a solicitation by that federal officeholder? My guess is your answer is going to be no.

MR. JOSEFIAK: And exactly right, but again, it goes back to -- or to answer that question, is the federal officeholder simply being listed on the invitation as the...
honored guest?

COMMISSIONER McGAHN: That's it.

MR. JOSEFIAK: Or speaker?

COMMISSIONER McGAHN: That's -- right.

MR. JOSEFIAK: The answer then is definitely no. But we've been -- and because of the Commission's sort of murky waters on all of this is that we would prefer that there would be no reference at all to contribution limits on that face of the invitation, where it is.

COMMISSIONER McGAHN: But what if state law requires it?

MR. JOSEFIAK: But on the invitation, that's the problem and that's going to be a problem.

COMMISSIONER McGAHN: Mr. Ryan, do you have different thoughts or similar thoughts?

MR. RYAN: Definitely different thoughts and I disagree with the premise of the question, or at least I would -- I want to state for the record that I'm not within the universe of people who agree that that is not a solicitation, being authorizing the use of your name on what constitutes a solicitation on the Commission's definition of to solicit, even if in the capacity of the
featured guest.

So I'll restate, if you authorize the name or your use on an invitation that meets the definition for -- to solicit, you've made a solicitation, then the question is, are you making a solicitation for federally-permissible funds or a general solicitation or an explicit solicitation for non-federal funds? And if you are serving in the featured guest, I read alternative two as establishing that that's more analogous to making a general solicitation. The disclaimer can be used to make clear and is required, would be required, in fact, to make clear that you're not soliciting non-federal funds.

And as awkward as it might be to have one paragraph saying state law permits you to give up to X a disclaimer after it's saying federal -- I am this federal candidate, whatever their name is, is not soliciting funds in excess of federal amount limits or from prohibited sources.

COMMISSIONER McGAHN: Let's say the invite lists a federal officeholder as a special guest, state law disclaimer requires them to state you can give up to $5,000 corporate, but up in the body of the invite it says, you
know, tickets are $500 per individual. What do you do in that situation?

MR. RYAN: Again, the featured guest designation, you have a solicitation under the existing rules.

COMMISSIONER McGAHN: We disagree on that, but let's assume -- let's assume for sake of argument, it's a solicitation by the federal officeholder, but it's limited to five -- $500 per individual.

MR. RYAN: I think the bright line is to have a disclaimer in there for the federal candidate under alternative two.

COMMISSIONER McGAHN: So the fact that state law requires them to say it, they don't have a choice in the matter? That undoes the $500 per individual limited ask so then they'd have to put like the Cantor type disclaimer on there as well?

MR. RYAN: Yeah, I think that's the bright line that parties seem to like and that the Campaign Legal Center does not oppose.

MR. JOSEFIAK: I think that's the real difference between Mr. Ryan and our position, is that we would say you don't need a disclaimer. Mr. Ryan would say it is and it
would be that kind of I'm not soliciting the contribution
over the federal limits. That's -- that's the difference.

COMMISSIONER McGAHN: I would assume the RNC and
the NRSC have similar views of the NRCC on this. Disagree
with Mr. Ryan on that point?

MR. PHILLIPPE: Yeah, I disagree. You just don't
need to say that you're not doing something that -- that
you're not doing. You know, if you're not soliciting, you
don't need to go ahead and tell people you're not
soliciting, because they won't think you are anyway.

COMMISSIONER McGAHN: Let me ask about what we
shorthand call the -- the Cantor disclaimer language. How
specific does that need to be? Does it really have to
spell it out or I think it's in -- see whose comments these
were. I think it's the NRSC comments. I'm only soliciting
federal funds. My involvement tonight should not be
construed as solicitation for non-federal funds.

Does -- does it have to -- how much verbiage do
you really need? What if it just says something, I'm not
soliciting money beyond what's permitted under federal
laws; is that -- is that sufficient? Let's start with Mr.
Ryan.

JARDIM REPORTING ASSOCIATES
(703)867-0396
MR. RYAN: I would -- I would prefer to see a --
a disclaimer that specifically states the federal amounts
that are not being solicited in excess of, but --

COMMISSIONER McGAHN: It’s getting kind of long
in the disclaimers though.

MR. RYAN: But I think that under --

COMMISSIONER McGAHN: And the reason why I ask is
I’m thinking of Mr. Cairncross sitting there reviewing it
and he’s got all these disclaimers and he may not have room
and, you know, can he tighten up language or is that
somehow not enough of a disclaimer?

MR. RYAN: Yeah, I’m looking now at some
disclaimers that have been used. For example, in your
statement of reasons in the McCain MURs, where Senator
McCain used the disclaimer saying, we are honored to have
Senator McCain as our special guest for this event. In
accordance with federal law, Senator McCain is not
soliciting individual contributions in excess of $2,100 per
person, nor is he soliciting corporate, labor union or
foreign contributions.

That’s the type of disclaimer that I think should
be required, that level of detail.
COMMISSIONER McGAHN: That much -- that much language. What if it doesn't fit because they need all the other disclaimers and they're only sending out a card and postage wise all they can afford is a smaller card?

MR. RYAN: I think they need to make it fit. I think that should be the required disclaimer.

COMMISSIONER McGAHN: Make it fit?

MR. RYAN: Yeah.

COMMISSIONER McGAHN: 6.5, just keep shrinking it?

MR. JOSEFIAK: But I don't think, in all due respect, that based on the Cantor AO that that kind of language is required. I think just some basic information that the federal candidate's not soliciting contributions over and above the federal limits and prohibitions would be sufficient.

COMMISSIONER McGAHN: It seems like Mr. Ryan's asking almost a magic words test for the disclaimer --

MR. JOSEFIAK: Oh, I mean, but that goes to show you that even, you know, Cantor you're dealing with a specific fact pattern in what the disclaimer was there and that was okay. And again, this is another reason to have
rulemaking. If you're going to require something specific, then you have the obligation to say it is.

    If it's something that just in general terms you have to notify individuals that are the recipients of these solicitations that you're not raising this kind of money --

    COMMISSIONER McGAHN: Let's -- let me -- let me -- let me follow-up on -- continue my hypos. You have -- you have an invite listing a federal officeholder as a special guest, but you're in a state that bans corporate money and has contribution limits less than the federal, right? Like Connecticut maybe. Do you still need the Cantor disclaimer on that? They can't, as a matter of state law, even accept money that's beyond the limits and prohibitions of federal law, so you need -- the disclaimer to me seems at that point redundant.

    Does anyone disagree with that?

    MR. JOSEFIAK: Our position has been, Commissioner McGahn, that when you're raising clean money, you don't have to have any disclaimer whatsoever.

    COMMISSIONER McGAHN: When you say clean money, does that mean that money in Virginia --

    MR. JOSEFIAK: Clean under federal law.
COMMISSIONER McGAHN: -- is dirty?

MR. JOSEFIAK: No, I'm saying that clean under federal law, which means contributions of no more than for party committee $5,000, for an individual.

MR. PHILLIPPE: Right, in your scenario that would be federal money, so you wouldn't need that extra disclaimer.

COMMISSIONER McGAHN: Mr. Ryan?

MR. RYAN: I would point to the actual language in alternative two which states that this type of disclaimer is required for a non-federal fundraising event that contains a solicitation of funds outside the limitations and prohibitions of the act or Levin funds. If -- if state law doesn't permit any funds outside of what federal law permits, then I don't think the disclaimer requirement in alternative two is triggered and we're comfortable with that.

But I also want to make a point of clarification about what this Commission said in Cantor. I have the language for the disclaimer that was approved in Cantor. The Commission recommended language as follows. I am asking for a donation up to $2,000 per election from an
individual's own funds or up to 5,000 per election for multi-candidate or political party committee. I am not asking for funds from corporations, labor unions and minors.

So this Commission in Cantor was quite specific:

It didn't simply advise Cantor, yeah, you can get away with this with -- this is permissible if you use a disclaimer. All you have to say is all I want is federally-permissible funds. This Commission was more specific. We endorse this Commission's approach in Cantor.

MR. JOSEFIAK: But there was a recommendation not a mandate.

COMMISSIONER MCGAHN: Right, it's an AO, and minors can give now so that we don't have to put minors in there anymore for Cantor. But if you read the concurrence of the three commissioners, they seem to not be nearly as firm on that AO, right? There's three commissioners that agreed that that was sufficient, but I think made clear that wasn't the only way to skin the cat.

I'm going to yield back, Mr. Chair. I don't want to keep going down hypothetical land, but thank you.

CHAIRMAN PETERSEN: Thank you, Commissioner.
Walther.

COMMISSIONER WALTHER: Thank you, Mr. Chairman.

Thanks for being on the panel and giving us your best. We have to admit, like Commissioner Weintraub, we've been through the Shays rulemakings and I think once we got that last opinion, my first reaction was, let's get rid of this sentence and get on with life and hopefully we'll at least do that, but now maybe be confronted with a way to try and make it better and hopefully we can do it. But we've not always, as you know, been able to reach a consensus on some of these issues.

In trying to reach kind of a compromise, I want to ask you, for those of you that are -- I've come from a history of being asked to raise money or being asked to give money or being asked to organize fundraisers and it seems to me when people get to these events they know quite well what the ground rules are, for the most part, not always.

But it seems to me it's kind of a safe harbor, and maybe that's not the best word, but a safety thing to have a disclaimer on there so that there's no question or there's reduced question as to the involvement of the
candidate. And so I'm wondering in your own experience if -- because we're going back and forth a lot on whether we should or should not have a disclaimer -- how important is it? Does it reduce the amount of contribution most of the time? Does it make it more difficult? Does it matter the space on an invitation? What is the negative part about having a disclaimer in terms of real life fundraising, in your experience?

MR. CAIRNCROSS: Sure, I hear you. In my experience, I think a couple of things. The first is, that disclaimer, if it's -- if it's required on something where there isn't a solicitation by the federal officeholder, creates confusion and requires an explanation to both the attendee and to the organizers of the event.

The second is, there's a practical concern about space on the invitation and third, one way to perhaps square this would be to require that sort of language appear at the event to protect against the conduct where, you know, perhaps during a speech someone says something, it could be deemed a solicitation, a card or whatever the case may be, would make clear that the attendance at that event doesn't constitute a solicitation of funds outside
the federal limits.

But leaving in place on the printed invitation what I view as being, like I said, before the logically consistent approach of -- of if a federal candidate or officeholder is not soliciting, they're not soliciting.

COMMISSIONER WALTHER: You make -- or the point was made earlier though that most people, not always, at least the fundraisers, they say I'm going to -- people who are committed to raise money are often invited to these events and they don't always fulfill their commitment. But assuming idealistically that everybody there has already paid the money, what you say there probably won't affect conduct too much of a degree. I'm raising the point --

MR. CAIRNCROSS: That's true.

COMMISSIONER WALTHER: It seems to me the invitation is --

MR. CAIRNCROSS: Sure, but the flip side to that is if everybody there is -- has already maxed out or already given what they can give, then why -- why worry about the conduct at the -- at the event at all?

COMMISSIONER WALTHER: Well, I'm speaking right now about the disclaimer at the invitation. I agree. I
understand that.

MR. JOSEFIAK: Commissioner Walther, I don't think it affects the amount of money that's raised, because I think it's irrelevant to the recipient of the invitation. It may be a lot more clutter that they don't pay attention to, but it's there. Where I think it's relevant is to the entity that's putting on the event and to the federal officeholder/candidate who is allowing their name to be used for the event as to the potential of violating federal law, and I think that's where the issue is and that's where the confusion is.

It's what the organizers of the event, not the donors to the event. And whether or not these organizers are going to follow into this chasm of FEC confusion and find themselves in an enforcement case is what concerns them and the federal officeholder/candidate in the same boat.

I'm not going to let my name be used on this invitation unless I know that you've signed off on it and it's got everything it needs to have on there or else I'm not going to do it. And so then it becomes an issue for the lawyers and the staff of the member or the -- or the
candidate to deal with and it becomes quite frankly
sometimes a political issue between the organization and
the candidate/campaign/officemember when they can't
necessarily come to an agreement because the local
organization says well, that's crazy. We can't do that.
That makes no sense to us. We've already gotten the
invitations printed. What do we do with them?

That's -- that's, I think, from a practical
standpoint where the more you have the clarity ahead of
time to know what this has to say, the check -- checklist
of things to do, and that the party committees can get that
out to the local folks, the better off everyone's going to
be. But from -- from a fundraising standpoint, I don't
think it makes a difference other than what is all this
nonsense on this thing and they just throw it away anyway.

COMMISSIONER WALTHER: Do you think -- just going
for a quick question from all of you because we're getting
short of time. But I think we all find ourselves falling
back into what the title is or what the relationship is,
not necessarily just a fundraising, but to the entity or
the sponsor. If somebody has a position, they're the
chairman or if they're on the host committee, that lends a
suggestion that they are -- have a role in the outcome other than just to participate as a featured, say an honored guest or a featured speaker, appears to be independent of what's going on at the fundraiser. It's there to provide a -- to be there, but to meet with people, maybe as these comments have pointed out, not just to raise money, but to enhance their own visibility within a party or an organization.

So I can see where in trying to reach a compromise we could find ourselves getting right back into the title situation and it seems to me if we were to do that I'd be thinking more in lines of if there's a responsibility in some regard or some relationship to the entity, regardless of the event, as opposed to someone who is there to make it a good event regardless of their motives and have -- and just be a featured speaker or a honored guest, something to that effect. So I welcome your comments on -- on that.

MR. RYAN: My view, and the view of the Campaign Legal Center, is that what matters is if the communication itself, and I think we're talking mainly here about the pre-event publicity, if the communication itself meets this
Commission's definition of to solicit, a communication, and
includes a reply device in short, then you're talking about
a solicitation and the question becomes is it a permissible
solicitation of federal funds? Is it a vague solicitation
that requires a disclaimer?

They're the questions that then get asked. So I
think that's the piece of the relationship that matters,
authorization of the use of your name as a federal
candidate in the sales pitch that asks for money.

MR. JOSEFIAK: Commissioner, I think --

COMMISSIONER WALTHER: Mr. Josefiak.

MR. JOSEFIAK: I was just going to say, I think
where you were going with your analysis is where the
initial Commission went in its analysis about a host
committee, that somehow the host committee had that kind of
function. And I think what we're raising is questions
about just being a host committee, whether that meets that
standard or is it some kind of a host committee?

Granted, it's a difficult issue to grapple with,
to sort of try to fine tune that a little bit, but since
you have the opportunity to look at this closer, is there a
way to even fine tune what would qualify as that versus
not? And -- and I would encourage you to at least look at
that.

MR. CAIRNCROSS: And just to follow on, whatever
the Commission should decide on this front, so long as you
include in the regulations affirmative, “this is okay, this
is not a solicitation,” I think that that is the -- that
should be the first priority. I think -- I think the other
is a legitimate and -- legitimate discussion and there are
legitimate arguments there, by the way, but the Commission
needs to have that clarity in the reg.

COMMISSIONER WALTHER: You have a comment?

MR. PHILLIPPE: Yeah, I agree with that. I mean,
there is -- I think we all agree on the need for clarity,
but the bright line does need to be drawn in the right
place and I agree with Mr. Cairncross that there are
specific kind of things you can do that are not
solicitations, but any -- I do think any -- the need for
safe harbor for titles or roles just isn’t there because
having those again does not constitute solicitations.

If you do go the safe harbor route, I would
suggest doing it in an exemplary fashion as in having
examples under the -- under the definition of solicitation,
because I do find that sometimes with parties and candidates, they'll just gravitate to the -- safe harbor becomes like a lowest common denominator and they'll just use that and they're afraid to do anything else. So it does chill in other -- other respects. So I think you would want to make it clear that these are examples of things that are not solicitations. And practically speaking, that would be very, very helpful for parties.

COMMISSIONER WALThER: Thank you, Mr. Chairman.

CHAIRMAN PETERSEN: Thank you. Does General Counsel have questions?

MS. DUNCAN: Thank you, Mr. Chairman. I wanted to continue along the line of exploring the aspect of alternative two that goes to pre-event publicity and specifically the statement that we've been calling here, I think, disclaimer, that the federal candidate or the officeholder is not making the solicitation.

Interestingly, I don't think we talk about it that way in the rule or in our -- proposed rule or in our explanation of it. We call it more like an attribution statement. I'm not sure whether that's for you just a semantic difference or whether it would make a difference
in terms of your views about the disclaimer, but I just
make that point as a point of clarification.

And also, we’ve heard, I think, about from three
of your points of view, I think the downsides of that
disclaimer or attribution statement. But I’m wondering
whether there are any circumstances in which it might be
helpful, and I’m thinking of a situation where perhaps it’s
not absolutely clear whether the invitation, the pre-event
publicity is a solicitation by the federal candidate or the
officeholder.

For example, if we were to adopt the safe harbor
approach and the federal candidate is listed on the
invitation in a capacity or with a title that we haven’t
deemed to be either specifically constituting a
solicitation or not, it’s unclear, would it then be helpful
in that -- under those circumstances to have the disclaimer
that says specifically that the federal candidate, this is
not a solicitation on the part of the federal candidate, or
are there any other circumstances where -- where -- I
understand your -- your concerns with it, but are there any
circumstances where the belt and suspenders aspect of it
would be helpful?
MR. CAIRNCROSS: Like I said earlier, I think it would be -- it would be most helpful if a federal candidate or officeholder could make a general solicitation on an invite asking for funds above federal amounts and have that attribution statement or disclaimer, you know, cut that out. But I don't think that that's -- we're not arguing for that, but I think that that's where it would be most useful.

With -- with respect to clarifying a non-safe harbor title, I think it would be helpful if -- if there were some -- if it helped give a guarantee that that would be -- that would be a safe use of the title. I think you'd be hard pressed -- if you establish a safe harbor for and list clearly titles, we're going to be very hard pressed -- no federal candidate or officeholder is going to say well, okay, I'm going to go outside of that list and just be listed on there in an unprotected fashion.

It would require something else, the event organizers or whomever. They won't -- they won't do that. So I think that would be where it would be most helpful.

MR. JOSEFIAK: I think it's really an either/or proposition that under your example you have maybe gone
over the line from being a person listed on an invitation
to actually making a solicitation and then you would have a
different set of “attributions” or /disclaimers, that you
would have to use basically the Cantor language, that
you're not raising money outside the federal limits and
prohibitions.

And so I think that it's an either/or
proposition. If you're under the safe harbor, you don't
need it at all. If you're not under the safe harbor, you
may need the Cantor language. But, you know, just so that
you know when we use the word “disclaimer,” we're using the
jargon that our -- our clients are going to be familiar
with. We recognize we're not making any distinction
between attribution and disclaimer, but when we go back to
them they're going to say -- they're going to view this as
another disclaimer and that's -- that's sort of the short-
term language we use to -- to communicate with our clients.

MR. RYAN: When I read this NPRM back in early
December, I made a note in the margin next to the final
section of alternative two where currently it states any
such publicity must include a clear and conspicuous written
statement that the solicitation is not being made by the
federal candidate or officeholder. I wrote into the margin
that, or a disclaimer limiting to federal funds. Because
again, my analysis of all of this is the solicitations made
when you authorize your use in a communication that has a
reply device, that meets your definition of solicitation.

So it makes at least as much sense, if not more
sense, to have the disclaimer, whatever you want to call
it, be a clarification that that already existing
solicitation is one for federally-permissible funds than to
disclaim that a solicitation itself is being made, which is
what this current language does. It's not a big -- not a
big enough deal for me to have made a point of it earlier
in the hearing, but I'm kind of hearing you about it's
different language.

Cantor says -- acknowledges a solicitation is
being made and states it's limited to federally-permissible
funds. This just says solicitation isn't being made. I
think the Cantor type language makes a little bit more
sense in this context, but we are also not opposed just
retaining this language and perhaps adding to it the
federally-permissible funds type language with amounts
specified.
MR. PHILLIPPE: Could I just go back to a concern that Mr. Cairncross raised earlier, because when you're dealing with the -- the realm of these unprotected roles or titles and you're not sure -- you know, it's not something you explicitly can't be, it's not something you explicitly can be. Once you start requiring a disclaimer, attribution statement, people are going -- it's naturally going to become seen as a solicitation role because you're required to have some kind of attribution statement on it.

So if you didn't have that attribution statement, that title would be seen as improper solicitation and that just goes in a direction that I think would be improper.

MS. DUNCAN: Let me just follow-up with Mr. Cairncross and say, is your answer to my question the same if we don't assume the safe harbor paradigm?

MR. CAIRNCROSS: So that potentially a title would trigger a solicitation?

MS. DUNCAN: Right.

MR. CAIRNCROSS: Well hopefully -- hopefully we won't find ourselves in that world, but if we were, then you would need -- you would want some -- yeah, you would want some sort of something to hang your hat on in terms of
protecting your clients, yes. Because you will inevitably, if we find ourselves without a safe harbor, I mean, you will find yourselves with complaint after complaint concerning honorary chair versus featured speaker.

I mean, soon enough you will be deciding the questions of what titles, if any, you know, constitute a solicitation and so I think it would behoove the Commission to avoid that and settle the matter now.

MS. DUNCAN: One more question on a different topic. We received some comments about whether the scope of the rule had been correctly established. We had had it the proposed rule covers events at which non-federal funds “are raised” and we received the comment that that should be "are solicited."

And from the nods of three heads I can see your response to that, but I'd like to ask of the person whose head is not nodding, Mr. Ryan, whether there -- whether you have any thoughts about that proposal and whether you foresee any issues with changing the scope. Does that create any kind of loophole that we haven't potentially envisioned or are the safeguards of the rest of the act sufficient to deal with that?
MR. RYAN: I think -- I hadn't given it any thought prior to this moment. It seems to me that -- and I want to give it a little bit more thought before giving you a definitive answer. I know that the statute refers to fundraising events and because the related invitations, those communications that we're all presuming the federal candidate or officeholder will be identified on as a fundraising device, a solicitation device, I'm not willing right now to say, no problem, change the language of the NPRM. I'm perfectly comfortable with that without giving it some further thought.

I'm not quite sure what legal significance changing the scope of the NPRM from solicit to fund -- you know, from fundraising to solely solicit might be. There is one aspect in which the scope of the NPRM I think does not encompass some of the discussion that's gone on here today and that is to amend your definition of to solicit to include safe harbors of some sort within that. I think that there's no notice of that in the NPRM that you're contemplating amendments to amending 300.2(m) and I think that would be inappropriate as a -- as a result of this rulemaking proceeding.
MS. DUNCAN: I welcome the comments of the other witnesses.

MR. JOSEFIAK: It was our comment that actually raised that point and the example was you can have an event where you're actually saying okay, I'm raising $1,000 for county Republican X from individuals and in that state there's unlimited corporate and individual money. And so the only way, let's say, the candidate would even consider doing this is going to an event that was going to be at that level.

So you go to the event. You have the event, but at the event itself, someone writes a check out for, you know, $50,000 and it's a corporation. That was never the intent of the -- of the event itself, but you can't -- I mean, it's legal under state law and you can't stop someone from writing that check. And it had nothing to do with what you were soliciting.

And that's why we said, you know, the focus is on solicitations and the prohibitions are on soliciting by federal officeholders and candidates, not on the -- not on the third-party entity that's actually raising the money, if in fact none of the event materials, none of the program.
soliciting of money was actually asking for that kind of money in the first place.

So under my theory that you wouldn't even need any sort of Cantor disclaimer because it's coming from individuals subject to the $1,000 threshold, the party committee could have gotten 5,000 from an individual, but the candidate or the officeholder makes it a policy not to go to any event that more than $1,000 from individuals is being raised, period. So it was trying to get to that sort of equation where it wasn't affecting what could happen at that event outside of the control of the officeholder period, but it was dealing with the solicitation for that event that became sort of the focus of all of this rulemaking, quite frankly.

MR. RYAN: You know, I have looked at some of the actual language in the proposed rule. I do have an opinion and one of the areas that this -- this type of change might concern me is that in the event where a federal candidate or officeholder makes a general solicitation orally at the event, right now the rule would require a disclaimer to either be printed or orally made by the federal candidate or officeholder and I think that type of requirement should
remain in the rules regardless of whether or not the entity hosting the event has explicitly itself solicited non-federal funds, funds in excess of federal amount limits. Because if the people there know that they can write a corporate $1,000 or $100,000 check, a general solicitation by a federal candidate or officeholder in a -- you know, looking at the Commission's own definition of solicit, which includes where a person would reasonably understand in the context that the -- that the ask is being made or the communication is made, in that context, I think the disclaimer should be retained.

So that does give me a little bit -- raises some concerns, changing it solely to an explicit solicitation by the hosting event versus an event at which non-federal funds are being raised.

CHAIRMAN PETERSEN: I think --

MS. DUNCAN: Thank you.

CHAIRMAN PETERSEN: I think we'll get a chance maybe to -- we're going to have a chance for some follow-up questions, so if there's further comments, we can get to it. I just wanted to ask the staff director if you had any questions?
MR. PALMER: Mr. Chairman, I do not.

CHAIRMAN PETERSEN: Okay. We do have a few minutes remaining for some follow-up questions. Mr. Phillippe, you look like you wanted to weigh in on -- or was I interpreting you wanting something else?

MR. PHILLIPPE: No, I mean, I think it was -- I'm glad that the NRCC in their comments pointed that out. It just highlights the practical importance of these kind of things where people out in the states at the parties could read these things and say wait, does that mean -- what happens if we get, you know, a check outside the federal limits, or does that mean, you know, one of our big high-dollar donors is going to be there and we'd like to take him aside and ask him something and it has no relation to the federal candidate or officeholder and so it's these sort of unintended consequences, I think, that you have to worry about because these things mean something to the people at the state level that we don't necessarily always take into account up here in -- up here in the D.C. bubble.

And one thing related to that point that we haven't addressed much today is if we -- if we do remain in this morass of AOs and statements of reasons guiding pre-
event publicity, the -- just the practical effect for state parties, for their finance folks, for volunteers who want to host an event in their house and we have to tell them they have to -- you know, if they're doing it for a candidate, might have to send out two separate mailings and have a save-the-date and then another one where you don't mention -- you don't mention the federal officeholder and you have to explain to people, you know, they say well is he coming or not, you know, and you can't -- you can't couple that with a solicitation, or you have to send an e-mail with two separate .pdfs because, you know, you're elevating form over substance here where you have to separate the ask from -- from -- from the officeholder's name.

These kind of things just make zero sense and there's nothing to gain by them. So I really would encourage you to as you proceed through this rulemaking to really keep in mind those practical, sometimes unintended consequences.

CHAIRMAN PETERSEN: Thank you. Do my colleagues have any follow-up questions? Okay, hearing none, I want to thank our witnesses again for -- for their very
articulate and very informative remarks and I think all of us up here on the dais would want to extend our most heartfelt thanks for -- for not only your written comments, but for -- for your willingness to engage in this question and answer period.

So if there's nothing else that we need to take care of, this meeting is adjourned.

(Whereupon, at 12:03 p.m., the meeting was concluded.)
CERTIFICATE OF REPORTER

I, JENNIFER O'CONNOR, the officer before whom the foregoing testimony was taken, do hereby testify that the testimony of witnesses was taken by me and thereafter reduced to a transcript under my direction; that said record is a true record of the testimony given by the witness; that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this testimony was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

____________________
JENNIFER O'CONNOR

JARDIM REPORTING ASSOCIATES
(703)867-0396