

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.

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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

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## P R O C E E D I N G S

(10:06 a.m.)

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2  
3 CHAIRMAN PETERSEN: Good morning. The special  
4 session of the Federal Election Commission for Tuesday,  
5 March 16, 2010 will please come to order.

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

14 I'd like to thank all those people who took the  
15 time to -- to -- to comment on the proposed rules and  
16 particularly those who have been willing to testify at this  
17 morning's hearing. And let me also thank the Office of  
18 General Counsel, whose efforts on this have been  
19 immeasurable, including our General Counsel, Tommie Duncan,  
20 our head of Policy Division, Rosie Smith, David Adkins, Amy  
21 Rothstein, and I know that I should also mention on this  
22 and other Shays III rulemakings, Bob Knop, Jessica

1 Selinkoff, and I know that there have been others whose  
2 names I may be forgetting, but your efforts have been truly  
3 appreciated throughout this whole process.

4 Today's format will be as follows. We will have  
5 one panel consisting of four witnesses that will last for  
6 90 minutes. Each witness will have five minutes to make an  
7 opening statement and we have a light system. When it  
8 starts -- the green light starts flashing, that means  
9 you're within your last minute. Once the yellow light  
10 comes on, you're within your last 30 seconds, and when the  
11 red light comes on, that means the five minutes has -- has  
12 been reached.

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

20 So without further ado, we will invite our  
21 witnesses to take their places at the witness table. Our  
22 panel this morning consists of Tom Josefiak, a former

1 Chairman of the FEC, representing -- speaking here on  
2 behalf of the National Republican Congressional Committee;  
3 Paul Ryan, on behalf of the Campaign Legal Center; John  
4 Phillippe, on behalf of the Republican National Committee;  
5 and Sean Cairncross, on behalf of the National Republican  
6 Senatorial Committee.

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

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

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

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

21           In the immediate post-BCRA era, a statute that  
22 limited federal candidate and officeholder solicitations

1 for non-federal candidates, and a statute that prohibited  
2 federal candidate officeholder non-federal solicitations  
3 for party and other non-federal committees unless it was  
4 federally clean, and a statute that explicitly allowed for  
5 federal candidate officeholder attendance and speaking at  
6 party events, regardless of the amount of non-federal funds  
7 being solicited by others, it appeared fairly clear to many  
8 of us how this new law would be applied based upon the  
9 succinct language in the statute itself and the initial FEC  
10 regulations.

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

19           With regard to other non-federal fundraising  
20 events, the same rule appeared to apply with the  
21 Commission's issuance of the RGA Advisory Opinion. I  
22 emphasize appear since after that opinion the Commission's

1 position has become at best confusing with the issuance or  
2 failure to issue guidance and numerous other AOs and MURs.  
3 Our written comments spell out that history and I would  
4 respectfully request that those comments be made part of  
5 the record.

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

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

1 what is not.

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

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

1 on the invite as the honored guest should not change that  
2 fact.

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

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

18           It seems analogous to me to the Commission's  
19 regulatory ban on corporations stating in company  
20 newsletters sent to all employees and to the public that  
21 the company is prohibited from soliciting them for  
22 corporate PAC contributions or "I can't legally solicit you

1 for your PAC contribution” since that kind of statement, by  
2 the Commission’s own regulations, is viewed as a  
3 solicitation. I think those are the kinds of  
4 considerations the Commission needs to look at and I  
5 commend the Commission for its efforts and again, we  
6 wholeheartedly support with modifications alternative two.

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

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

11 STATEMENT OF PAUL RYAN ON BEHALF OF  
12 THE CAMPAIGN LEGAL CENTER

13 MR. RYAN: Thank you, Mr. Chairman. Good  
14 morning, Commissioners. Thank you for giving me the  
15 opportunity to be here this morning. I think by contrast  
16 to many of the rulemakings, or I think it’s fair to say  
17 most of the rulemakings the Commission engages in, this one  
18 seems quite simple by comparison. The Commission’s charge  
19 in this rulemaking is to repeal the invalidated portion of  
20 your regulation that permits federal candidates and  
21 officeholders to solicit non-federal funds at state,  
22 district, and local party fundraisers. We believe -- the

1 Campaign Legal Center believes that alternative one is the  
2 simplest if most straightforward way of doing that.

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

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

21 Regardless of which of the three alternatives,  
22 and the Campaign Legal Center doesn't oppose any of them,

1 this Commission chooses -- I think the analysis really  
2 boils down to two questions. First, is a federal candidate  
3 or officeholder making a solicitation, period, or question  
4 mark, I should say, and second question, if so, is that  
5 solicitation for non-federal funds or is it limited to  
6 federal funds?

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

13           Under alternative two, if a federal candidate or  
14 officeholder authorizes the use of their name in a position  
15 specifically related to fundraising, it's treated as a  
16 solicit in the pre-event publicity materials. That package  
17 of materials is treated under alternative two as a  
18 solicitation and it's prohibited if that invitation or pre-  
19 event publicity material solicits non-federal funds, or in  
20 other words, that -- if the federal candidate or  
21 officeholder is identified in a position specifically  
22 related to fundraising, there's no disclaimer cure for

1 that. It's simply the solicitation itself has to be  
2 limited to federal funds.

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

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

20           Under alternative three by contrast, any  
21 invitation identifying and authorized by a federal  
22 candidate or officeholder that solicits funds is prohibited

1 if the -- if the invitation solicits non-federal funds.  
2 There's no disclaimer cure for any of these and regardless,  
3 it doesn't make that distinction between in a position  
4 specifically related to fundraising or some other position.  
5 And again, I think if the Commission decides that they  
6 don't want to try to draw that line between what positions  
7 are and are not specifically related to fundraising,  
8 alternative three is an acceptable way to implement the  
9 statute.

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

20 The Cantor A0 correctly required disclaimers for  
21 general solicitations. That's one aspect of the Cantor A0  
22 that there was a majority of the Commissioners in agreement

1 with. Alternatives two and three both correctly require  
2 disclaimers for general solicitations, although some  
3 commenters here today and in written form are urging the  
4 Commission to dispose of the disclaimers for general  
5 solicitations. We respectfully urge the Commission not to  
6 do so, to retain those disclaimers.

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

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

12           STATEMENT OF JOHN PHILLIPPE ON BEHALF OF THE  
13           REPUBLICAN NATIONAL COMMITTEE

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

22           From the RNC perspective, we deal with federal

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

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

21           Because these rules regarding pre-event publicity  
22 in practice are what -- what really matter. These are the

1 things that when we're dealing with campaigns and with  
2 parties, approving invitations, that sort of thing, these  
3 are really where solicitations are made and we need to be  
4 clear about what constitutes a solicitation and more so,  
5 what constitutes a solicitation by a federal candidate or  
6 officeholder.

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

15           A couple principles I would like to just point  
16 out and hope the Commission recognizes and would be happy  
17 to discuss, first is that I do not believe that a  
18 solicitation can be imputed based on somebody's defined  
19 role in an event. A solicitation is an act and I think the  
20 regulatory definition of solicitation recognizes that. So  
21 whether you're listed as an honorary chair or a member of a  
22 host committee, or a featured speaker, unless you are

1 actively engaged in the act of soliciting, you are not  
2 soliciting, and just having a certain title doesn't --  
3 doesn't make you -- doesn't bestow that solicitation upon  
4 you.

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

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

17           For one thing, that's not always the motive for  
18 appearing at events and I think we and other commenters  
19 point that out. But even if it is, federal candidates and  
20 officeholders are allowed to do a lot of things that make  
21 it more likely that an event will raise money. They're  
22 allowed to be involved in the planning and finance

1 strategy. So just because that's their motive or just  
2 because it might have the effect of leading to raising more  
3 money, that doesn't make that a solicitation.

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

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

15 Mr. Cairncross.

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

18 MR. CAIRNCROSS: Good morning. Good morning, Mr.  
19 Chairman, Vice Chair, members of the Commission, on behalf  
20 of the NRSC, I appreciate the opportunity to testify today.  
21 My committee, our members are frequently invited to attend  
22 and appear at non-federal fundraising events and so we have

1 a real interest in this rulemaking.

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

13           The bottom line on this rulemaking is very brass  
14 tacks. Can my client appear on this invite? Can my client  
15 go to this event? These are -- alternative three, which  
16 leaves open to the wind the question of how many people  
17 properly constitute a fundraiser and turn potential feature  
18 guests into Hamlet, don't necessarily lend the clarity to  
19 this -- to this rulemaking that's necessary. And  
20 alternative one, which leaves large swaths of fundraising -  
21 - non-federal fundraising untouched, also don't provide  
22 that clarity, and the practical effect of that is federal

1 officeholders and candidates will be limited in their  
2 involvement with these events more so than Congress  
3 intended, and that certainly shouldn't be, I think, I would  
4 submit, the goal of the regulations.

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

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

20           And that brings me to a point that hopefully we  
21 can lend some clarity or help the Commission clarify today,  
22 and that is, does the appearance by a candidate on an

1 invite that doesn't constitute a solicitation by the  
2 candidate, but where the invite solicits money outside the  
3 limits and prohibitions of federal law require some sort of  
4 Cantor or RGA-style disclaimer.

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

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

1 a solicitation.

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

9           Thank you.

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

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

20           You mentioned that you are supportive of  
21 alternative two. Alternative two in -- it does contain a  
22 provision that talks about solicitations by someone other

1 than a federal candidate or officeholder and it says that  
2 that's okay, but it does say that any such publicity must  
3 include a clear and conspicuous written statement that the  
4 solicitation is not being made by the federal candidate or  
5 officeholder, in other words, a disclaimer of some sort.

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

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

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

22           MR. PHILLIPPE: Yes, absolutely. That's one of

1 the modifications we would -- we would certainly recommend  
2 with respect to alternative two. It's just there's nothing  
3 to disclaim if -- if the -- if the federal officeholder  
4 isn't making a solicitation.

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

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

17 But the rule goes on to provide a specific  
18 example of what constitutes solicitation. It lists the  
19 following types of communications, constitutes  
20 solicitation. The first example is a communication that  
21 provides a method of making a contribution or donation  
22 regardless of the communication. This includes but is not

1 limited to providing a separate card, envelope, or reply  
2 device that contains an address so on and so forth to  
3 return a contribution to the requesting organization.

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

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

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

21 MR. CAIRNCROSS: Yeah, if I could just put it  
22 another way. I think that it may make sense if the

1 Commission were to say, look, in an invite that says  
2 Senator -- Senator Dodd asks you to -- to contribute to  
3 this organization and then the ask was a non-federal ask  
4 over and above the amounts of federal, then I think the  
5 disclaimer makes sense.

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

13           CHAIRMAN PETERSEN: Mr. Josefiak?

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

1 my example. Why is it there?

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

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

22           And the last thing you're going to do is want the

1 President of the United States or any Senator or  
2 Congressman to get pulled into an enforcement case because  
3 the party didn't do what it was supposed to do even if the  
4 candidate's committee had reviewed that invitation, would  
5 have no idea whether those rules were being met or not,  
6 because they really look to the parties to know what those  
7 rules of engagement are.

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

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

13           CHAIRMAN PETERSEN: Mr. Phillippe?

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

15           CHAIRMAN PETERSEN: Sure.

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

1 it decreases the impact of any of them.

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

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

15 CHAIRMAN PETERSEN: Mr. Cairncross?

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

1 be the natural reading of that.

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

9           CHAIRMAN PETERSEN: Mr. Ryan?

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

15           I think the Commission's regulations defining  
16 solicit establish that a communication that gives you a  
17 method, a concrete method of making contribution is a  
18 solicitation and we move on to the second question, when a  
19 federal candidate or officeholder authorizes their name to  
20 appear in that solicitation, the question becomes, is that  
21 federal candidate or officeholder making a solicitation for  
22 non-federal funds? The disclaimer is what limits the

1 solicitation, which is being made, there's no doubt about  
2 it, a solicitation to a legal, permissible solicitation of  
3 not -- of federal funds.

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

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

20 MR. CAIRNCROSS: I'm not sure there is much in it  
21 either way. I think it wouldn't hurt to have them in the  
22 regulation itself, but I think at the very least, they

1 ought to be in the -- in the E&J. And I certainly look to  
2 the other panelists and ask if anyone else has anything to  
3 add to those. But those -- those, at least in my  
4 experience, are the -- are the most common sort of  
5 introductory or general statements of thanks that federal  
6 candidates and officeholders make during an appearance at  
7 one of these events.

8 CHAIRMAN PETERSEN: Mr. Josefiak?

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

20 If there's any uncertainty in that regulation,  
21 that's where the issues are going to be. And so I would  
22 strongly recommend, particularly in this case where you're

1 going to have a lot of non-federal entities throughout the  
2 country using this regulation when they're looking for  
3 federal candidate participation or officeholder  
4 participation, that it be put in the regulation as much as  
5 you can, any of this information, and not the explanation  
6 and justification.

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

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

17 Mr. Phillippe, I think you said in your testimony  
18 this morning that members of a host committee may raise  
19 funds, but they don't have to, and in your written comments  
20 said that this designation is not meaningful because in  
21 your experience that federal candidates, when they  
22 participate on host committees, they're not really doing

1 the fundraising, unlike other host committees might -- host  
2 committee members might be doing.

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

14           And I just want to make one other reference and  
15 I'd like to open it up to all of you to answer because the  
16 NRSC in your written comments, you did say that adding the  
17 word "honorary" to host committee would be a way to  
18 eliminate the appearance that this could -- this would be a  
19 solicitation, which suggests that in your view, being on a  
20 host committee might be viewed by some as a solicitation at  
21 a minimum. So I'd like you to -- if you could just sort of  
22 further explain that.

1           And then again, ask for others to comment on how  
2 do we deal with this particular title and role? Because I  
3 think it is one that we've obviously identified in the NPRM  
4 as something we've -- we've proposed to address in a  
5 certain way and there's been some comment about this when  
6 it seems to be one of the more -- I think featured guest is  
7 something perhaps we can all find some consensus around.  
8 Apparently host committee is not one we can, so.

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

15           I still think that soliciting is -- I mean,  
16 that's an active. You're making an ask, so unless you're  
17 saying please contribute or there is something specific  
18 about the federal candidate officeholder reaching out and  
19 attaching themselves to that, to requesting those funds in  
20 some way, that it's not a solicitation and that host --  
21 even host committee membership wouldn't -- wouldn't hit  
22 that threshold.

1           But like I say, if honorary host committee is a  
2 way for the Commission to get there and gives us some  
3 clarity on what we can -- in what we can say, then I think  
4 that's fine.

5           VICE CHAIR BAUERLY: Okay, Mr. Phillippe?

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

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

20           I've got a problem with alternative two where you  
21 talk about being listed as a host -- member of a host  
22 committee or as a title, having a title in some other

1 fundraising capacity, because that opens it up to complete  
2 subjectivity again and you don't know -- you don't know  
3 what titles we're talking about.

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

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

21           So what -- what would be required, in your view,  
22 to have your person be actively soliciting on a piece of

1 paper versus obviously in some sort of phone call or  
2 personal communication?

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

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

21 VICE CHAIR BAUERLY: But if we could -- so take  
22 the state party. So use my example, please, which was a

1 host committee of which a federal candidate or officeholder  
2 is a member of the committee, is inviting you to this event  
3 and here's the response card with a dollar amount on it.  
4 So in your view, that's not a solicitation?

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

13 VICE CHAIR BAUERLY: Mr. Cairncross would you --

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

22 And two, to the extent that you're a member of

1 the host committee, and typically the host committee  
2 members are donors to the event, they're not necessarily --  
3 they're listed not necessarily because they're making the  
4 ask, but they're listed because here are the people who  
5 have contributed to sponsor this event. They are -- they  
6 are hosting it.

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

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

20 VICE CHAIR BAUERLY: Mr. Ryan?

21 MR. RYAN: I just want to dispute the notion that  
22 what is being proposed here, at least I don't think that

1 the correct approach to this is, as Mr. Phillippe put it,  
2 determining that a solicitation is being made on the basis  
3 of which title is being given. I don't think that's what's  
4 going on here. I think the correct approach is to say that  
5 if there -- what -- what makes it a federal candidate or  
6 officeholder solicitation is their authorization to have  
7 their name used on a communication that falls clearly  
8 within the scope of this Commission's definition of "to  
9 solicit," a -- a printed communication that contains a  
10 reply device, to be specific.

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

19           And I think the way I understand alternative two  
20 it is to say that there are certain instances in which  
21 we're going to deem these printed solicitations as being in  
22 the first category and explicit solicitation for non-

1 federal funds, and that is, if the federal candidate or  
2 officeholder signs the communication, the ask, or if the  
3 federal candidate or officeholder serves on -- in another  
4 capacity directly related to fundraising.

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

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

20 MR. JOSEFIK: Definitely. Obviously I dispute  
21 Mr. Ryan's position that just allowing your name to be put  
22 on an invitation is a solicitation. But I think part of

1 the challenge the Commission has in this overall issue of  
2 host committee and what that means and what is a  
3 solicitation and what is not is that it's part of the post-  
4 BCRA culture from the very beginning when the Commission  
5 looked at this and made that decision that A, being on a  
6 host committee was viewed as a solicitation and whether  
7 that was based on empirical evidence based on host  
8 committees. And we've heard today there are many different  
9 types of host committees, but maybe the Commission took the  
10 position giving the benefit of the doubt that it could be  
11 -- was taking that position.

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

20           But when you usually list it in -- in -- in the  
21 fundraising world as an honorary chairman, it means that  
22 that's exactly what you are. They're using your name to be

1 put up there, but you're not raising any money like the  
2 Chairman would or the Vice Chairman would, so there are  
3 some distinctions there. But when I made my example this  
4 morning and I talked about the host committee being  
5 included, I very specifically said that the host committee  
6 was expected to be raising some sort of money.

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

21           And, you know, I would take into consideration  
22 Mr. Phillippe's suggestion that, you know, you be sure that

1 it really would fall under that category of a solicitation  
2 as best you can before you make those distinctions. But I  
3 think it's more important to have that kind of clarity,  
4 what is and what is not going forward. Because again,  
5 we're going to be asked many times to approve these  
6 invitations and we need to know how a federal officeholder  
7 or a federal candidate can be listed on these invitations.

8 CHAIRMAN PETERSEN: Thank you. Commissioner  
9 Hunter.

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

18 It would also -- I know this is very optimistic  
19 and I'm not going to promise anything, but the FEC is  
20 having its party conference here in Washington on May 3 and  
21 it would be great, and I think it's possible, it's not --  
22 we're not promising anything, but it will possible to --

1 I'm afraid to look over at the other side -- I'm still  
2 smiling. It would be at least possible to get this rule  
3 done by that conference and I really sincerely hope we can  
4 do that.

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

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

19 MR. CAIRNCROSS: Sure.

20 COMMISSIONER HUNTER: Mr. Cairncross?

21 MR. CAIRNCROSS: Well I think two things. One, I  
22 think alternative one doesn't square with the -- with the

1 logic of the -- of the court opinion, right, because the  
2 only distinction between these non-federal fundraising  
3 events was there was an exemption that was -- or the state  
4 party events were treated as exempt. They could do --  
5 federal candidates or officeholders could say whatever they  
6 want without restriction. And so now that that's been  
7 removed, I don't think that serves as any sort of limiting  
8 function on -- on any other non-federal event. All it does  
9 is it -- it is dissolves the distinction.

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

20 And if I could just revisit Mr. Ryan's comments  
21 just briefly. I think that with respect to the disclaimer  
22 question and whether it's required if you're not -- if --

1 if you're appearing as a featured guest, et cetera, I just  
2 think that that muddles the distinction of who's actually  
3 doing the soliciting and the -- I don't think there's any  
4 requirement that a federal candidate being listed on an  
5 invite who is deemed in every other context as not  
6 soliciting, by regulation not soliciting, suddenly be  
7 transformed into a solicitor on the basis of -- on the  
8 basis of the ask and the amount of the ask on the invite.

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

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

22           I mean, this is a -- an attempt to provide some

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

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

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

19           (Laughter.)

20           MR. JOSEFIK: On that note --

21           (Laughter.)

22           MR. JOSEFIK: But just going with alternative

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

11           They're going to thank them for the contribution,  
12 but not ask them for the money, because it's already there.  
13 That's sort of the ridiculousness of that decision. But  
14 having said that, you go back to where things were. And  
15 part of the problem is from the genesis of this. The first  
16 AO that the Commission addressed was Cantor and Cantor was  
17 dealing with a federal officeholder/candidate raising money  
18 for a non-federal candidate. There is a specific section  
19 in the statute that allowed for that because Congress,  
20 thinking in terms of its own history, was saying, we don't  
21 want to preclude ourselves from having to go and actually  
22 solicit money for these folks.

1           But it was made very clear it had to be clean  
2 money. But it was a -- but it wasn't a limiting factor for  
3 everybody else. It was just making it clear you could do  
4 that for a non-federal candidate. You have the overall  
5 rule that says for a non-federal election you can go out  
6 and raise money provided it's clean, for anybody, for any  
7 kind of organization. So it's not changing that.

8           Then you had the RGA opinion, which applied to  
9 everything but a party committee. It was a non-candidate  
10 committee, but it was a 527 that wasn't affiliated with any  
11 party. So you had a rule that seemed similar to Cantor for  
12 other kinds of groups. But then that seems to all have  
13 fallen apart, so again, you're going to get the same kinds  
14 of complaints. You're going to get the same kinds of  
15 requests for clarity and A0. So I think this is the  
16 opportunity for the Commission, as best they can, to come  
17 with that clarity across the board for everyone. And  
18 that's why I think, at least three of us think that having  
19 alternative two with one rule for everybody with fair --  
20 fairly clearly laid out at one time will give the regulated  
21 community the kind of instructions that they need as to how  
22 they can solicit non-federal money using federal candidates

1 and federal officeholders.

2 COMMISSIONER HUNTER: Thank you.

3 CHAIRMAN PETERSEN: Commissioner Weintraub?

4 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

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

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

19 Now it could have said by the way, when we said  
20 you're not allowed to solicit, we didn't mean that you  
21 couldn't be a -- that you couldn't attend, speak, or be a  
22 featured guest at any event. They -- they -- for whatever

1 reason, they singled out these party events.

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

13           So what I've been trying to do for years is to  
14 try and make sense out of all of this. At the end of the  
15 day, I understand -- believe me, I get the desire for a  
16 clear and uniformed set of rules that everybody will be  
17 able to advise their clients on. That is a good goal. I -  
18 - I'm with you on that. If we adopt alternative two, are  
19 we basically saying that the provision on attending,  
20 speaking or being a featured guest at party events is  
21 superfluous? Does it have any meaning anymore? What's it  
22 doing there?

1           MR. PHILLIPPE: I think that's what the Shays III  
2 court said essentially. I mean it said it was just merely  
3 clarifying, and if that is the case, it was merely  
4 clarifying language that could otherwise be construed to  
5 prohibit these things. If that is the case, then there is  
6 no legal import to that with respect to -- to non-party  
7 events.

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

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

21           MR. JOSEFIK: I would tend to agree with that.  
22 I don't think you want to read again the section about

1 being able to solicit money for non-federal candidates  
2 that's clean any differently from the broader perspective.  
3 If you look at the statute that you can raise money for  
4 non-federal purposes, you can't raise it unless it's clean  
5 for anybody versus going to party events and being able to  
6 speak.

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

21           So -- and so I think that the general prohibition  
22 of soliciting for -- for party committees was there unless

1 it was clean, but they wanted to reemphasize what they  
2 could do for non-federal candidates as long as it was  
3 clean. But I don't think you should read that as limiting  
4 their ability to do things for others, like attending non-  
5 federal events for other kinds of organizations when you  
6 look at the broader language in the statute and then --  
7 which was adopted in the Commission regulations that allow  
8 for that.

9 I think the problem you have is exactly what  
10 you're talking about. Based on the revised regulation on  
11 the definition of solicitation, what in your mind is viewed  
12 as an implicit solicitation as opposed to an explicit  
13 solicitation. It's easy to know what an explicit  
14 solicitation is, and I think that's where, quite frankly, I  
15 was trying to go with the distinction between the host  
16 committee situation and other kinds of things where you  
17 could draw that line, where it's implicit, because it is  
18 part of a fundraising package as opposed to, you know, it's  
19 not uncommon in a non-political world to have an event with  
20 a celebrity featured speaker to come as a draw. But they  
21 are not viewed as soliciting the money themselves unless  
22 they're specifically asking for it.

1           You have celebrities that ask for money. You  
2 have celebrities that just go to an event because they want  
3 to support the organization. So I think you can draw those  
4 distinctions, but I think the challenge you have is to  
5 figure out where in your head that implicit rule requires  
6 you to say it goes over the line.

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

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

1 admit with pride, I guess you might call it.

2 But -- but the definition of "solicit" in past  
3 years has been somewhat of a moving target, so.

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

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

22 Does any of that make a difference? You know, is

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

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

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

20 MR. CAIRNCROSS: He or she is, but at the same  
21 time, those federal officeholders, or particularly  
22 candidates, have a lot of reasons to -- to be shaking hands

1 and taking pictures, and that is, anyone who goes through a  
2 line and takes a picture with so and so is going to have  
3 that picture on their wall and say, you know, he or she --

4 COMMISSIONER WEINTRAUB: That's my guy.

5 MR. CAIRNCROSS: -- took that picture with me and  
6 that's -- that's my guy. It's not necessarily tied to any  
7 sort of financial commitment one way or the other. It's a  
8 --

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

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

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

18 MR. RYAN: Yeah. I'm going to go back to my  
19 earlier point, which is that when a federal candidate  
20 authorizes the use of their identity in an invitation,  
21 you're talking about a solicitation and I think this  
22 Commission could go with alternative three, which says that

1 type of solicitation has to be limited to federally-  
2 permissible funds, period. I think that's permissible  
3 construction of the statute.

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

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

19           MR. RYAN: Well again, I mean, you're talking  
20 about looking at the -- the invitation itself and under  
21 your scenario, is it get your picture taken with featured  
22 guest candidate X or is it, I'm candidate X, federal

1 candidate X. I am going to be at this fundraiser. Please  
2 make \$100,000 contribution and get your picture --

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

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

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

22 So what's in alternative two without getting into

1 oh, should we modify it in some way that we haven't had a  
2 chance to review and write comments about? What's in there  
3 right now we're all right with. But it -- you know, it  
4 creates scenarios in which the bottom line is any  
5 participation by a federal candidate or officeholder in a  
6 non-federal fundraising event is done by and large to  
7 increase the take for the event.

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

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

14           CHAIRMAN PETERSEN: Sure.

15           COMMISSIONER WEINTRAUB: Would it make a  
16 difference, because we are contemplating a unitary rule  
17 that could apply to all kinds of organizations, not just --  
18 you know, it happens that we only have party organizations  
19 represented here as, you know, potential beneficiaries of  
20 the fundraising, but, you know, we could be talking about  
21 527s or 501(c)(4)s, who now have a lot more leeway on what  
22 they can spend money on.

1           Suppose the candidate or officeholder is the  
2 featured guest at a fundraising event for a 501(c)(4) and  
3 then the 501(c)(4) turns around and spends the money on  
4 independent expenditures -- I suppose it depends on how we  
5 define independent. But without any further contact with  
6 the candidate or officeholder, they then choose to use that  
7 money for independent expenditures that promote that  
8 person's election, but specifically and explicitly urge  
9 that person's election. Any issues?

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

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

19           MR. JOSEFIK: Commissioner, I think that you got  
20 a couple issues. Number one, you come down to the  
21 solicitation issue, is it or isn't it? If it's a  
22 solicitation then obviously you have your 501(c)(4) rules

1 that limit the ability of a -- of a federal candidate,  
2 federal officeholder raising money. That's at the 20,000  
3 range if it's going to be used for election activity.

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

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

19           And -- and it strikes me that the analysis there  
20 would be has this candidate or officeholder engaged in  
21 conduct that meets one of the conduct prongs within the  
22 coordination rule in order to treat that expenditure as a

1 coordinated communication. And from what you have said in  
2 your hypothetical, it seems that's not the case.

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

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

20 CHAIRMAN PETERSEN: Commissioner McGahn.

21 COMMISSIONER MCGAHN: Thanks, Mr. Chairman. Let  
22 me just continue on that, just to -- just to flesh that out

1 a little bit more. 501(c)(4)s can't do independent  
2 expenditures and maintain their tax status, correct, Mr.  
3 Cairncross? You were in private practice for a number of  
4 years?

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

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

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

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

22 MR. RYAN: Please.

1 COMMISSIONER McGAHN: -- a nice discussion.

2 MR. RYAN: Thank you, sir.

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

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

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

1 hearing, but -- but I believe that the restrictions are in  
2 regard to federal candidate raising of money for 501(c)s,  
3 not across the board BCRA restrictions on 501(c)  
4 activities.

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

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

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

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

22 COMMISSIONER McGAHN: (c)(4)s could, but they

1 couldn't do all their money on IEs.

2 MR. RYAN: But kept the requirement. Right.

3 COMMISSIONER MCGAHN: Right?

4 MR. RYAN: So suggest --

5 COMMISSIONER MCGAHN: Thank you for that --

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

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

15 MR. JOSEFIK: Commissioner McGahn, the rule  
16 exempts raising money for 501(c) organizations from the  
17 prohibition on raising soft money by officeholders and  
18 candidates. There may be other rules, even including the  
19 House and Senate rules that deal with members raising  
20 money. But unless it is specifically designated for  
21 election-related activities, and then it's \$20,000, and  
22 what you do if you're a candidate or an officeholder

1 raising money for a (c)(4), in order to have a safe harbor,  
2 you get a letter from the organization saying that it's not  
3 going to be doing that.

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

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

9 MR. JOSEFIAK: It was treating as a general rule  
10 501(c)s as being exempt from the ban on soliciting soft  
11 money. It wasn't viewed as soft money under BCRA.

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

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

1 by federal officeholders and candidates?

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

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

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

19 COMMISSIONER McGAHN: Mr. Josefiak?

20 MR. JOSEFIK: I don't know if it decreases it.  
21 It causes a lot of angst, but what it does is again goes to  
22 Mr. Ryan's position that by consenting to having your name

1 on there and reviewing it, that is automatically a  
2 solicitation. That's where I think the issue is, that no  
3 member or officeholder that I've ever dealt with would  
4 allow their name to be used without making sure it was  
5 legal and that they were not going to allow that invitation  
6 to go out unless somebody in a credible position from a  
7 legal perspective would review it and say that's going to  
8 meet the FEC's muster and we're not going to do that  
9 without that.

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

19 COMMISSIONER McGAHN: So maybe a better question  
20 would be in the converse, and what I hear you saying is --  
21 is that you're not going to have a federal officeholder  
22 say, I don't want to know if you're using my name. That's

1 just -- that's just -- so the idea of they approved it or  
2 not becomes almost an academic exercise because if you go  
3 out and use your local congressman's name without  
4 permission, there's probably a political price to pay.

5 MR. JOSEFIK: Exactly.

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

8 MR. JOSEFIK: That's exactly right.

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

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

19 COMMISSIONER McGAHN: Let me continue down the  
20 road of -- the broadly define the time it takes to figure  
21 all this out, the various disclaimers, because Mr.  
22 Phillippe I think hit on it in his earlier testimony about

1 disclaimers. Although they sound easy, after awhile it  
2 takes up half the page. You got the "paid-for-by." You  
3 might have a "not authorized by." You got best efforts.  
4 Now you have this. You may have state law disclaimers. So  
5 you may end up having a whole, you know, page of  
6 disclaimers.

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

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

20           MR. JOSEFIK: And exactly right, but again, it  
21 goes back to -- or to answer that question, is the federal  
22 officeholder simply being listed on the invitation as the

1 honored guest?

2 COMMISSIONER McGAHN: That's it.

3 MR. JOSEFIAK: Or speaker?

4 COMMISSIONER McGAHN: That's -- right.

5 MR. JOSEFIAK: The answer then is definitely no.

6 But we've been -- and because of the Commission's sort of  
7 murky waters on all of this is that we would prefer that  
8 there would be no reference at all to contribution limits  
9 on that face of the invitation, where it is.

10 COMMISSIONER McGAHN: But what if state law  
11 requires it?

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

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

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

1 featured guest.

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

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

19           COMMISSIONER McGAHN: Let's say the invite lists  
20 a federal officeholder as a special guest, state law  
21 disclaimer requires them to state you can give up to \$5,000  
22 corporate, but up in the body of the invite it says, you

1 know, tickets are \$500 per individual. What do you do in  
2 that situation?

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

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

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

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

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

20 MR. JOSEFIK: I think that's the real difference  
21 between Mr. Ryan and our position, is that we would say you  
22 don't need a disclaimer. Mr. Ryan would say it is and it

1 would be that kind of I'm not soliciting the contribution  
2 over the federal limits. That's -- that's the difference.

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

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

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

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

1 MR. RYAN: I would -- I would prefer to see a --  
2 a disclaimer that specifically states the federal amounts  
3 that are not being solicited in excess of, but --

4 COMMISSIONER McGAHN: It's getting kind of long  
5 in the disclaimers though.

6 MR. RYAN: But I think that under --

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

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

21 That's the type of disclaimer that I think should  
22 be required, that level of detail.

1           COMMISSIONER McGAHN: That much -- that much  
2 language. What if it doesn't fit because they need all the  
3 other disclaimers and they're only sending out a card and  
4 postage wise all they can afford is a smaller card?

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

7           COMMISSIONER McGAHN: Make it fit?

8           MR. RYAN: Yeah.

9           COMMISSIONER McGAHN: 6.5, just keep shrinking  
10 it?

11          MR. JOSEFIAK: But I don't think, in all due  
12 respect, that based on the Cantor A0 that that kind of  
13 language is required. I think just some basic information  
14 that the federal candidate's not soliciting contributions  
15 over and above the federal limits and prohibitions would be  
16 sufficient.

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

19          MR. JOSEFIAK: Oh, I mean, but that goes to show  
20 you that even, you know, Cantor you're dealing with a  
21 specific fact pattern in what the disclaimer was there and  
22 that was okay. And again, this is another reason to have

1 rulemaking. If you're going to require something specific,  
2 then you have the obligation to say it is.

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

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

16 Does anyone disagree with that?

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

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

22 MR. JOSEFIK: Clean under federal law.

1 COMMISSIONER McGAHN: -- is dirty?

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

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

8 COMMISSIONER McGAHN: Mr. Ryan?

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

18 But I also want to make a point of clarification  
19 about what this Commission said in Cantor. I have the  
20 language for the disclaimer that was approved in Cantor.  
21 The Commission recommended language as follows. I am  
22 asking for a donation up to \$2,000 per election from an

1 individual's own funds or up to 5,000 per election for  
2 multi-candidate or political party committee. I am not  
3 asking for funds from corporations, labor unions and  
4 minors.

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

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

13           COMMISSIONER McGAHN: Right, it's an A0, and  
14 minors can give now so that we don't have to put minors in  
15 there anymore for Cantor. But if you read the concurrence  
16 of the three commissioners, they seem to not be nearly as  
17 firm on that A0, right? There's three commissioners that  
18 agreed that that was sufficient, but I think made clear  
19 that that wasn't the only way to skin the cat.

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

22           CHAIRMAN PETERSEN: Thank you. Commissioner

1 Walther.

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

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

19           But it seems to me it's kind of a safe harbor,  
20 and maybe that's not the best word, but a safety thing to  
21 have a disclaimer on there so that there's no question or  
22 there's reduced question as to the involvement of the

1 candidate. And so I'm wondering in your own experience if  
2 -- because we're going back and forth a lot on whether we  
3 should or should not have a disclaimer -- how important is  
4 it? Does it reduce the amount of contribution most of the  
5 time? Does it make it more difficult? Does it matter the  
6 space on an invitation? What is the negative part about  
7 having a disclaimer in terms of real life fundraising, in  
8 your experience?

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

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

1 the federal limits.

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

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

14 MR. CAIRNCROSS: That's true.

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

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

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

1 understand that.

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

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

18 I'm not going to let my name be used on this  
19 invitation unless I know that you've signed off on it and  
20 it's got everything it needs to have on there or else I'm  
21 not going to do it. And so then it becomes an issue for  
22 the lawyers and the staff of the member or the -- or the

1 candidate to deal with and it becomes quite frankly  
2 sometimes a political issue between the organization and  
3 the candidate/campaign/officerholder when they can't  
4 necessarily come to an agreement because the local  
5 organization says well, that's crazy. We can't do that.  
6 That makes no sense to us. We've already gotten the  
7 invitations printed. What do we do with them?

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

16           COMMISSIONER WALTHER: Do you think -- just going  
17 for a quick question from all of you because we're getting  
18 short of time. But I think we all find ourselves falling  
19 back into what the title is or what the relationship is,  
20 not necessarily just a fundraising, but to the entity or  
21 the sponsor. If somebody has a position, they're the  
22 chairman or if they're on the host committee, that lends a

1 suggestion that they are -- have a role in the outcome  
2 other than just to participate as a featured, say an  
3 honored guest or a featured speaker, appears to be  
4 independent of what's going on at the fundraiser. It's  
5 there to provide a -- to be there, but to meet with people,  
6 maybe as these comments have pointed out, not just to raise  
7 money, but to enhance their own visibility within a party  
8 or an organization.

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

19           MR. RYAN: My view, and the view of the Campaign  
20 Legal Center, is that what matters is if the communication  
21 itself, and I think we're talking mainly here about the  
22 pre-event publicity, if the communication itself meets this

1 Commission's definition of to solicit, a communication, and  
2 includes a reply device in short, then you're talking about  
3 a solicitation and the question becomes is it a permissible  
4 solicitation of federal funds? Is it a vague solicitation  
5 that requires a disclaimer?

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

10 MR. JOSEFIK: Commissioner, I think --

11 COMMISSIONER WALTHER: Mr. Josefiak.

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

19 Granted, it's a difficult issue to grapple with,  
20 to sort of try to fine tune that a little bit, but since  
21 you have the opportunity to look at this closer, is there a  
22 way to even fine tune what would qualify as that versus

1 not? And -- and I would encourage you to at least look at  
2 that.

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

11 COMMISSIONER WALTHER: You have a comment?

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

20 If you do go the safe harbor route, I would  
21 suggest doing it in an exemplary fashion as in having  
22 examples under the -- under the definition of solicitation,

1 because I do find that sometimes with parties and  
2 candidates, they'll just gravitate to the -- safe harbor  
3 becomes like a lowest common denominator and they'll just  
4 use that and they're afraid to do anything else. So it  
5 does chill in other -- other respects. So I think you  
6 would want to make it clear that these are examples of  
7 things that are not solicitations. And practically  
8 speaking, that would be very, very helpful for parties.

9 COMMISSIONER WALTHER: Thank you, Mr. Chairman.

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

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

18 Interestingly, I don't think we talk about it  
19 that way in the rule or in our -- proposed rule or in our  
20 explanation of it. We call it more like an attribution  
21 statement. I'm not sure whether that's for you just a  
22 semantic difference or whether it would make a difference

1 in terms of your views about the disclaimer, but I just  
2 make that point as a point of clarification.

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

11           For example, if we were to adopt the safe harbor  
12 approach and the federal candidate is listed on the  
13 invitation in a capacity or with a title that we haven't  
14 deemed to be either specifically constituting a  
15 solicitation or not, it's unclear, would it then be helpful  
16 in that -- under those circumstances to have the disclaimer  
17 that says specifically that the federal candidate, this is  
18 not a solicitation on the part of the federal candidate, or  
19 are there any other circumstances where -- where -- I  
20 understand your -- your concerns with it, but are there any  
21 circumstances where the belt and suspenders aspect of it  
22 would be helpful?

1           MR. CAIRNCROSS: Like I said earlier, I think it  
2 would be -- it would be most helpful if a federal candidate  
3 or officeholder could make a general solicitation on an  
4 invite asking for funds above federal amounts and have that  
5 attribution statement or disclaimer, you know, cut that  
6 out. But I don't think that that's -- we're not arguing  
7 for that, but I think that that's where it would be most  
8 useful.

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

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

21           MR. JOSEFIK: I think it's really an either/or  
22 proposition that under your example you have maybe gone

1 over the line from being a person listed on an invitation  
2 to actually making a solicitation and then you would have a  
3 different set of "attributions" or /disclaimers, that you  
4 would have to use basically the Cantor language, that  
5 you're not raising money outside the federal limits and  
6 prohibitions.

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

18           MR. RYAN: When I read this NPRM back in early  
19 December, I made a note in the margin next to the final  
20 section of alternative two where currently it states any  
21 such publicity must include a clear and conspicuous written  
22 statement that the solicitation is not being made by the

1 federal candidate or officeholder. I wrote into the margin  
2 that, or a disclaimer limiting to federal funds. Because  
3 again, my analysis of all of this is the solicitations made  
4 when you authorize your use in a communication that has a  
5 reply device, that meets your definition of solicitation.

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

15           Cantor says -- acknowledges a solicitation is  
16 being made and states it's limited to federally-permissible  
17 funds. This just says solicitation isn't being made. I  
18 think the Cantor type language makes a little bit more  
19 sense in this context, but we are also not opposed just  
20 retaining this language and perhaps adding to it the  
21 federally-permissible funds type language with amounts  
22 specified.

1 MR. PHILLIPPE: Could I just go back to a concern  
2 that Mr. Cairncross raised earlier, because when you're  
3 dealing with the -- the realm of these unprotected roles or  
4 titles and you're not sure -- you know, it's not something  
5 you explicitly can't be, it's not something you explicitly  
6 can be. Once you start requiring a disclaimer, attribution  
7 statement, people are going -- it's naturally going to  
8 become seen as a solicitation role because you're required  
9 to have some kind of attribution statement on it.

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

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

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

18 MS. DUNCAN: Right.

19 MR. CAIRNCROSS: Well hopefully -- hopefully we  
20 won't find ourselves in that world, but if we were, then  
21 you would need -- you would want some -- yeah, you would  
22 want some sort of something to hang your hat on in terms of

1 protecting your clients, yes. Because you will inevitably,  
2 if we find ourselves without a safe harbor, I mean, you  
3 will find yourselves with complaint after complaint  
4 concerning honorary chair versus featured speaker.

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

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

15 And from the nods of three heads I can see your  
16 response to that, but I'd like to ask of the person whose  
17 head is not nodding, Mr. Ryan, whether there -- whether you  
18 have any thoughts about that proposal and whether you  
19 foresee any issues with changing the scope. Does that  
20 create any kind of loophole that we haven't potentially  
21 envisioned or are the safeguards of the rest of the act  
22 sufficient to deal with that?

1           MR. RYAN: I think -- I hadn't given it any  
2 thought prior to this moment. It seems to me that -- and I  
3 want to give it a little bit more thought before giving you  
4 a definitive answer. I know that the statute refers to  
5 fundraising events and because the related invitations,  
6 those communications that we're all presuming the federal  
7 candidate or officeholder will be identified on as a  
8 fundraising device, a solicitation device, I'm not willing  
9 right now to say, no problem, change the language of the  
10 NPRM. I'm perfectly comfortable with that without giving  
11 it some further thought.

12           I'm not quite sure what legal significance  
13 changing the scope of the NPRM from solicit to fund -- you  
14 know, from fundraising to solely solicit might be. There  
15 is one aspect in which the scope of the NPRM I think does  
16 not encompass some of the discussion that's gone on here  
17 today and that is to amend your definition of to solicit to  
18 include safe harbors of some sort within that. I think  
19 that there's no notice of that in the NPRM that you're  
20 contemplating amendments to amending 300.2(m) and I think  
21 that would be inappropriate as a -- as a result of this  
22 rulemaking proceeding.

1 MS. DUNCAN: I welcome the comments of the other  
2 witnesses.

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

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

18 And that's why we said, you know, the focus is on  
19 solicitations and the prohibitions are on soliciting by  
20 federal officeholders and candidates, not on the -- not on  
21 the third-party entity that's actually raising the money,  
22 if in fact none of the event materials, none of the program

1 soliciting of money was actually asking for that kind of  
2 money in the first place.

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

15           MR. RYAN: You know, I have looked at some of the  
16 actual language in the proposed rule. I do have an opinion  
17 and one of the areas that this -- this type of change might  
18 concern me is that in the event where a federal candidate  
19 or officeholder makes a general solicitation orally at the  
20 event, right now the rule would require a disclaimer to  
21 either be printed or orally made by the federal candidate  
22 or officeholder and I think that type of requirement should

1 remain in the rules regardless of whether or not the entity  
2 hosting the event has explicitly itself solicited non-  
3 federal funds, funds in excess of federal amount limits.

4           Because if the people there know that they can  
5 write a corporate \$1,000 or \$100,000 check, a general  
6 solicitation by a federal candidate or officeholder in a --  
7 you know, looking at the Commission's own definition of  
8 solicit, which includes where a person would reasonably  
9 understand in the context that the -- that the ask is being  
10 made or the communication is made, in that context, I think  
11 the disclaimer should be retained.

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

16           CHAIRMAN PETERSEN: I think --

17           MS. DUNCAN: Thank you.

18           CHAIRMAN PETERSEN: I think we'll get a chance  
19 maybe to -- we're going to have a chance for some follow-up  
20 questions, so if there's further comments, we can get to  
21 it. I just wanted to ask the staff director if you had any  
22 questions?

1 MR. PALMER: Mr. Chairman, I do not.

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

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

20 And one thing related to that point that we  
21 haven't addressed much today is if we -- if we do remain in  
22 this morass of AOs and statements of reasons guiding pre-

1 event publicity, the -- just the practical effect for state  
2 parties, for their finance folks, for volunteers who want  
3 to host an event in their house and we have to tell them  
4 they have to -- you know, if they're doing it for a  
5 candidate, might have to send out two separate mailings and  
6 have a save-the-date and then another one where you don't  
7 mention -- you don't mention the federal officeholder and  
8 you have to explain to people, you know, they say well is  
9 he coming or not, you know, and you can't -- you can't  
10 couple that with a solicitation, or you have to send an e-  
11 mail with two separate .pdfs because, you know, you're  
12 elevating form over substance here where you have to  
13 separate the ask from -- from -- from the officeholder's  
14 name.

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

20           CHAIRMAN PETERSEN: Thank you. Do my colleagues  
21 have any follow-up questions? Okay, hearing none, I want  
22 to thank our witnesses again for -- for their very

1 articulate and very informative remarks and I think all of  
2 us up here on the dais would want to extend our most  
3 heartfelt thanks for -- for not only your written comments,  
4 but for -- for your willingness to engage in this question  
5 and answer period.

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

8           (Whereupon, at 12:03 p.m., the meeting was  
9 concluded.)

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1 CERTIFICATE OF REPORTER  
2  
3

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

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19 JENNIFER O'CONNOR  
20  
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