Accountability After Citizens United – Panel Two Transcript

Panel 2: Regulatory Pressure Points: New Strategies for Accountability

Mimi Marziani: Hello and welcome to the afternoon portion of our symposium today. My name is Mimi Marziani. I am counsel here at the Brennan Center in the Democracy Program. I spend most of my time in the Campaign Finance Project with all of these wonderful people you've seen today.

Before we begin, I wanted to look back at this morning's discussions before looking ahead to what's to come. This morning's remarks made one thing very clear: *Citizens United* was a game changer. And last year's election gave us a preview of post *Citizens United* elections to come. As Chairwoman Bauerly described, last election, tens of millions of dollars from powerful special interest groups, including business corporations, were spent to influence the electoral process. This did two things. One, it pushed voters and grassroots organizations to the side. Two, perhaps even more alarming – if that's possible – is that the spenders were allowed to do this without disclosing their identities, and therefore escaping all political accountability.

We've talked a bit about the public's anger and some of the consequences of this spending. Unfortunately, it is clear to many of us that – well, it's indisputable that – Congress has thus far failed to enact any reform. Unfortunately, given the hyper partisan nature of and the perpetual gridlock in *that* part of Washington, D.C. (I know many of my wonderful panelists are from Washington, D.C.), it is unlikely that we will see any robust reform coming from Congress any time soon. And so the second panel of today's symposium will identify non-legislative, strategic pressure points to facilitate accountability in political spending. Perhaps, some of these strategies could be implemented in advance of the 2012 election. First, we will discuss corporate governance strategies that are outside of the legal system. Then, we will examine various plans to use the administrative rulemaking process through the IRS, the FEC, and the FCC to give voters more salient information about political spending. Finally, we will take a practical look at these proposals and consider their real world implications.

Our panelists are leading academics and practitioners. Each has a long resume of very impressive accomplishments. I don't even have time to go into all of those accomplishments today, but I urge you to read all of their bios in your program. Very quickly though, in order of appearance, we have Bruce Freed, the Founder and President of the Center for Political Accountability. Then

we have Holly Schadler, a partner at Trister, Ross, Schadler & Gold. And then we have Professor Ellen Aprill, the John E. Anderson Chair in Tax Law at Loyola Law School. And finally, we have Marc Elias, a partner at Perkins Coie and Chair of the firm's political law practice.

One last thing: To streamline the presentation, I ask that you hold your applause until the end of the panel. And, we will have time for questions, but please out of courtesy try to keep your questions short and sweet. Thank you.

Bruce Freed: Thank you. It's a pleasure to be with all of you this afternoon, and it's a pleasure to be with our partners and friends who have been working with us in the effort on corporate political accountability. My colleague Valentina Judge is here this afternoon. As a non-lawyer on today's program, I'd like to go talk about going outside the legal and political system. Specifically, I want to focus on how corporate governance is being used to achieve corporate political accountability and bring accountability to the relationship between companies and trade associations and to the disclosure of corporate contributions to secretive 501(c)(4) groups.

Taking the corporate governance route helps surmount obstacles that we're finding that are posing serious problems to achieving change: The Supreme Court's hostility to regulation of corporate political spending, and the paralysis or inaction of the enforcement and regulatory agencies – specifically, the IRS and the Federal Election Commission. Today, the threat from hidden political spending and the use of trade associations and 501(c)(4)'s as conduits for that spending only gets worse. Associations and 501(c)(4)'s are the real problem, because there's no disclosure of their funding. We've seen hundreds of millions of dollars that is being pumped into the system, and a great deal of that money is coming from corporations. The *Citizens United* decision created or exacerbated that problem. Today, independent expenditures are the new vehicle for corporate political spending. These independent expenditures can be done either directly by companies or indirectly through the conduits. You're finding that companies are coming under real pressure, very serious pressure, from political figures and politically active trade associations to engage in that type of spending. We've talked about the risks that this poses to companies and the outcries it generates from shareholders.

What I'd like to do is move beyond that and focus on the innovative strategy that the Center for Political Accountability developed that predates *Citizens United* by seven years. The CPA strategy combines corporate governance, direct corporate engagement and advocacy to achieve corporate political disclosure and accountability. This was being done even before, well before, the *Citizens United* decision was handed down. The CPA's goal, and the goal of its partners, has been to achieve disclosure and accountability. I want to underscore that point. We see the two as going hand in hand, and we see them as critical to changing the way corporations participate in the political process by bringing accountability to direct and indirect political spending, and accountability to the relationship between companies and their trade associations. What's so important about this strategy and what makes it so unique is that it is not vulnerable to political obstruction or legal challenge. This is a strategy that goes directly to the companies and focuses on directly engaging the companies.

There are four elements to this strategy that has been carried out over the past seven years. The first is to engage companies by approaching them or by filing a shareholder resolution. CPA

drafted a model political disclosure resolution that our partners have been filing. It's one that has passed muster at the SEC, which makes it very important and a good vehicle to use. The second element is to seek to enter into a dialogue with companies. Some companies will go into a dialogue without the filing of a resolution; others need a resolution to bring them to the table. The third element is to reach an agreement with a company to adopt political disclosure and board oversight of their political spending with corporate funds; not the PACs spending which is already disclosed, but the undisclosed corporate funding. The disclosure includes the company's decision-making policies and procedures for its political spending. Political spending is defined broadly in our effort. It covers soft money contributions and payments to trade associations and other tax-exempt organizations that are used for political purposes. This includes independent expenditures made directly or indirectly by a company. Lastly, once an agreement is reached, we monitor the company's activities and adherence to the agreement, and we work with the companies to strengthen or expand their policies and practices on political disclosure.

Companies have been doing this. This is very important to assure that the effort is not static and that it changes with conditions. Our corporate governance approach today is bringing about real change. I want to go through what the examples are to show what has been able to be achieved where you've had paralysis or hostility elsewhere. Eighty-five large public companies, including 51 – that's more than half – of the trendsetting S&P 100 – have adopted political disclosure and accountability. What that does is create a beachhead that you work from. The leaders in disclosure and accountability today include Aetna, Dell, Exelon, Merck, Microsoft, Norfolk Southern, Pfizer and Prudential Financial. These are companies we have worked with, developed relationships with, and that have shown a commitment to political disclosure and to making it even more robust. The Conference Board, the nation's leading business research organization, has recognized political disclosure as a risk. It asked CPA to help write a handbook on corporate political activity. That handbook was released on the eve of the 2010 elections. It sets out the emerging best practices for disclosure, approval and board oversight of political spending by companies, and also creating an ethical culture within companies on handling their political spending. What's important is that the handbook is being used by companies and by election lawyers who are advising corporate clients. Companies are including political spending in their codes of conduct or creating codes of conduct for political spending. This has been the case with Dell, Intel, Merck and Microsoft. We're also finding that companies are beginning to place restrictions on the use of their money for political purposes. They're doing it for themselves, and they're also doing it with trade associations. It's just beginning. But the fact that this is starting is very important. These restrictions apply to independent expenditures, electioneering communications and state judicial elections. Companies that are doing this include Merck, Microsoft, Wells Fargo and Unum. Some of the companies are now asking the trade associations to confirm that they are adhering to the restrictions.

We're also working with companies on developing ways to make these restrictions meaningful and effective. Secrecy is being peeled back on corporate company payments to trade associations, and on the company-trade association relationship. As a result of agreements with CPA and its partners, 18 companies disclosed payments to the Chamber, totaling $5.2 million for 2009. Some of the companies are cutting payments to the Chamber as a result of follow-up engagement by the shareholders. The proxy advisory services are recognizing political spending as posing a risk. That's been important, because they've been recommending for many of the

CPA model political disclosure resolutions. The effect of this is that the average vote for the model resolution topped 30 percent in the 2010 proxy season. It was above 30 percent at 15 companies. And at four companies it exceeded 40 percent. That sends a strong message to companies and puts serious pressure on them to adopt political disclosure. Lastly, company contributions are being scrutinized much more closely by shareholders and the media. We saw that in the case of Target after it made the contribution to Minnesota Forward. Companies recognize now – and this is something that I found when I've been speaking to general counsels and corporate secretaries – they're really much more sensitive to what the implications could be. They look at Target. Target really for them was a wakeup call for the need to pay much closer attention and to begin to start asking, how can they stay away from this?

What's next? We've talked about what we have achieved, what we do. What are the new things going forward? CPA is developing the first ever index to rate companies on their political disclosure and accountability policies and practices. We developed 30 indicators; we're doing the data collection now; we have a scoring advisory committee made up of leading people in the socially responsible investment community and academia who have expertise in scoring. We're assuring that this is going to be rigorous and will be accepted. The indicators are based on the handbook's emerging best practices. The index starts off with the S&P 100. You'll have that for 2011. It will be expanded to the S&P 500 for 2012. What we've found is that the index data collection has already spurred some companies to strengthen their political disclosure policies and practices to get a higher score. Merck and Microsoft, for example, want to be at the top of the list. You have companies like Altria that wants to be a leader in political disclosure. I received an email this morning informing us about the changes that they have adopted. You begin to see changes. Exelon sent a detailed response to the indicators that we sent to them and the other S&P 100 companies. CPA is following up on the Handbook on Corporate Political Activity now with a primer that we're writing for directors on how to conduct effective oversight of their company's political spending. That's important if you're going to make accountability important and effective and start having a change in the way companies are engaging in political spending and the political process. We see the index, the handbook, and the primer providing companies and directors with the guidance that will help them better manage and avoid the risks associated with direct and indirect political spending.

A priority for the Center and its partners remains increasing the number of companies adopting political disclosure and accountability. This is absolutely critical for having political disclosure move from being a best practice to a standard.

I just want to close with the point that political accountability is being achieved through the strategic use of corporate governance, and that a firm foundation has been laid for further advances. Where we talk about the frustrations that are followed in other areas, what's important to recognize is that there is movement, there is change, and we will see that going forward. Thank you.

Holly Schadler: Originally when we were planning this panel I was asked to talk about the FEC Form 5, and that is the form that non-federally registered political committees report through. It's the individuals, corporations and other types of entities that are not registered with the FEC. And since that time, there have been several developments alluded to by both Michael Waldman and

Chairman Bauerly addressing disclosure of independent expenditures and the sources of these expenditures. So we decided to change course.

And so you will be spared my detailed discussion of Form 5, which I'm sure would be rather dull. But I will say that prior to *Citizens United*, this form was not widely used. Its primary use was by qualified non-profit corporations – those corporations that are a very, very small slice of the non-profit community that were permitted to make independent expenditures and use that form. And there might have been a smattering of other organizations using it. But it's one that I've worked with for many years. And I will simply say that there are any number of areas where the regulations and the instructions read together are not clear. And these will really need to be addressed at a minimum to provide additional clarity for those many, many organizations that are going to be complying with the requirements now. And most of the disclosure discussion that we're going to have this afternoon will circulate around that Form 5. Because that's the foundation, right now, for all of this reporting.

So instead, I'm going to talk briefly about a number of the challenges and proposals to revise and enhance the disclosure of political expenditures, and particularly the specific funding sources behind those expenditures. And largely, I'm going to describe these initiatives. And both Marc Elias and I will be making a few observations. I hope to cue up some of the questions that might come up in our discussion period.

Most recently, Congressman Van Hollen with his support of various campaign finance reform organizations filed a petition of rulemaking to revise the regulations on disclosure of independent expenditures. The petition raises an issue that's actually been quite controversial for many years, and prior to *Citizens United*. So, so few groups were using these regulations and reporting under them, that it really was not receiving much attention. But under the FEC's regulations, a Form 5 filer is required to report any contributor who gave an aggregate amount over $200 specifically for the purpose of furthering the reported independent expenditure. And we're going to get into a discussion about articles of speech right now. The filer need not list contributors who don't earmark contributions. And in practice, very few contributors actually earmark contributions for a specific independent expenditure. They might give for the purpose of independent expenditures, or they might give generally to the organization with the hope that that might be the use of the funds. But it's fairly unusual – not never seen – but fairly unusual that they'll give for the purpose of a specific independent expenditure.

The language of the Federal Election Campaign Act, the statute, however, provides that all contributions made for the purpose of furthering an independent expenditure must be reported. And assuming the word "an" has a different meaning than "the" in this context, the statute would would seem to be broader than the regulations are currently. And this is exactly what Van Hollen raised an issue about. He proposes the same language in his petition set out in the draft Notice of Proposed Rulemaking presented by, we assume, the Democratic commissioners in January as part of the attempt to do a rulemaking in *Citizens United*. And that was not a successful attempt. There was, as Chairman Bauerly alluded to today, there was not – the Commission couldn't get the four votes to even put out a Notice of Proposed Rulemaking. But this uses the same language as is presented in one of those. Under his proposal, independent filers would be required to report the identification of each person who makes a contribution in excess of $200 within a calendar

year, and each person who makes a contribution during the reporting period in excess of $2,000 for the purpose of furthering an independent expenditure. So that's considerably broader language. If adopted, however, it's unclear precisely how much broader this language is than the current regulation. Since a contribution under the statute and under the regulation says defined as a gift or anything else of value for the purpose of influencing an election for federal office, the reporting required under this proposed language might be so limited as well. Therefore, it would cover contributions and anything of value contributed for the purpose of influencing a federal election. And it would seem to require reporting of any person who earmarked it for that purpose. But these are questions that obviously are raised by this petition. They will, if this proceeds, certainly be debated vigorously, and we'll see what the outcome is.

Van Hollen also, very shortly after that, challenged in Federal District Court the FEC's Electioneering Communications regulations on somewhat similar grounds, though the statutory provision is quite different. If an entity spends an aggregate of $10,000 or $1,000 within 20 days of an election to produce or air electioneering communications, the group must report these expenditures on a Form 9. And under the current regulations disclose each of its donors who contributed an aggregate of $1,000 or more for the purpose of furthering electioneering communications. That's what the regulations say right now. Unlike the provision for the independent expenditures, the statute requires disclosure of all contributors who contributed in excess of $1,000 to the entity that's conducting the electioneering communication. The FEC amended the language after the decision in *WRTL* limiting that disclosure to contributions for the purpose of. So Van Hollen argues that the FEC had no authority to revise its regulations in this manner, and we'll see where that goes.

In another interesting development, the Media Access Project has filed a petition with the FCC. And again, its purpose is to augment disclosure of funding sources beyond the organization that's paying for the ad. The current FCC regulations say that the broadcaster must be – is required to "fully and fairly disclose the true identity of the person or group sponsoring the message." The petition takes the position that the FCC has broad discretionary authority to impose additional requirements, and the suggested language would have the broadcaster announce all donors that directly or indirectly provided at least 25 percent of funds for the payment of the advertisement; 10 percent of the funding of any donor who provided 10 percent or more of the funding would have to be listed in their broadcast, the broadcaster's files, public files, and be available to the general public. So there's some major implications for broadcasting regulations. And that is before the FCC right now, and we'll see how that fares.

And finally, a Draft Executive Order, apparently a current project of the Administration, was leaked and would require entities that submit offers for federal contracts to disclose political contributions and expenditures made within two years prior to submission of the offer. It's a fairly straightforward proposal. Federal contractors are currently banned from making political contributions. But the specific language of the order seems to suggest that it would go beyond the federal contractors and cover subsidiaries, executives, directors, officers of the entity that's filing the submission for a contract. So that'll be interesting to watch as well.

Ellen Aprill: Again, I thank everyone for having me here. Former FEC Counsel Larry Noble stated that the major impact of *Citizens United* is that more money is going to 501(c)(4) groups,

trade groups, and others that don't disclose their donors. All of these are forms of tax exempt organizations. Since I'm a tax lawyer, I'm going to talk to you about tax law.

Let me give you a little bit on the tax landscape, so you can put this in context. We've already talked about charitable contributions. Charities are 501(c)(3)'s under the Internal Revenue Code. We divide 501(c)(3)'s into two other categories: public charities and private foundations we have many representatives of private foundations here today. Public charities are limited in how much lobbying they can do, and they are prohibited from any campaign intervention. Private foundations essentially cannot do lobbying or any campaign intervention at all. Private foundations generally are grantmaking institutions established by individuals, families or corporations; they have a limited number of donors. Both private foundations and public charities get deductions for income tax purposes and gift tax purposes. But the distinction I particularly want to make is that, under the Internal Revenue Code, under the statutes, we can have public disclosure of contributors to private foundations, but not to public charities. These rules are all statutory rules.

501(c)(4)'s – social welfare organizations, 501(c)(5)'s – labor unions, labor organizations, 501(c)(6) – trade groups, chambers of commerce, trade association –can do unlimited lobbying if it's related to their exempt purpose, and they can do campaign intervention if it's not their primary activity. Now all of these are rules announced under various levels of IRS administrative pronouncements. None of this is in the statute. It's regulatory interpretation of the statute. If these organizations do engage in campaign interventions directly rather than through a 527 organization, they are subject to a tax, on the lesser amount, the lesser of the amount they spend on this campaign intervention or their investment income. Similar rules probably apply to the couple dozen other 501(c)'s but we're not certain; we don't have authorities. There is no income tax deduction for these organizations, and there's certainly no explicit exemption for gift tax purposes. That's been particularly important with 501(c)(4)'s. The IRS, we hear, has recently undertaken an enforcement effort with 501(c)(4)'s. If they audit a 501(c)(4) they've also been auditing large contributors to it. We understand they're also looking at state records for property transfers between family members. After years of not having enforcement of the gift tax, we are starting to get enforcement of the gift tax. However, Congress for this year and next has also passed a law that says, no gift tax out of pocket until you've spent more than $5 million dollars. We don't know what will happen to that in two years.

Senator Baucus, Chair of the Senate Finance Committee, has been particularly concerned about whether the IRS has been enforcing these rules about campaign intervention for (c)(4)s, (5)s, and (6)s. The IRS, in its announcement of its work plan for next year said, yes, sir, yes, sir; we will look at the (c)(4)s, (5)s, and (6)s. What that will mean, we're not so sure.

We also have Section 527. 527 serves two very different purposes that can make it a little hard to follow. On one hand, it taxes any political organization, whether it's regulated by the FEC, by states or by the IRS. Then it also has regulation, including disclosure and, notification to the IRS for political organizations that are not regulated by the FEC, because they do not engage in electioneering or express advocacy or by states. The IRS in the same annual report said it looked at organizations regulated by the states and thought they were doing okay.

In *Citizens United*, the court didn't speak of tax issues. It did excoriate the FEC for its open-ended, rough and tumble use of factors. And how do we define campaign intervention under 501(c)(3), (4), (5) and (6)? With a set of factors. And with nothing explicit. There is also no way to define what is primary activity for these organizations that cannot have campaign intervention as their primary activity. This is something the IRS could do by reguations. There's a group of private practitioners and academics working on proposed regulations to submit to the IRS. Another issue is that applications for exemption are required by a certain period for 501(c)(3) organizations, and a couple more obscure ones – not for (c)(4)'s, in particular (5)'s or (6). Perhaps we could see an application required for these organizations. We get a lot of information from the application for exemption. We can compare it to their annual information report, and see if they're doing what they said they would do. However, the requirement that (c)(3)'s do it by a certain date is in the code. A former head of the IRS, Exempt Org Division, has argued to me that he thought the IRS could do it by regulation, because there's already a regulation that says any 501(c) shall file the form of application prescribed by the Commissioner. I don't think the IRS is going to do that without Congressional authority to say, require (c)(4)'s, (5)'s and (6)'s to file an application by a specific date.

Then the last item that's of the greatest concern to everyone is disclosure of donors. Currently it is very explicit in the code that only private foundations and 527's can have public disclosure of contributors. All these organizations disclose it to the IRS for any contributions of $5,000 or more. The IRS has a form that's Schedule B that gives this information. But the code is very explicit that no other entities can be required to make public discosure.

So thus, change here to require public disclosure would require Congress to act. The IRS clearly could not do initiate such a change on it own. Given that the Disclose Act did not pass, I wouldn't bet on Congress doing it for (c)'s (4)'s, (5)'s or (6)'s either. The one thought I've had – and I'm going to end with this – is that perhaps Congress would be more willing to follow a private foundation model and say, okay, we won't make all of the (c)(4)'s disclose their donors. But if they have a limited number of donors, if they are funded by only a few people – and we have a very technical definition in the code that I will not trouble you with – that we will also require those kinds of (c)(4)'s to disclose their donors. Maybe we could get Congress to do that. Thank you.

Marc Elias: Let me start by saying that everything I'm about to say are my own views. None of them are the views of any of my clients. It's fair to say that probably my clients probably disagree with me as often as they agree with me on a lot of things. And it's – they're not even the views of necessarily all the other attorneys at my law firm. Like Holly, I had originally been prepared to discuss a very scintillating topic, which was the comparison of the rulemaking proposals put out by the Democratic Commissioners and the Republic Commissioners, both of which failed – leaving you all, leaving you all to wonder, well, why would you have taken up our time to talk about that? But luckily for you, I changed course. And I was struck by Michael Waldman's introduction and then actually changed course again this morning. And a couple of things struck me.

First is that the title of this panel, and a phrase that he use several times is pressure points, what are the pressure points? And some of what I have to offer this group you will agree with, and

some of which you will probably violently disagree with. I've talked to a number of conservative leaning organizations and told them that *Citizens United* is an odd case jurisprudentially for them to embrace, for a whole host of reasons – probably many of which you know. And that, for folks committed to judicial restraint, it's a weird case for them to have joined onto. And one of the things that Michael said at the front end was that part of the goal here is to come up with a coherent jurisprudence and, in some respects, that's right on the progressive or the reform side. And that's kind of what I'm cautioning conservatives about embracing *Citizens United* too closely. Part of pressure points is not bludgeoning the entire body. Right? If your goal is to apply – pressure to a pressure point on the arm, you don't chop the arm off. And you don't beat it with a two by four. And candidly, just as I provide unsolicited advice occasionally to conservatives, I'm now going to provide it to reform advocates. You've got to stop with the two by fours also. The fact is, we wind up with *Citizens United* because someone wanted to make a movie that, honestly, very few people in America really were clamoring to see. So I've got an idea. How about we let them make the movie? Right?

We wind up with actually a trilogy of cases – and this was another point that Michael pointed out. And he used a great phrase, and I wish I could have remembered exactly. But he said, basically, *Citizens United* has become a brand that encompasses a series of cases. One of those three cases – and not surprisingly, when at least one of the Republican FEC commissioners speaks about *Citizens United* he always leads with *Emily's List* as the first in the trilogy… *Emily's List* wound up going to court. In disclosure, my firm and I represent Emily's List – represented them in litigation. Emily's List wound up in litigation because the FEC passed a series of rules which, among other things – and there were other pieces of it – but among other things, said that if a federal candidate signs a solicitation soliciting money for a state candidate in another state when they're not in cycle, and none of their constituents get that piece of mail – right, so you have a Senator from New York sign a piece of mail to raise money for a State legislative candidate in California – when the Senator in New York is not in cycle, and no one in New York is going to get a copy of it; it is only available to people in California – the FEC rule said, that has to be paid for 100 percent with hard money. One hundred percent with hard money, because it was signed by a federal elected official. That case goes up to the D.C. Circuit. And of course the D.C. Circuit not only invalidated that rule, but invalidated much more than just that rule. It invalidated a large piece of the regulations. That was a pressure point rule that many in the reform community argued for. And I would say that between arguing that David Bossie and *Citizens United* couldn't make a movie, in arguing that the *Emily's List* financing rule was required by McCain-Feingold, this is where, at times, people who have meant well have not applied pressure points, but rather they have decided to go significantly beyond that.

Now, where do I think the pressure points have been successful? I'm going to offer one concrete and one prospective. One which is a concrete one, which honestly many in this room undoubtedly decry but they should celebrate, Commissioner Bauerly mentioned. I was counsel to an organization called CommonsenseTen. And CommonsenseTen went to the Federal Election Commission and said, we want to register with the FEC and report all of our donors. We want to. We want to be here with the FEC reporting all of our donors of $200 and above, and reporting all of our disbursements of $200 and above. We wish to disclose electronically, online, the whole searchable, sortable – right – the whole thing that you get with FEC disclosure. And we know we have a right to take corporate money in unlimited amounts because we read that opinion from the

Supreme Court. So if we take corporate and labor money in unlimited amounts, can we file as a federal political committee and disclose it all?

Now, the FEC said yes. But honestly, what I expected was a rush in from the reform community celebrating this as a win. Right, here it is, after all, trying to set the precedent that, in fact, these groups can – and there's a vehicle for them to – disclose. Instead, there was a combination of silence and opposition. And every so often the concept of super PACs gets brought up, and they get lumped in with various other organizations that don't disclose. And I think if you want to have a strategy, a coherent jurisprudence going forward that is aimed at disclosure – and maybe it's not – but if it is, aimed at disclosure then you need to pick the pressure points. And the pressure points include that when groups come before the Federal Election Commission saying, we wish to disclose the corporate and labor funds we receive and the unlimited individual funds we receive, then that ought to be a point of celebration or a point of support at least from those who care about campaign finance reform and not opposition.

The second is something that is, has not been – has come up from time to time before the Commission, which has not yet – is not currently before the Commission but I would, again, put before this group. Several people have decried – and I have, in many forms and settings – the effect that the current system has on the parties. Right, the parties play a useful role in the system, the national party communities on each side. National parties only raise hard money, they only spend hard money, all their money that they raise is disclosed, it's all regulated, all the money they spend is disclosed. Yet, they are subject to a series of coordination rules that look like the same rules in the main that apply to soft money groups. I don't think that that's actually what McCain-Feingold says, I think that McCain-Feingold actually said they couldn't do that, but the FEC did it anyway.

One of the things that would be a pressure point would be to say okay, let's find way to advantage those spenders we think are playing a constructive disclosed part of the process, the national party committees. Let's find ways to make them stronger in the process rather than focusing only on the other part, let's find ways to make them stronger in the process rather than opposing efforts to do so.

So where does this leave us from a regulatory standpoint? Right, now what we have is a high cost in the system because of uncertainty. I actually am more optimistic than probably anyone else at the FEC actually does work, it deadlocks a lot around ideological issue and big issues but that doesn't mean that the agency isn't working, it's working in a lot of respects that Chair Bauerly mentioned around disclosure and other things. So one of my messages, I wouldn't give up on the FEC. They're obviously pieces of this, and there are pieces that can be done in the court. I think Congressman Van Hollen's litigation is an example of where you can take a pressure point approach to disclosure and try to advance that, but I would not give up on the FEC and I would mention two things in particular. One is, there is, I think an opportunity for there to be a rulemaking process that works with the FEC. The FEC did deadlock in its most recent efforts around *Citizens United* but for those of you in this room who wish to find the pressure points, to increase disclosure, I wouldn't give up on the FEC process. I think people would be well spending good time investing in ways to break that log jam and move the rulemaking process forward. The second is, frankly, the advisory opinion process. The FEC advisory opinion

process still works pretty well. Within 60 days you bring them an actual transaction and within 60 days, they give you an answer and it has been my experience that the Commissioners by and large try pretty hard to try to given an answer. It may not be the answer you always want but an answer and I think we've seen that in the past as a vehicle that people trying to apply pressure to pressure points on one or the other have used in the past and I'd recommend that going forward so with that. I will stop.

Questions and Answers

Mimi Marziani: Wonderful and thank you all. I truly appreciate that you can approach what can be very controversial issues with common sense and sanity. I think that's to be applauded and, as Marc noted, sometimes unfortunately too rare. And I think I will lead off the question period but people should feel free to start lining up at the microphones.

My question, and Marc hit on this somewhat, but as an advocate who cares deeply about enhancing accountability, and as a concerned citizen, what one top pressure point would you recommend to me as something that I could support and has a reasonable likelihood of success? I'm thinking what's our next step, in other words? Anybody can start.

Marc Elias: I was just going to say I would sort of pick up two themes that I heard earlier. The first is, I think Commissioner Bauerly pointed out correctly the language in *Citizens United* around disclosure and not just in *Citizens United*, but in other cases, around disclosure. I am not, there are others who have spent a lot of time and think deeper thoughts than I do around what this jurisprudence is, but I think there is certainly a way to tease out a jurisprudence around disclosure that frankly right now I think there is a reflexive answer to disclosure and I think that the Supreme Court has given the building blocks to create a more thoughtful jurisprudential position around disclosure.

Holly Schadler: I would second that and I wouldn't just look at *Citizens United*, though I don't think that's what anyone is suggesting. In preparing for this I went back to Massachusetts *Citizens for Life* and it had some very interesting passages about disclosure that again are measured. The Court seems in certain passages in that opinion to have talked about what is necessary to achieve the end we're trying to achieve and not disclosure that is so burdensome that you end up ultimately either having a backlash as Marc was alluding to or you have disclosure that is tantamount to what federal political committees are subject to though the organizations that are disclosing are not federal political committees. So I think going back to *Massachusetts Citizens for Life* is really important as well. And I would second this idea of looking at opportunities for advisory opinions because I do think that that's a useful tool and one that has produced some real clarity in certain circumstances and could be useful in the disclosure as well.

Mimi Marziani: Do you have any thoughts?

Bruce Freed: No.

Ellen Aprill: One of the issues we have in tax is the purpose of disclosure in the tax laws, and if it's different in the tax laws. The reason why we get disclosure within private foundations is, at the time the law was enacted, we thought private foundations were suspect. It is not clear whether we can legitimately do that for c-4's that do not get charitable contribution deductions, and which exist for many different kinds of purposes, not all of whom engage in campaign intervention. What disclosure means in tax as opposed directly in campaign finance is an issue that requires further thinking.

Audience Member #1: Hi, Bruce, I have a question. These accountability, disclosure, transparency policies are being adopted in the C Suite. We have also heard, Charles Kolb say today that there seems to be a disconnect between the C Suite and K Street, and not just K Street but the equivalent streets in Albany and Sacramento and the other 48 states. So, how are you tracking implementation company wide because you can adopt a policy at the top but these corporations often have multiple subsidiaries and others that can take independent action and I go back to the 80's when there was a big rush to adopt corporate privacy policies because the Europeans were adopting all of these personal privacy legislation and about 120, 130 corporations with a lot of publicity adopted personal privacy policies but when we drill down and the we then was business international it didn't permeate very low and the policies weren't followed, so in terms of the kind of negotiation you're doing with company to what level of implementation are you getting and how are you tracking the companies are really disclosing and not giving money to citizens for the clean air which is really supporting fracking.

Bruce Freed: I mean companies that have adopted disclosure. There are some that honor agreements in the breach. We go through and try as much as possible to monitor adherence. The index is a powerful tool for that and that's why we're doing it with the S&P 100 and then expanding it. We are using that as the tool for going back and with those companies that have lower scores and that have adopted disclosure re-engaging them. That means re-engaging them directly by CPA but also with our partners. Doing it with the partners is important because an agreement allows the partner to go in and say you're not adhering to an agreement that you have reached with us, an agreement that has standing. When Charlie was talking about the disconnect between the C Suite and others, that's another interesting question. I was just speaking to the Council of Chief Legal Officers of the Conference Board. The audience included the general counsels of 34 companies, a very interesting mix because there were two folks from companies that had adopted political disclosure and who were very open about why their company did it and were positive and supportive. But then there were general counsels from other companies who were skeptical or hostile. I think you need to deal with folks at that level. Having groups like The Conference Board that are now supportive of dealing with political spending and its risks is important because there is an education process that needs to be continued and enlarged to get companies to recognize the need for political disclosure and accountability. Increasing the number of companies that have adopted political disclosure is important because it begins to create pressure on other companies that have not adopted to do so. That will make political disclosure a standard. Moving from a best practice to a standard is important because it creates those further pressures on companies to adopt political disclosure and accountability.

Audience Member #1: Can I just follow up? What kind of support would help move that process along?

Bruce Freed: You need to have foundation support to provide the sustained and substantial resources to underwrite the effort and achieve results. We're working with other organizations on this. Support from the business community is important because political disclosure and accountability must be seen as something that's acceptable but also something that is the norm, that companies are expected to do. That's why we're developing relationships with companies that want to be leaders on this. We work with them, we continue to expand that, because it's much like the ripple effect. We need to be able to get more companies and more leading companies to adopt political disclosure and accountability.

Mimi Marziani: Thank you. Adam, do you have a question?

Adam Skaggs: In the last several days we've seen a substantial amount of attention to the leaked Executive Order, that's come to public attention and I wonder if anyone on the panel would have any thoughts to share either on the content of the order or at least what we understand it to be and the criticisms that have been leveled at that?

Holly Schadler: I can speak to the content of the order which I went through rather quickly. What the order seems to say is that the if an entity applies for a federal contract, it is required to disclose all contributions and expenditures to or on behalf of Federal candidates, parties and party committees made by the entity and its directors, officers and any affiliates or subsidiaries and then contributions made to third party entities with the intention or reasonable expectation that they'll be used for contributions or to make independent expenditures and it's a look back of two years. So it's a very broad provision.

Adam Skaggs: And in terms of some of the criticism that we've seen about that in terms of violating *NAACP* and these cases that protected some anonymity and political speech, do you have any responses to any of that?

Holly Schadler: Well I'll just say very briefly that I'm not sure, I'd have to think about it a bit more but I'm not sure *NAACP* really is invoked here simply because this is, the spender itself disclosing its contributions or independent expenditures so no third party is being required to disclose receipts, its receipts. I think that some of the issues that have been discussed are very interesting, there is a whole discussion about how this interacts with the Pay to Play rules which is very well worth taking a look at and we don't have time to talk about that here but it's a very interesting issue. The second issue is the language in the second part of the draft order seems to talk about giving donations to third parties where there's an intention or reasonable expectation and those terms we know from the Disclose Act and other debates of a similar nature raise some significant issues about intent and how you determine that intent.

Marc Elias: I mean the only thing I would add which is on a kind of related point is that I think there's probably no area, at least on a campaign finance front that is expanding more rapidly and dynamically than Pay to Play generally. I mean the FCC has adopted pay to play regulations, G-37, of course, has been in place for a long time but there's a lot of different places to look at, law typically either follows the sort of the mini model where there's a federal stature then mini state statutes or the laboratories of democracy approach and paid to pay is one of these areas where

other's lots of laboratories of democracy going on and I suspect we will see more of that stuff bubble up to various ideas at the Federal level.

Audience Member #2: With a panel like this with such well established and well known technical expertise and practical experience in this area I want to nudge at you a bit more. To talk about what disclosure we think would be beneficially, what we mean by disclosure and what we don't mean by disclosure and where we think the pressure points of opposition may be. And I'm specifically interested in money trails, not just disclosing one's own activity but the movement of money. Now there's nothing inherently wrong with the movement of money, but as Ellen and I know from the entities that we have represented and written about for more years than we're going to enumerate right here or anywhere else potentially, our entities serve as disclosure blockers. Or can, and other entities say they want to disclose but they may be relying on us as disclosure blockers. And I will say about Common Sense Ten, you've got a great deal, you've got corporate money for disclosure and it was a wonderful bit of lawyering and I thought it was terrific. And, I'm one admires the ability to do this and again that's *Citizens United* and fine, but it was good, nevertheless, good lawyering, but if we're thinking about money trails and all the places where the block to disclosure can occur, quite legally and even with good arguments about why that block to disclosure should occur then it is fascinating to have the President's Executive Order with Part II and I knew Holly or somebody would have the executive, I couldn't be the only person with the Executive Order in my briefcase today, but Part B talks about these contributions to third parties. No reference to a charity carve-out, no reference to tax exempt status and different taxable status. It seems quite broad, but I would just like to take it out of the Pay to Play context which I agree with you, Marc, is going to be a tremendous area of controversy, and probably legislation and just talk about money trails, what are the pressure points? What are the blocker entities? Do they necessarily have to be blocker entities and the big question is what do we mean by disclosure?

Mimi Marziani: A great question, and Bruce, let's start with you perhaps because you work so closely with so many business corporations.

Bruce Freed: I think you're absolutely right and this is something that we have been very concerned about and we do have an eye on because you can give money to an entity, and then that money goes further along. You would give it to a 527 in the past or to a trade association and the money moves along. We've seen in this in judicial races in the South, in Alabama particularly. It's a daisy chain and it's used deliberately to hide the source of the money.

Audience Member #2: It's Laundering.

Mimi Marziani: Great, thank you.

Bruce Freed: Oh it is laundering, without question and we addressed this in the handbook. I want to hold this up for everyone to see. It's on the CPA website. You can get it from The Conference Board. The Conference Board was going to charge for this but decided it was so important that they are distributing it free of charge. There is a footnote, footnote 45. It deals with Avon and Avon's practice of disclosing how its money is being used. The company is not a major contributor. However, it felt disclosure was important and it agreed to the policy. It

doesn't give direct contributions but it does make payments to trade association. It disclosed how some of the trade associations were using its money. They're not major trade associations, but it established a precedent. In discussions with companies, we do talk about the importance of, the need for companies to know how their money is being used, because as it goes down the line, the company is still associated. It is the origin of the money that is being used for various purposes that can create risk. This whole thing about companies placing restrictions on how trade associations can use their money is very important. We've had discussions with companies where they've said yes, money is fungible, so we place the restriction and it means that trade association tells us, oh no, we're not using your money for that purpose. But you know that either it is or that other monies are being used. Other monies are being freed up. I think companies are recognizing that this is something that they need to look seriously at, and some of them have said to us, let's work on developing restrictions that are meaningful, that are effective. In the case of a major financial services company, when they agreed to disclosure, they said we're sending a letter to all of our associations, stating that our money is not to be used for political purposes and we're requiring the associations to acknowledge receipt of the letter and adherence to this.

Holly Schadler: I don't have an answer for you. But, I'll give a few thoughts, because I think this is a very tricky issue and I come at it, largely from the perspective of organizations that are trying to be involved in the political process, they think in a beneficial way and the burdens of disclosure and even if they're very, very much of the mind that disclosure is a good thing the administrative burdens get to be slightly overwhelming, particularly if they, you take it very seriously and it begins to discourage what is probably you know very very noble and good activity in furthering democracy. So what I would say is one thing to do would be to sit down with these groups that are really trying to, that are not working on necessarily campaign finance reform but are working on their types of issues that are social and economic issues and say how would these proposals work for you. Because I think that will be a very instructive exercise. With some really careful thought about what the implications would be of various disclosure regimes, particularly these ones that reach back and aren't just, these are our donors, but those that say if you give with the intent and you know that sort of thing.

The second issue is: when we talk about the responsibility for your donation through a process you get into situations where you do have an organization that has a $3 million budget and makes $100,000 worth of independent expenditures and you really do question whose money is it and it would really be quite inaccurate to say it's, you know, one or another individual entities' money that was being used for this unless it was earmarked for that purpose. On the other hand disclosing all of the millions of contributions that they received, big and small, would probably overload the disclosure system and make it really difficult for the public to use it in any useful way. And there is some actually very interesting language again and I don't have it written down so I'm probably going to get it slightly wrong but in the *MCFL* decision it talks about really two different types of contributions, one which the donor continues to have some role in, or with, where they've earmarked the contribution and another where there's really a delegation of authority and they've just given because they very generally think this organization is going to do good things and that's the end of their involvement and I do think that's a very interesting conceptual issue that should be thought through in any disclosure regime.

Ellen Aprill: One thing we might think about, not answering all of Fran's questions, is raising the threshold for disclosure. The IRS number of $5000 or more, seems more meaningful and may very well give the information that the public needs.. One of the interesting things about the Disclose Act was the organizations it limited disclosure to and if Congress had said that only these have to disclose, all sorts of other 501(c)'s would suddenly become vehicles, I believe, for this kind of activity. I'm still astonished that veterans organizations that are allowed to take deductions and can lobby and engage in political activities, but we don't see them as players in this area,.No one I've asked has said they have gotten to this area. If, however, you start saying, telling c(4)'s, (5)'s and (6)'s that they can't engage in this activity, I bet we will see 501(c)19's veterans organizations doing it. In the private foundation area we have something called expenditure responsibility. If a foundation makes a grant to something that is not a public charity and there may be some places where we would require expenditure responsibility for certain kinds of grants. But Fran and I would have to talk together to figure out where that line might be drawn.

Marc Elias: I just want to add just very briefly to what Holly said. For many years the opponents of campaign finance reform would regularly talk about, if only we had disclosure we wouldn't need all of it, and the disclosure was not just going to be disclosure, it was going to be instantaneous, it was going to be on the Internet, it was going to be like billboards with disclosure. I mean there's going to be disclosure everywhere you turn around, there would be disclosure, and honestly I thought and maybe naively so, I thought that the Disclosure Act was an effort to get at exactly what you're talking about. Some of the criticism that came with Disclose Act I thought was unfair because it was precisely to try to get at those blockers to use your term and try to figure out, okay, let's getting meaningful disclosure around this and, in the end, the opponents of Disclose didn't seem to come forward with any alternative compromised position to the Internet real time billboard, you know, some sort of disclosure that they had talked about and so I think that that's a real issue and I think that in some ways it's unfortunate that the opponents of Disclose rather than seeing that as a problem to help try to say okay we don't like exactly the way Disclose did it, so let's try to solve this problem a slightly different way, they I think instead just used as an opportunity to oppose the bill which I think was unfortunate.

Mimi Marziani: I'm actually going to take the Moderator's prerogative, use Charlie's term, to ask a follow up. Because something I thought was interesting about the Disclose Act, or one particularly interesting aspect was that it allowed a C(4) organization that wanted to get involved in partisan politics to put aside some separate segregated funds, and then it would have to disclose individual donations when they were given to that fund, so that we would avoid the problem that Holly mentioned where you know a Planned Parenthood type entity would be in a situation of having to disclose every person who had ever given a $50 donation which I think strikes you know, the insanity, I mean that just seems crazy and I wanted to hear your thoughts on that kind of compromise solution in the Disclose Act, whether you think it makes sense and whether you think it would work.

Holly Schadler: And that kind of segregated fund is available under the regulations for election and communications too, to avoid disclosure of all contributions but to have a specially dedicated fund. The little that I remember in looking at the Disclose Act… months ago and

during the election cycle as well, so my attention was not entirely on it, is that the one issue that is raised by that is because this is theoretically money that is going to be used in the political process it could raise 527 tax issues. I mean is that separate segregated fund actually a 527 tax entity which you really get into complicated issues.

Ellen Aprill: And I was astonished that nobody addressed that in any of the discussions.

Holly Schadler: We did.

Ellen Aprill: It seemed to be a very big issue.

Holly Schadler: Yeah, that was why I remembered it.

Marc Elias: But again, you know it strikes me that we're in the context of Congress passing a law that's solvable since Congress could have changed the law.

Mimi Marziani: Right.

Marc Elias: So if that's the basis upon which opponents of Disclose didn't want to support it, then let's solve that issue through the passage of the Disclose Act. Like I said, in the end at least in some quarters and I won't say universally, in some quarters there just seemed that having suggested that disclosure might be a solution when it actually was upon, when it was actually upon them as an opportunity to discuss, here's a real piece of legislation rather than saying, okay we have to adjust this threshold up or we have to deal with related tax issue that was just, there was no interest in engaging in that and it was just an opposition.

Mimi Marziani: Well in all fairness, if we had a majority rule Senate, we actually would have a Disclose Act.

Marc Elias: Indeed.

Mimi Marziani: Arguably it would have passed in a different universe.

Marc Elias: I think it got close, it got 1 or 2 votes…

Mimi Marziani: Yeah I think it was 59 votes.

Marc Elias: Yeah.

Mark Ladov: I was hoping that the panel could follow up on something that Marc mentioned about political parties and sort of their role in this new *Citizens United* world. One of the concerns that I have and that I've heard in a lot of quarters is that with all this new outside money coming in that the candidates who are actually accountable to voters and the political parties who are at least somewhat accountable to voters, are being pushed to the margins of elections. I think, as I believe Chair Bauerly alluded to earlier, there's been research about the 2010 election showing that outside spending groups were much more likely than parties or

candidates to run negative ads and that the groups that were not disclosing their funders were even more likely to be running negative ads, and you know much more likely to be running misleading ads, because at the end of the day nobody is going to really be calling them on it. And so I'd be curious to know I guess what proposals the panel would have, I guess whether you share that concern, and what you would think we should be doing to try to bolster the role of parties in the system.

Marc Elias: So far, I've spoken a lot about this. Let me put two concrete things on the table and let me preface it by saying that for the reform community I think they just have to, each of you have to sort of make a decision here whether you want to actually help solve this problem by strengthening parties, or whether it's simply a talking point to talk down corporate spending. If you want to solve the problem with weak parties, I think there are a couple of things you could do. Number one, the Federal Election Commission took a statute that says FEC write new restrict coordination rules for ads run by everyone other than candidates and parties, and they wrote restrictions that applied to parties. It was an error when they wrote the rule. I don't believe it's consistent with McCain-Feingold, Commissioner Bauerly wasn't on the FEC at the time but she certainly said this before, the FEC tomorrow could open a rule-making, change the coordination standard for parties, lower it significantly, I would bet you if the Democratic Commissioners went along with that, I bet you the Republican Commissioners would go along with it, it could be done and if the reform community filed that petition, I bet you it would be go through. The second thing which was a part of, at least part of the Disclose Act in one of the two chambers and I can't remember which, which was actually an amendment offered during McCain-Feingold by Senator Torricelli, which is to extend lowest unit rate to party committees. You could significantly advantage party committees in buying television time, by applying a more robust standard of lowest unit rate generally but applying it to ads purchased by party committees. Those would be two things you could do that would strengthen the role of parties vis-a-vis third party groups.

Elizabeth Kennedy: Well I wanted to return us for a second to talking about how to effectuate real disclosure of these issues because I think that as we saw in 2010 with so much stark political spending that we're really only continue as people learn how to play more effectively and in a more sophisticated fashion in the current regulations, they'll be able to as Lance had called launder more of their money through organizations that in fact then don't have to share their true source of funds with the voters, and I wonder if anyone on the panel thinks that the concept particularly when we're discussing business corporations that they would have to go through and disclosure these organizations would have to disclosure under the concept of doing business as. So for example, groups, you know, when it was I believe it was Littleton Neighbors for Sensible Development or something was almost entirely funded by Wal-Mart, so if you're looking at an organization that receives a very high percentage of its funding from a specific source and if that source is specifically a business corporation that we definitely have seen those examples and if you think that that concept of doing business as, which exists in other elements of corporate law and I believe in regulations, although you would know more if we could import that in a useful way. And then generally on the developing narratives of disclosure you know recently we've seen all of this attempt to portray disclosure which used to be agreed upon, they were for it, before they were against it, but suddenly we're seeing this attempt to develop this idea that it is in fact chilling of speech or a burden of political speech and I noticed Professor Schadler that

you just had said that it begins to discourage participation and that's exactly the kind of means that opponents of disclosure are trying to forward, so I think that we want to be really sensitive to how we discuss those things.

Ellen Aprill: I don't know whether this is doing business but it is similar to the suggestion I made about requiring disclosure, and similar to the private foundation rules, when you have only a few donors which would be defined and would catch these kinds of organizations, and not require Congress to go quite as far as it was clearly unwilling to go.

Holly Schadler: There's one other thing I would add is that idea that concept is certainly what is contemplated in the FCC petition, that there would be some percentage, 25%, or so that there's a minimum of four donors, sorry a maximum of four donors disclosed on any particular broadcast ad, now that of course will only ever cover radio and television but the same kind of provision can certainly be brought into other forms of disclosure and for example, California has that, has a provision for all political advertising I believe that requires not only the name of the organization that's paying for the advertisement, whether it be a handbill or anything, newspaper, but also the major donors to that organization.

Audience Member #3: No, that only covers initiatives, that was passed by, and only publicly passed initiatives and it only covers political advertising related to initiatives campaigns.

Holly Schadler: Right but what I'm saying is that it doesn't just cover broadcast.

Audience Member #3: No, it covers everything and it basically says you know funding provided by is the top of …

Holly Schadler: Correct, right.

Audience Member #3: Funders above $25,000 dollars.

Holly Schadler: Right, but there are other states that do have this, not many, but …

Mimi Marziani: Washington…

Ellen Aprill: It does cover other types of media.

Mimi Marziani: Great. I think we have time for one more question. Okay, one more question.

Audience Member #4: Yes, actually once we had *Citizens United*, the spending went up measurably, what was it five times. I want to ask you to give, because you're on the front lines of dealing with these technical issues, just assume for a second that we have disclosure. Okay, and that's it's a significant disclosure. We don't have a plethora of new veterans organizations… So, given this, would you expect that amount of money now being spent that's unaccountable to go down, just by the fact of disclosure or do you think it will have no effect?

Holly Schadler: It's an interesting question and I certainly don't know the answer. One of the things that I think about is in I guess 2000 when the prior to 2000, 527 organizations were not required to file with the Internal Revenue Service and were not required to disclose their donors so for I guess $200, everyone thought that when the new disclosure regime was instituted that 527 money would significantly drop and I don't believe that that was the case. So, I think it would be interesting to look back at that experience and see whether that's the case or whether really it would continue with fuller disclosure.

Ellen Aprill: And maybe partly because the IRS database wasn't very good.

Marc Elias: Yeah, my instinct, I have no idea, like Holly, I don't know. My instinct is along the lines of hers that in 2004, we saw some very large 527's and honestly, you could speak to this but honestly 501(c)(4)'s existed in 2004. And there was not this sort of sense of oh my god we can't be in a disclosure regime. This needs to be in a … because there are trade-offs, there are issues that involve primarily purpose that make 501(C)(4)'s less optimal for some of this…

Ellen Aprill: and gift tax.

Marc Elias: and gift tax.

Ellen Aprill: 527's explicitly are not subject to gift tax.

Marc Elias: So, I like Holy I would be curious to see if there's any data to suggest that at least in that experience there was any dissuasion but …

Bruce Freed: I think that disclosure can be helpful if it is accompanied with monitoring. Some of companies have come under pressure from their shareholders. I know of at least one case where a company has told a shareholder that it will reduce its payments to a trade association by half. If you're going to get about this type of change, then you need to have that type of monitoring and follow up engagement. That's why you have to have disclosure and accountability. Accountability means going in and taking a look at where the money is going, are there conflicts with company values and positions? You have to really examine this to understand the level of risk and make companies aware of the risks they are exposed to.

Ellen Aprill: But Bruce, aren't you saying possibly what Fran talked about - you form two trade associations. One doesn't do the campaign intervention and they continue to give the money and the ones who want to give the money to the campaign intervention, they go to the other trade association.

Bruce Freed: Now you're talking about trade associations such as the Chamber, you're not going to have dual trade associations there.

Ellen Aprill: But smaller ones.

Bruce Freed: The smaller ones are not the major players. When you're taking a look at the intervention in elections, in this last election it was the Chamber of Commerce, it was Pharma and the health insurance plans. You're looking at a handful of associations.

Mimi Marziani: Okay, all right, so now we can have thunderous applause for our wonderful panel.