

OCT 15 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 5934
DATE COMPLAINT FILED: 08/20/07
LAST RESPONSE RECEIVED: 10/05/07
DATE OF NOTIFICATION: 08/27/07
DATE ACTIVATED: 11/13/07
EXPIRATION OF SOL: 06/2012

COMPLAINANT:

T. Lane Hudson

RESPONDENTS:

Friends of Fred Thompson, Inc.
and Lin Howard, in his official capacity
as Treasurer

Fred D. Thompson

RELEVANT STATUTES:

2 U.S.C. § 431(2)
2 U.S.C. § 432(e)(1)
2 U.S.C. § 433(a)
2 U.S.C. § 434(b)

INTERNAL REPORTS CHECKED:

FEC Database

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns the "testing the waters" exemption, which permits an individual to test the feasibility of a campaign for federal office without becoming a candidate and triggering registration and reporting requirements under the Federal Election Campaign Act of 1971, as amended ("the Act"). The complaint alleges that former Senator Fred D. Thompson, a candidate in the 2008 Republican Presidential primary, and his authorized committee, Friends of Fred Thompson, Inc. and Lin Howard, in his official capacity as Treasurer ("the Committee"),

1 violated the Act by failing to register and file reports with the Commission after Sen. Thompson
2 triggered candidate status and, thus, was no longer exempt under the testing the waters
3 regulations. Specifically, the complaint alleges that Sen. Thompson met four of the regulatory
4 criteria for candidate status months before he filed his statement of candidacy with the
5 Commission on September 6, 2007, citing statements of Sen. Thompson or his staff quoted in
6 news articles and other information contained in public documents.

7 In response, the Respondents assert that they conducted all of their activities in
8 compliance with the Commission's testing the waters regulations. In particular, they cite other
9 press statements indicating that Sen. Thompson had not decided whether to become a
10 Presidential candidate before September 6, 2007. Notably, however, Respondents do not deny
11 that the statements included in the complaint were made, nor do they assert that these statements
12 were taken out of context or misquoted. Based on the totality of the circumstances, it appears
13 that Sen. Thompson may have become a candidate by June 26, 2007. Thus, we recommend that
14 the Commission find reason to believe that Fred D. Thompson violated 2 U.S.C. § 432(e)(1) by
15 failing to designate a principal campaign committee within 15 days of June 26, 2007 and that
16 Friends of Fred Thompson and Lin Howard, in his official capacity as treasurer, violated
17 2 U.S.C. § 433(a) by failing to file a Statement of Organization within 10 days following the 15-
18 day period and 2 U.S.C. § 434 by failing to file the July Quarterly disclosure report with the
19 Commission, and enter into pre-probable cause conciliation.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Factual Summary**

22 Friends of Fred Thompson was incorporated under the laws of Tennessee on June 1,
23 2007. On June 4, 2007, the Committee filed a Political Organization Notice of Section 527

1 Status Form with the Internal Revenue Service ("IRS") with a stated purpose "to promote the
2 potential candidacy of Fred Thompson for the office of President of the United States." The
3 Committee subsequently filed a Political Organization Mid-Year Report with the IRS disclosing
4 contributions totaling \$3,462,355 and expenditures totaling \$625,743 for the period beginning
5 June 4, 2007 through June 30, 2007.

6 Sen. Thompson filed a Statement of Candidacy with the Commission on September 6,
7 2007 and registered with the Commission as a political committee on September 7, 2007. The
8 Committee's initial disclosure report, filed on October 15, 2007, reflected total receipts of
9 \$12,828,110 and total disbursements of \$5,706,366 for the period from the Committee's
10 inception on June 4, 2007 through September 30, 2007.

11 **B. Legal Analysis**

12 An individual becomes a candidate for federal office – and thus triggers registration and
13 reporting under the Act – when he or she has received or made in excess of \$5,000 in
14 contributions or expenditures. 2 U.S.C. § 431(2). However, money raised and spent solely to
15 "test the waters" does not count towards this dollar threshold until the individual decides to run
16 for federal office or conducts activities that indicate he or she has decided to become a candidate.
17 "Testing the waters" activities include, but are not limited to, conducting polls, making telephone
18 calls, and traveling. 11 C.F.R. §§ 100.72(a) and 100.131(a).

19 Activities indicating an individual has decided to become a candidate and gone beyond
20 "testing the waters" include: (1) the use of general public political advertising to publicize an
21 intention to run for office; (2) raising funds in excess of what could reasonably be expected to be
22 used for exploratory activities or undertaking activity designed to amass campaign funds that
23 would be spent after becoming a candidate; (3) making or authorizing statements referring to him

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1 or herself as a candidate; (4) conducting activity in close proximity to the election or over a
2 protracted period of time; and (5) taking action to qualify for the ballot under state law. See 11
3 C.F.R. §§ 100.72(b) and 100.131(b).

4 Achieving "candidate" status triggers registration and reporting requirements for the
5 candidate and his or her principal campaign committee. A candidate has 15 days from the date
6 on which he or she becomes a candidate to designate a principal campaign committee by filing a
7 Statement of Candidacy with the Commission. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a).
8 The principal campaign committee must then file a Statement of Organization within ten days of
9 its designation as principal campaign committee. 2 U.S.C. § 433(a).

10 The complaint alleges that Sen. Thompson became a candidate months before filing his
11 September 6, 2007 statement of candidacy because he had (1) raised and spent funds in excess of
12 what could reasonably be expected to be used for exploratory activities, (2) used general public
13 political advertising to publicize an intention to run for office, (3) conducted activities in close
14 proximity to the election or over a protracted period of time, and (4) made or authorized
15 statements that refer to him as a candidate.¹ These allegations are considered below in turn.

16 **1. Thompson's Fundraising and Spending**
17

18 The complaint alleges that Sen. Thompson went beyond the testing the waters exemption
19 by raising funds in excess of what could reasonably be used for exploratory activities. As
20 support the complaint cites the fact that the Committee's Mid-Year Report filed with the IRS on
21 July 31, 2007 disclosed that the Committee had raised \$3,463,355 and made expenditures of
22 \$625,743. The complaint further notes that the IRS filing also indicated that \$72,000 of the

¹ The complaint does not allege and we have no information that Mr. Thompson took any action to qualify for the ballot under state law, the remaining regulatory example of activities that indicate that an individual has decided to become a candidate at 11 C.F.R. §§ 100.72(b) and 100.131(b).

1 Committee's total contributions received "were marked for use in the General Election," which
2 the complaint describes as "an egregious violation" because it "clearly indicates an intention for
3 protracted campaign activity." In addition, the complaint notes that the Committee disclosed
4 expenditures for rent totaling \$88,789, which is "a substantial sum" and "another clear indicator
5 that [Sen. Thompson] was operating as a candidate," and \$25,322 for legal services, which
6 would have been minimal "if Mr. Thompson had been truly testing the waters."

7 With respect to the level of Sen. Thompson's fundraising, the Commission has
8 previously declined to find reason to believe in matters where exploratory committees had raised
9 a significant amount in contributions. *See, e.g.*, MUR 5703 (Rainville) (no reason to believe
10 where committee raised \$100,000); MUR 5661 (Butler) (same); MUR 2710 (Judge Harvey
11 Sloane) (no reason to believe where committee raised \$200,000). While the \$3,462,355 in
12 contributions the Committee raised in June 2007, its first month in operation, is substantially
13 higher than sums the Commission has opined upon with respect to congressional races, *i.e.*,
14 MURs 5703, 5661 and 2710, it is not clear whether this amount exceeds what could reasonably
15 be expected to be used for exploratory activities related to a potential candidacy for the office of
16 President of the United States, particularly given the anticipated cost of the 2008 Presidential
17 election.² However, the fact that Thompson only spent \$2,923,607, yet raised \$9,528,494, prior
18 to announcing his candidacy seems to indicate he may have been amassing campaign funds to
19 be used after he became a candidate.

20 The complaint's allegation that \$72,000 of the Committee's total contributions received
21 "were marked for use in the General Election" appears to be based on the fact that multiple
22 contributors made a contribution in the amount of \$4,600 – twice the contribution limit for the

² *See* Editorial, *Killing the Cash Cow*, ST. LOUIS POST-DISPATCH, Apr. 9, 2007, at C6 ("Experts say the 2008 presidential election alone will cost \$1 billion.").

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1 primary election. The Committee categorically denies the allegation and asserts that it neither
2 solicited nor collected funds for the general election during the testing the waters period and
3 explains that it raised funds subject to the limits that apply for the primaries. According to the
4 response, if an individual contributed more than \$2,300, the Committee sought to reattribute the
5 excess portion to the individual's spouse for the primary election within the 60-day window or
6 refunded the excess portion to the contributor. We currently have no information that suggests
7 otherwise.

8 **2. Paid Advertising**

9 The complaint further notes that among the Committee's expenditures were six
10 expenditures totaling \$168,940 for Internet services, an expenditure of \$21,142 for Media, and a
11 \$133 expenditure made to Google AdWords, an Internet advertising service, and alleges that
12 these expenditures all violate the "paid advertising clause," pursuant to which an individual is
13 deemed to have decided to become a candidate when that individual uses general public political
14 advertising to publicize his or her intention to campaign for federal office. See 11 C.F.R.
15 § 100.72(b)(1). In response to this allegation, the Committee asserts that it complied fully with
16 the testing the waters advertising restriction as none of its advertising or media expenditures
17 were to "publicize ... [an individual's] intention to campaign for Federal office," as prohibited
18 by 11 C.F.R. § 100.721(b)(1).

19 Specifically, Respondents explain that the \$133 payment to Google AdWords referenced
20 in the complaint was to create a link to the Committee's testing the waters website, which stated
21 that Senator Thompson was testing the waters, and read as follows:

22 **I'm With Fred**
23 Fred Thompson is testing the waters
24 To share your support, visit
25 **www.I'mWithFred.com**

1 Respondents further explain that the expenditure of \$21,142 referenced in the complaint was
2 made to New Media Strategies, which tracks blogs and provides strategic advice for dealing with
3 online media. Respondents do not specifically address the complaint's reference to the
4 Committee's \$168,940 in expenditures for "Internet services."³

5 The available information does not indicate that any of the aforementioned expenditures
6 were made to publicize Sen. Thompson's intention to campaign for federal office.

7 3. Length of Thompson's "Exploratory" Activity
8 and Proximity To The Election
9

10 The complaint alleges that Sen. Thompson became a candidate in July 2007 because he
11 conducted activities in close proximity to the election or over a protracted period of time. In this
12 vein, the complaint cites a July 2, 2007 Washington Post article that reported that Sen.
13 Thompson's campaign organization signed a long-term lease on a building that would serve as
14 their national campaign headquarters. In that same article, Sen. Thompson is quoted as saying
15 that he "doesn't have any big announcement tonight" but "I plan on seeing a whole lot more of
16 you, how 'bout that?" See Michael Shear, *Thompson Moves From 'If' He'll Run to 'How'*,
17 WASH. POST, Jul. 2, 2007, at A3 (Compl. Attach. 3).

18 In response to this allegation, the Respondents state that operating as a "testing the
19 waters" committee for only approximately three months, as the Committee did, cannot be
20 regarded as a protracted period of time under any circumstances, and that it did not operate as a
21 testing the waters committee in close proximity to an election, as no primary or caucus was
22 scheduled to take place before January 2008 and it registered as a principal campaign committee

³ We note that under the Commission's regulations, the term "general public political advertising" does not include communications over the Internet, except for communications placed for a fee on another person's Web site. See 11 C.F.R. § 100.26.

1 on September 7, 2007. The response, however, does not address the allegation that Sen.
2 Thompson signed a long-term lease.

3 Thus, it remains an open question whether Sen. Thompson entered into a "long-term
4 lease" intended to serve as the Committee's national headquarters and, if so, whether that lease is
5 sufficient to establish that Sen. Thompson had at that time made a decision to become a
6 candidate. We currently do not have sufficient information regarding the actual term of the lease
7 to properly consider this issue. If, however, Mr. Thompson did enter into a long-term lease, that
8 would appear to indicate he had already decided to run for Federal office.

9 4. Statements Referring to Thompson as a Candidate

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11 Sen. Thompson's fundraising and spending activities do not appear sufficient, by
12 themselves, to trigger candidate status under the "testing the waters" regulations. These
13 activities, however, taken together with statements made by Sen. Thompson and his staff, lead us
14 to believe that Sen. Thompson may have already decided to become a candidate. Specifically,
15 the complaint cites the following statements:

- 16 • In a June 4, 2007 interview, Sen. Thompson was quoted as saying, "I can't remember
17 exactly the point that I said, 'I'm going to do this, but when I did, the thing that occurred
18 to me: 'I'm going to tell people that I am thinking about it and see what kind of reaction
19 I get to it.'" The article begins:

20
21 Politician-turned-actor Fred Thompson has been coy with
22 audiences as he flirts with a bid for the Republican presidential
23 nomination.

24
25 In an interview with USA TODAY, however, the former
26 Tennessee senator not only makes it clear that he plans to run, he
27 describes how he aims to do it. He's planning a campaign that will
28 use blogs, video posts and other internet innovations to reach
29 voters repelled by politics-as-usual in both parties.

30
31 Susan Page, *Thompson Wants to Be 2008's Outsider*, USA TODAY, Jun. 4, 2007 (Compl.
32 Attach. 2).
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- 1 • In a June 26 report by the Associated Press, Sen. Thompson is quoted as saying he's
2 "testing the waters" about a run, "but the waters feel pretty warm to me." The article
3 further reports that, while Sen. Thompson declined to give a specific date for an official
4 announcement about a presidential run, he stated, "I have a general time in mind," and
5 "You're either running or not running. I think the steps we've taken are pretty obvious."
6 *Fred Thompson Defends Record as Lobbyist*, ASSOC. PRESS, Jun. 26, 2007, available at
7 <http://www.foxnews.com/story/0,2933,286820,00.html> (Compl. Attach. 1).
8
- 9 • According to a July 12, 2007 article, Mary Matalin, reportedly a Thompson adviser,
10 stated that the announcement of Sen. Thompson's candidacy will be made when the
11 campaign infrastructure is ready to make the most of the surge in interest she believes
12 will follow. Ms. Matalin is quoted as stating in reference to Sen. Thompson's decision
13 about whether to be a candidate for President: "He has made up his mind. And one can
14 appreciate that planning the announcement of what's on his mind needs to take place in a
15 deliberative fashion." *Thompson Still Waiting For Right Moment to Announce*, Wash.
16 Post, Jul. 12, 2007, at A6 (Compl. Attach. 4)
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- 18 • In an August 17, 2007 interview on CNN, Sen. Thompson said, "We are going to be
19 getting in if we get in, and of course, we are in the testing the waters phase," he said,
20 adding, "we're going to be making a statement shortly that will cure all of that. But yeah,
21 we'll be in traditionally when people get in this race." Compl. at 2 (quoting Interview by
22 John King with Sen. Fred Thompson, CNN NEWS, Aug. 17, 2007, available at
23 <http://www.cnn.com/video/#!/video/politics/2007/08/17/king.thompson.values.interview.cnn>).
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25

26 Respondents do not deny that the cited statements were made, nor do they assert that the
27 statements were taken out of context or misquoted. Rather, Respondents assert that none of
28 these statements indicate that Sen. Thompson was a candidate or that he had made a decision on
29 whether to become a presidential candidate. Respondents further state that they repeatedly stated
30 during the testing the waters phase that Sen. Thompson was not a presidential candidate and had
31 not decided whether to become a candidate. In this vein, respondents cite numerous statements
32 contained in news articles dated from March 11, 2007 through August 22, 2007. See Response
33 at 6-10.

34 However, the quoted statements strongly suggest that Sen. Thompson had decided to
35 become a candidate. Moreover, the subsequent statements cited by the Respondents do not
36 negate the earlier statements triggering candidate status. See Factual and Legal Analysis in

MUR 5363 (Sharpton Exploratory Committee) (once an individual becomes candidate, equivocal statements of intent, or future "official announcement" do not eradicate the registration and reporting requirements that have been triggered).

In previous matters, the Commission has relied on statements similar to those at issue here to support reason to believe findings. For example, in MUR 5693 (Aronsohn), the candidate sent a solicitation letter to an unknown number of recipients on "Congressional Exploratory Campaign" letterhead that included statements such as:

- "Defeating an incumbent is never easy. But I have the energy, the experience, and the determination to win this race. And as evidenced by the attached news article, I am ready to begin fighting for our future... now;"**
- "Now, I want to take this experience and my passion for public service and put them to work for the people of New Jersey's 5th Congressional District;"**
- "Every dollar we receive in the next few weeks can help us prepare for this fight against Scott Garrett;" and**
- "We have come a long way in just a few short weeks. And with your support, we can go the distance."**

MUR 5693 (Aronsohn), General Counsel's Report #2 at 2-4. Based on these statements, the Commission found reason to believe and, later, probable cause to believe that Aronsohn violated the Act by failing to timely file a Statement of Candidacy.

Similarly, in MUR 5251 (Rogers) the candidate reportedly said, "I want to be your congressman and need your help to win the seat" at a fundraising event. A fundraising letter from his Committee stated, "I know that I will effectively serve your interests in Congress and that because of the close working relationship with the President and the leadership of Congress that I will immediately work for the benefit of Colorado," and "Thank you in advance for your help with this new campaign. With your support I look forward to serving you in the next

1 United States Congress." The Commission found reason to believe that Rogers violated the
2 Act.⁴

3 Just as the statements in MURs 5693 and 5251 indicated that Messrs. Arohsohn and
4 Rogers had decided to become candidates, the statements at issue in this matter indicate that Mr.
5 Thompson decided to become a candidate several months before filing his Statement of
6 Candidacy in September 2007. As discussed above, on June 26, 2007, Sen. Thompson stated, "I
7 have a general time in mind. You're either running or not running. I think the steps we've taken
8 are pretty obvious." See Associated Press, *supra* at 8-9. At a June 29, 2007 fundraiser, Sen.
9 Thompson reportedly stated, "I don't have any big announcements here tonight. [But] I'll be
10 seeing a whole lot more of you. How about that?" Michael Shear, *Thompson Moves From 'If'*
11 *He'll Run to 'How'*, WASH. POST, Jul. 2, 2007, at A3 (Compl. Attach. 3). Moreover, shortly after
12 Sen. Thompson's campaign signed a lease on a building intended to serve as his campaign
13 headquarters, his campaign advisers reportedly represented to the press that he planned to
14 announce his candidacy by mid-July 2007.⁵ See *id.* Sen. Thompson's June 26, 2007 statements,
15 as well as the other statements discussed above, viewed together with his fundraising activity
16 (i.e., Sen. Thompson only spent \$2,923,607, yet raised \$9,528,494, prior to announcing his
17 candidacy), lead us to believe he had crossed the line from "testing the waters" to candidate
18 status. See *supra* at 8-9.

⁴ In another matter, MUR 5363 (Sharpton), the Commission found reason to believe that Al Sharpton violated the Act by failing to register as a candidate for President. Sharpton crossed the line from "testing the waters" to candidate when he published his book, *Al on America*, in which he made statements referring to himself as a candidate for the Democratic nomination for President. The book contains statements such as: "It is on these qualities that I am seeking the Presidency of the United States in 2004"; "I am running for president to finally put the issues concerning most Americans onto the front burner"; and "I'm running to build the Democratic Party, to strengthen it."

⁵ Sen. Thompson's advisers reportedly debated how and when to announce a formal candidacy "for months." See Michael Shear, *Head of the House*, WASH. POST, Nov. 13, 2007, at A1.

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Based on all of the foregoing discussion, it appears that Sen. Thompson became a candidate no later than June 26, 2007, the date of the Associated Press article. Thus, we recommend that the Commission find reason to believe that Fred D. Thompson violated 2 U.S.C. § 432(e)(1) by failing to designate a principal campaign committee within 15 days from the date on which he crossed the line from testing the waters and became a candidate. In addition, we recommend that the Commission find reason to believe that Friends of Fred Thompson and Lin Howard, in his official capacity as Treasurer, violated 2 U.S.C. § 433(a) by failing to file a Statement of Organization within 10 days following the 15-day period and 2 U.S.C. § 434 by failing to file the July Quarterly disclosure report with the Commission.

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IV. RECOMMENDATIONS

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1. Find reason to believe that Fred D. Thompson violated 2 U.S.C. § 432(e)(1).

2. Find reason to believe that Friends of Fred Thompson and Lin Howard, in his official capacity as Treasurer, violated 2 U.S.C. §§ 433(a) and 434.

3. Approve the attached Factual and Legal Analysis.

4. Enter into conciliation prior to a finding of probable cause to believe with respondents Fred D. Thompson, and Friends of Fred Thompson, Inc. and Lin Howard, in his official capacity as Treasurer.

5. Approve the attached Conciliation Agreement.

6. Approve the appropriate letters.

10/14/2008
Date

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

Kathleen Guith
Kathleen Guith
Deputy Associate General Counsel
for Enforcement

Julie L. McConnell
Julie L. McConnell
Assistant General Counsel

Tracey L. Ligon
Tracey L. Ligon
Attorney