



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Fred D. Thompson;)	MUR 5934
Friends of Fred Thompson, Inc. and)	
Lin Howard, in his official capacity)	
as treasurer)	

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND
COMMISSIONERS CAROLINE C. HUNTER DONALD F. MCGAHN,
AND ELLEN L. WEINTRAUB**

In this matter, the Office of General Counsel recommended the Commission find reason to believe Senator Fred Thompson, his committee, and treasurer, in his official capacity, violated 2 U.S.C. §§ 432(e)(1); 433(a); and 434 of the Federal Election Campaign Act of 1971, as amended (the Act), by improperly using the regulatory “testing the waters” exemption to the statutory requirement to register with the Commission. 11 C.F.R. §§ 100.72 and 100.131. Because we do not believe Senator Thompson’s public statements establish that he had definitively decided to become a federal candidate before he filed his Statement of Candidacy on September 6, 2007, we voted against finding reason to believe that a violation occurred.

Senator Thompson formed Friends of Fred Thompson on June 1, 2007 and subsequently registered the organization with the IRS under Section 527 of the tax code, stating that the organization’s purpose was “to promote the potential candidacy of Fred Thompson for the office of President of the United States.”

Under the Act, an individual becomes a candidate for federal office when the individual has received or made contributions or expenditures in excess of \$5,000, 2 U.S.C. § 431(2), and then has fifteen days to file a Statement of Candidacy with the Commission, 2 U.S.C. § 432(e)(1). An individual who has not yet decided to run as a federal candidate may “test the waters” prior to declaring candidacy. 11 C.F.R. §§ 100.72 and 100.131. While testing the waters, the individual need not file reports with the Commission disclosing money received and spent, although all such activity is subject to the Act’s limits and prohibitions. *Id.* If the individual becomes a candidate, all such financial activity must be reported. *Id.*

During the “testing the waters” period, the individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy. *Id.* Commission regulations provide that certain activities may indicate that an individual has decided to become a federal candidate and is no longer testing the waters, such as: running

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general political advertising; raising funds in excess of that which would be reasonably required for exploratory activities; making or authorizing written or oral statements referring to the individual as a candidate; conducting activities in close proximity to the election; and taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b) and 100.131(b).

The complaint in this matter referenced a number of newspaper articles including statements by Senator Thompson and information that the campaign had signed a lease for an office building that it purportedly planned to use as campaign headquarters.

While Senator Thompson's statements and activities may have tested the boundaries of the testing the waters exemption, they stayed within its ambit. As one reporter noted, "Fred Thompson has been coy with audiences as he flirts with a bid for the Republican presidential nomination." Susan Page, *Thompson Wants To Be 2008's Outsider*, USA TODAY, Jun. 4, 2007. In that interview, Senator Thompson stated: "I can't remember exactly the point that I said, 'I'm going to do this, but when I did, the thing that occurred to me: 'I'm going to tell people that I am thinking about it and see what kind of reaction I get to it.'" Telling people that the person is "thinking about" running to see "what kind of reaction" it gets describes the kind of prospective candidate activities – i.e., to gauge the level of support that might be achieved and determine the viability of the candidacy – that the "testing the waters" provision permits.

In an article dated June 26, 2007, Senator Thompson is quoted as saying to an audience that he is "testing the waters" and "the waters feel pretty warm to me." He added, "You're either running or not running. I think the steps we've taken are pretty obvious." *Fred Thompson Defends Record as Lobbyist*, ASSOC. PRESS, Jun. 26, 2007. Thus, he explicitly said he was testing the waters. The statement about the steps being "pretty obvious" may have been intentionally ambiguous (was it obvious that he was running or obvious that he was not yet running?), but they do not establish that Senator Thompson had decided to run.

In an August 17, 2007 interview on CNN, Senator Thompson said, "We are going to be getting in if we get in, and of course, we are in the testing the waters phase," adding, "we're going to be making a statement shortly that will cure all of that. But yeah, we'll be in traditionally when people get in this race." Interview by John King with Sen. Fred Thompson, CNN NEWS, Aug. 17, 2007.¹ "[W]e're going to be making a statement shortly" could simply mean that he anticipated making a decision soon. "[W]e'll be in traditionally when people get in this race" could be read as subject to the preceding qualifiers "if we get in, and of course, we are in the testing the waters phase." In light of Senator Thompson's phrasing, these statements are not sufficient by themselves to find reason to believe a violation occurred.

The complaint also cites to MUR 5365 (Sharpton) for further support. However, the statements made by the candidate in that matter plainly, unambiguously, and repeatedly stated that he was running for the presidency. Chapter One of his book, *Al On America*, was entitled "Mr. President." On page four he wrote "I am seeking the Presidency of the United States in 2004" and in the following twenty pages wrote "I am running for president" or "I'm running" at least five times. Senator Thompson's public statements are not similar in form or function to

¹ Available at <http://www.cnn.com/video/#/video/politics/2007/08/17/king.thompson.values.interview.cnn>

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Statement of Reasons

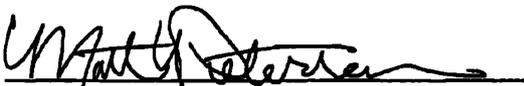
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Reverend Sharpton's statements regarding his candidacy. Indeed, the contrast between Senator Thompson's ambiguous phrasings and Reverend Sharpton's unambiguous statements supports our determination in this matter.

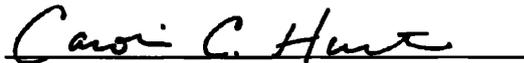
Finally, we do not find it dispositive that the committee had reportedly signed a long-term lease on a building in Nashville, Tennessee to serve as national headquarters. The mere signing of a long-term lease does not necessarily alter the testing the waters analysis because one could sign a long-term lease for other reasons. For instance, many property owners require a 12-month lease. The length of a lease, by itself, does not demonstrate that an individual has decided to run for office.

For the foregoing reasons, recognizing that this is a close case, we voted against finding reason to believe that a violation occurred.

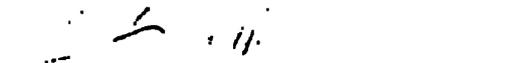
March 10, 2009



Matthew S. Petersen
Vice Chairman



Caroline C. Hunter
Commissioner



Donald F. McGahn II
Commissioner



Ellen L. Weintraub
Commissioner

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