

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

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4313
DATE COMPLAINT FILED: 2/23/96
DATE OF NOTIFICATION: 3/4/96
DATE ACTIVATED: 6/13/96

STAFF MEMBER: Anne A. Weissenborn

COMPLAINANT: United States Sugar Corporation

RESPONDENTS: Lugar for President, Inc.
Patrick J. Kiely, as treasurer
The Hon. Richard Lugar
Paul Tudor Jones, II
Coalition for Good Government, Inc.
Tudor Investment Corporation

RELEVANT STATUTES: 2 U.S.C. § 431(17) and (18)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a) and (b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
2 U.S.C. § 441d
2 U.S.C. § 441f
11 C.F.R. § 100.17
11 C.F.R. § 100.22
11 C.F.R. § 109.1
11 C.F.R. § 109.3
11 C.F.R. § 110.11
11 C.F.R. § 114.10(e)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

EXHIBIT 07

23-04-406-1751

I. GENERATION OF MATTER

This matter was generated by a complaint filed by the United States Sugar Corporation on February 23, 1996. The complaint alleges that Paul Tudor Jones, II, the Coalition for Good Government, Inc. ("the Coalition"), and "perhaps others unknown" violated the Federal Election Campaign Act ("the Act" or "FECA") in November, 1995, as a result of expenditures made on behalf of the campaign of U.S. Senator Richard Lugar for nomination to the office of President of the United States.

The above-cited respondents, plus the Lugar for President Committee and Patrick J. Kiely, as treasurer, ("the Committee"), the Hon. Richard Lugar, and the Tudor Investment Corporation, were notified of this complaint on March 4, 1996. Written responses have been received from Mr. Jones and the Coalition and from the Committee. Counsel for the Committee has stated orally that Senator Lugar has been consulted on the Committee's response, has submitted an accompanying affidavit, and may be considered to be covered by the Committee's response.

On May 13, 1996, a "First Amended and Supplemented Complaint" was filed, providing additional information in support of the earlier complaint.

II. FACTUAL AND LEGAL ANALYSIS**A. The Law**

The Federal Election Campaign Act defines "contribution" and "expenditure" to include payments, loans, advances and "anything of value" provided by a person "for purposes of influencing a federal election." 2 U.S.C. § 431(8)(A)(i) and 2 U.S.C. § 431(9)(A)(i).

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11 C.F.R. § 100.7(a)(1)(iii) and 11 C.F.R. § 100.8(a)(1)(iv)(A) define “anything of value” as including in-kind contributions. 2 U.S.C. § 431(11) defines “person” as including, *inter alia*, an individual, a committee and an association.

2 U.S.C. § 441a(a)(1)(A) limits to \$1,000 the amount which any person may contribute to a candidate and his or her authorized political committee per election. 2 U.S.C. § 441a(a)(3) limits to \$25,000 per calendar year the total amount which any individual may contribute to candidates and political committees. 2 U.S.C. § 441a(f) prohibits the knowing acceptance by candidates and political committees of contributions in excess of the limitations established at 2 U.S.C. § 441a(a).

Expenditures made with the knowledge, cooperation or encouragement of a candidate or campaign are contributions. 2 U.S.C. § 441a(a)(7)(B)(i) and 11 C.F.R. § 109.1(c). The Commission has stated: “[A] communication made in coordination with a candidate presumptively confers ‘something of value’ received by the candidate so as to constitute an attributable ‘contribution’.” Advisory Opinion 1988-22.

More recently, when considering whether particular activities had resulted in “contributions” or “expenditures” under the Act, the Commission stated that “financing . . . activities will result in a contribution to, or an expenditure on behalf of, a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate’s campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate.” Advisory Opinion 1992-6. The Commission also has stated that “the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a

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determination that an activity is 'campaign-related.'" Id.; see also Advisory Opinions 1990-5, 1988-27, 1988-22, 1986-37, 1986-26, 1984-13 and 1983-12.

2 U.S.C. § 431(17) defines an "independent expenditure" as

an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or an authorized committee or agent of such candidate.

"Clearly identified" is defined at 2 U.S.C. § 431(18) as "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." In July, 1995 the definition of "clearly identified" at 11 C.F.R. § 100.17 was expanded to include an "unambiguous reference" to a person's "status as a candidate." A definition of "expressly advocating" was also added in July, 1995 at 11 C.F.R. § 100.22.¹ This latter definition includes communications which contain phrases such as "Bill McKay in '94" or "Smith for Congress."

¹ This new regulation expands upon and replaces the definition of "expressly advocating" previously found at 11 C.F.R. § 109.1(b)(2).

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2 U.S.C. § 441b(a) makes it "unlawful . . . for any corporation whatever to make a contribution or expenditure in connection with any election at which presidential or vice presidential electors or a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . "; for "any officer or any director of any corporation . . . to consent to any contribution or expenditure by the corporation"; and for any candidate or political committee to knowingly accept such contributions. 2 U.S.C. § 441b(b)(2) defines "contribution or expenditure" as including "any direct or indirect payment, distribution, loan . . . or anything of value . . . to any candidate, campaign committee or political party or organization, in connection with any election to federal office."

The financing by a corporation of communications to the general public that mention "a candidate in an election-related contest" and are "undertaken in coordination with the candidate or his campaign" would constitute coordinated expenditures and thus prohibited in-kind contributions to the candidate. Advisory Opinion 1988-22.² See also 11 C.F.R. § 114.10(d)(2).

² In Advisory Opinion 1988-22, the Commission addressed the activities of a non-profit incorporated organization. With regard to a newsletter which the organization proposed to publish, the Commission wrote:

If statements, comments or references regarding clearly identified candidates appear in the newsletter and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of the candidates or their agents, regardless of whether such references contain 'express advocacy' or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute 'expenditures' and 'in-kind contributions' to the identified candidates.

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Pursuant to 26 U.S.C. § 1361, et al., a small incorporated business may avoid double taxation, i.e., of the corporation and then again of any shareholders, by organizing itself as an "S Corporation." Such a small business corporation may elect to have its income passed through and taxed to its shareholders as ordinary income rather than pay corporate income tax.

26 U.S.C. § 1366. This election does not, however, alter the fact that any corporation acquires, by the act of incorporation, a legal identity separate from its investors, and is subject to regulation as such. See United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972) (“[T]he legislative history of Subchapter S negates any inference that Congress intended” corporations to lose their corporate character); Johnson v. U.S., 386 F. Supp. 374, 377 (E.D. Kentucky, 1974) (“The congressional desire to provide an alternative form of doing business [as Subchapter S corporations] does not suggest an intention to treat electing corporations as partnerships or proprietorships for tax purposes.”)

2 U.S.C. § 441f prohibits any person from making “a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution.” In addition, this statutory provision prohibits any person from “knowingly accept[ing] a contribution made by one person in the name of another person.”

B. The Complaint and Supplement

On November 18, 1995, a convention and straw poll known as “Presidency III” or “P-3” were held by the Florida Republican Party in Orlando, Florida. According to the complaint and

supplement, during the week prior to the party convention and straw poll \$1,000,000 was spent to run television advertisements allegedly in support of the presidential candidacy of U.S.

Senator Richard Lugar. "An organization formed for this purpose, funded by [Paul Tudor] Jones, financed advertising supporting Lugar's presidential candidacy on the basis - - clearly and specifically - - of his support for the sugar tax." (Complaint, page 5).⁴ Earlier, on November 1, 1995, Senator Lugar had introduced a bill in the United States Senate "to provide authority for the assessment of a tax on cane sugar produced in the Everglades Agricultural Area of Florida." (Supplement to Complaint, page 2).

The organization cited in the complaint is the Coalition for Good Government, Inc., which, based upon documents submitted with the supplement to the complaint, was registered as a Subchapter S corporation in the State of Delaware on November 6, 1995, and as a "foreign corporation" in the State of Florida on November 21, 1995. According to the Coalition's Certificate of Incorporation, which is attached to the supplement to the complaint, the Coalition registered as a profit, stock-issuing corporation; it could not issue stock as a non-profit corporation under Delaware law.⁵ On the Coalition's "Application by Foreign Corporation for

⁴ A presidential preference primary was held in Florida on March 12, 1996. This was a direct, closed primary. The Florida Republican national convention delegation is selected by caucus after the presidential preference primary. Allocation of delegates to winning candidates is based upon a "winner-take-all-method," with the winning candidate in a congressional district taking all the district's delegates. "The winning candidate statewide takes all of the at-large delegates." Nomination and Election of the President and Vice-President of the United States, 1992, Congressional Research Service for the Committee on Rules and Administration, United States Senate, 1992, pp. 203-204.

⁵ Pursuant to the Delaware Code, Title 8, §§ 101 and 102, this state has one law covering both profit and nonprofit corporations. Corporations not organized for profit are not authorized to issue stock. A nonprofit corporation's certificate of incorporation must state the fact that it cannot issue capital stock. Phelan Nonprofit Enterprises § 1.19.

Authorization to Transact Business in Florida,” also attached to the supplement to the complaint, Paul Tudor Jones, II is named as the chairman of the corporate directors and as president.

The complaint asserts that the Coalition “served as the front for the organization of Jones’ own personal resources to influence the so-called Florida ‘P-3’ . . . in favor of Lugar and to otherwise expressly advocate his election.” (Complaint, page 1). The complaint alleges that Mr. Jones and the Coalition did not “comply with the contribution limitations, source restrictions, or disclosure requirements of [the Act],” that Mr. Jones “funneled almost \$1 million of his own money through the Coalition advertising campaign to support Lugar’s candidacy,” and that other individuals may have made “similar contributions.” (Complaint, pages 1-2).

According to the complaint, Mr. Jones and his “allies” had met earlier with Senator Lugar on an unspecified date and had “pressed their case” for a sugar tax. (Complaint, page 3). “It appears from the circumstances of that meeting, and the action taken by both sides immediately thereafter, that Lugar offered support for Jones’ sugar tax. In return, it appears that Jones offered Lugar a commitment of support at ‘P-3’ and with the Florida Republican primary electorate.” *Id.* Again according to the complaint,

[t]he context in which Lugar introduced this bill was apparent to all concerned within the state of Florida. P-3 was approaching, and the Lugar campaign . . . would benefit from the support that Jones and his allies in the pro-tax movement would be willing to provide in return for Lugar’s adoption of the tax. “GOP Candidate Endorses Sugar Tax” read one headline. The electoral context and significance of the Lugar move was plain for all to see.

(Complaint, page 4).

The complaint also alleges that “Mr. Jones and his allies have run their political activities thorough a corporation - - the Coalition for Good Government” which has “operat[ed] as a

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'political committee',” but which has not registered or reported with the Commission.

(Complaint, page 2).

The amendment and supplement to the complaint enclosed a videotape of the television spot at issue. The audio and video portions of the tape are as follows:

VIDEO:

CHYRON: Paid for by the Coalition for Good Government Inc.

Picture of sunrise or sunset on water and land areas; reeds in forefront. (Color)

Picture of dead fish in water (Black and white) (Superimposed): - Newspaper story headline: “Mercury taints 3 fish species in Florida Bay”

Picture of U.S. Capitol dome (Superimposed): - Newspaper story headline: “Sugar Contributes over \$550,000 in '95 to Congress” (Black and white)

Picture of four campaign bumper stickers:

“LUGAR for President DOLE for President

Arlen SPECTOR GRAMM President
... '96” (Color)

Photos of candidates added above bumper stickers as names spoken.

AUDIO:

ANNCR: “The issue is simple.

Our Everglades are dying and big sugar is to blame.

Big sugar and big sugar's campaign contributions to Washington politicians.

Now four Senators, Lugar, Dole, Spector and Gramm can make a difference for Florida

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