

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR: 7780

DATE COMPLAINT FILED: August 14, 2020

DATE OF NOTIFICATIONS: August 20, 2020

LAST RESPONSE RECEIVED: October 21, 2020

DATE ACTIVATED: October 21, 2020

EXPIRATION OF SOL: August 6, 2025

ELECTION CYCLE: 2020

COMPLAINANT:Wayne Goodwin on behalf of North Carolina
Democratic Party**RESPONDENTS:**Thom Tillis Committee and Collin McMichael in his
official capacity as Treasurer
Senator Thom Tillis
North Carolina Republican Party and Zachary Crotts in
his official capacity as Treasurer**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b)

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30120(a)(2)

11 C.F.R. § 104.3(b)

11 C.F.R. § 109.37

11 C.F.R. § 110.11(a)(1), (d)(2)

INTERNAL REPORTS CHECKED: Disclosure Reports**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaint alleges that Respondents — Senator Thom Tillis, Thom Tillis Committee and Collin McMichael in his official capacity as Treasurer (the “Tillis Committee”), and the North Carolina Republican Party and Zachary Crotts in his official capacity as Treasurer (the “NCGOP” or “Party Committee”) — made an unreported party coordinated communication that did not contain the appropriate disclaimer in violation of the Federal Election Campaign Act of 1971, as amended (“the Act”). According to the Complaint, Tillis recorded a robocall that was

1 disseminated by the NCGOP on August 6, 2020, less than 90 days before the general election.
2 Tillis concluded the recording with a disclaimer, stating that the call ““was not authorized by any
3 candidate or candidate’s committee.””¹ The Complaint alleges that the disclaimer was inaccurate
4 based upon Tillis’s apparent involvement in recording the call.

5 Respondents argue that the Commission should dismiss this matter. NCGOP admits that
6 the call was a coordinated party expenditure and did not contain an accurate disclaimer but that it
7 would report the expenditure in its upcoming September Monthly Report.² The NCGOP
8 maintains that its actions constituted “harmless error,” as no reasonable person would think that
9 Tillis did not authorize a message that he personally recorded for the Party Committee.³ The
10 Tillis Committee also admits that Senator Tillis recorded the robocall but contends that Tillis had
11 no personal knowledge regarding the distribution of the robocall and understood that the Party
12 Committee would be following all applicable federal and state laws.⁴ On October 20, 2020, the
13 NCGOP disclosed a coordinated party expenditure for a robocall totaling \$2,550 in its
14 2020 October Monthly Report.⁵

15 The available information indicates that the apparent cost of the robocall was well below
16 the coordinated party expenditure limit for North Carolina. Accordingly, we recommend that the
17 Commission find no reason to believe that that the NCGOP made, or that Tillis and the
18 Committee accepted, an excessive contribution in violation of 52 U.S.C. § 30116(a) and (f). In

¹ Compl. at 3 (Aug. 14, 2020) (noting availability of robocall at N.C. Democratic Party, *Tillis NCGOP Voicemail*, YOUTUBE (Aug. 8, 2020), <https://www.youtube.com/watch?v=ijjhnDxZKpc>).

² N.C. Republican Party Resp. at 1 (Sept. 3, 2020) (“NCGOP Resp.”).

³ *Id.*

⁴ Counsel for Senator Tillis has indicated that the Response of the Tillis Committee would also cover him individually. Email from Roger Knight, Counsel for Thom Tillis, to CELA, FEC (Oct.21, 2020).

⁵ NCGOP 2020 October Monthly Report at 899 (Oct. 20, 2020) (“2020 October Monthly Report”).

1 addition, given the low-dollar amount of the robocall, this matter does not appear to warrant the
2 further use of the Commission's limited resources. We therefore recommend that the
3 Commission exercise its prosecutorial discretion and dismiss the allegations that the NCGOP
4 failed to timely report a coordinated party expenditure in violation of 52 U.S.C. § 30104(b)(4)
5 and 11 C.F.R. § 104.3(b) and that NCGOP did not include an accurate disclaimer in violation of
6 52 U.S.C. § 30120(a)(2) and 11 C.F.R. § 110.11(d)(2).⁶

7 **II. FACTUAL SUMMARY**

8 Tillis was the incumbent candidate for U.S. Senate from North Carolina in 2020, and
9 Thom Tillis Committee is his principal campaign committee.⁷ Tillis won the Republican
10 primary on March 3, 2020, and the general election on November 3.⁸ The NCGOP is registered
11 as the Republican state party committee in North Carolina.⁹

12 In the spring of 2020, Tillis recorded a robocall message at the request of the NCGOP.¹⁰
13 According to the Complaint, on August 6, 2020, within 90 days of the general election, the
14 NCGOP disseminated the robocall in North Carolina,¹¹ the full transcript of which was:

15 Hello. This is Senator Thom Tillis. I'm calling on behalf of the North
16 Carolina Republican Party to make sure you have the information you need
17 to protect the physical and economic health of your family during the
18 COVID-19 outbreak. For medical guidance, the North Carolina

⁶ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁷ Thom Tillis, Amended Statement of Candidacy 2020 (Aug. 3, 2020).

⁸ Compl. at 2; *03/03/2020 Official Local Election Results – Statewide, U.S. Senate*, N.C. STATE BD. OF ELECTIONS, https://er.ncsbe.gov/?election_dt=03/03/2020&county_id=0&office=FED&contest=2867 (last accessed on Feb. 17, 2021); *11/03/2020 Official Local Election Results – Statewide, U.S. Senate*, N.C. STATE BD. OF ELECTIONS, https://er.ncsbe.gov/?election_dt=11/03/2020&county_id=0&office=FED&contest=1374 (last accessed on Feb. 17, 2021).

⁹ NCGOP, Statement of Organization at 2 (Aug. 17, 2020).

¹⁰ Resp. of Thom Tillis Committee and Collin McMichael in his official capacity as Treasurer at 1 (Oct. 16, 2020) (“Tillis Resp.”).

¹¹ Compl. at 2. August 6, 2020, was 89 days before the November 3 general election. NCGOP states that the robocall had been running “for some time” prior to August 6. NCGOP Resp. at 1.

1 Department of Health and Human Services has the information on its
2 website. That website is www.ncdhhs.gov. Please reach out to that website
3 and other sources to protect yourself and your family. This call was paid
4 for by the North Carolina Republican Party. It was not authorized by any
5 candidate or candidate's committee.¹²

6 The NCGOP acknowledges that the call was a coordinated party expenditure and
7 reported a \$2,550 disbursement for a robocall on September 15 in its 2020 October Monthly
8 Report.¹³ Although we cannot definitively conclude that the robocall the NCGOP reported in
9 October is the same as the one at issue, it is the only robocall the Party Committee reported as an
10 itemized coordinated party expenditure in 2020.¹⁴ The NCGOP did not report any other
11 disbursements to or in support of Tillis for the 2020 cycle.¹⁵

12 III. LEGAL ANALYSIS

13 A. The Commission Should Find that There Is No Reason to Believe that the 14 NCGOP Made, or that Tillis and the Committee Accepted, an Excessive 15 Contribution

16 The Act prohibits any person from making, and any candidate or committee from
17 accepting, excessive contributions.¹⁶ A multicandidate committee may not make contributions

¹² *Supra* note 1; *see also* NCGOP Resp. at 1.

¹³ NCGOP Resp. at 1; 2020 October Monthly Report at 899.

¹⁴ Schedule F is used to report “itemized coordinated party expenditures made by political party committees or designated agent(s) on behalf of candidates for federal office”; the NCGOP made Schedule F disclosures on two reports in 2020. *See* 2020 October Monthly Report at 899 (reporting the robocall in support of Tillis and coordinated media in support of a House candidate); NCGOP 2020 Amended Post-General Report at 1,264 (Jan. 5, 2021) (reporting coordinated mail in support of a House candidate).

¹⁵ *See* 2020 October Monthly Report at 4, 899 (reflecting that the coordinated party expenditures reported in the October report were the NCGOP's only such expenditures for the year); N.C. Republican Party Disbursements, filtered for “2019-2020” and “Tillis,” FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00038505&recipient_name=tillis&two_year_transaction_period=2020 (last accessed Feb. 11, 2021).

¹⁶ 52 U.S.C. § 30116(a), (f).

1 “to any candidate and his authorized political committee with respect to any election for Federal
2 office which, in the aggregate, exceed \$5,000.”¹⁷

3 Notwithstanding the general limits on contributions to candidates, the state committee of
4 a political party may make coordinated party expenditures in connection with the general
5 election campaign of a candidate for federal office, subject to the limits established by the Act
6 and Commission regulations.¹⁸ Coordinated party expenditures include disbursements for
7 communications that are coordinated with the candidate.¹⁹ For the 2020 general election, a
8 North Carolina state party committee was limited to making \$849,000 in coordinated party
9 expenditures with its senate candidate.²⁰

10 Under 11 C.F.R. § 109.37, a political party communication is coordinated with a
11 candidate, a candidate's authorized committee, or agent of the candidate, when the
12 communication satisfies a three-pronged test: (1) the communication is paid for by a political
13 party committee or its agent;²¹ (2) the communication satisfies at least one of the content

¹⁷ *Id.* § 30116(a)(2)(A).

¹⁸ *Id.* § 30116(d); 11 C.F.R. §§ 109.30, 109.32(b).

¹⁹ *See* 11 C.F.R. §§ 109.30, 109.37.

²⁰ *See id.* § 109.32(b)(2); Price Index Adjustments for Expenditure Limitations & Lobbyist Bundling Disclosure Threshold, 85 Fed. Reg. 9,772, 9,774 (Feb. 20, 2020).

²¹ 11 C.F.R. § 109.37(a)(1).

1 standards set forth in 11 C.F.R. § 109.37(a)(2);²² and (3) the communication satisfies at least one
 2 of the conduct standards set forth at 11 C.F.R. § 109.21(d).²³

3 Here, as the NCGOP admits,²⁴ the call satisfies all three prongs of the test at section
 4 109.37 because: (1) the NCGOP paid for the call; (2) the NCGOP disseminated the call in North
 5 Carolina within 90 days of the general election;²⁵ and (3) Tillis, as the robocall's narrator, was
 6 materially involved in the content of the communication.²⁶ Thus, NCGOP's robocall constitutes
 7 a coordinated party expenditure; and it appears to have reported it as having a value of \$2,550.²⁷
 8 However, because this appears to be the only coordinated expenditure that the NCGOP made in
 9 support of Tillis in 2020, the Party Committee's payment for the call was well below its
 10 \$849,000 aggregate limit for coordinated party expenditures in North Carolina.²⁸ We therefore
 11 recommend that the Commission find no reason to believe that the NCGOP made, or that Tillis

²² The content prong is satisfied if the communication is a public communication under section 100.26 and complies with the further requirements identified in section 109.37(a)(2), including, for Senate candidates, that it (1) clearly identifies the candidate and (2) is publicly distributed or otherwise disseminated in the candidate's jurisdiction 90 days or fewer before the candidate's general election. *See* 11 C.F.R. § 109.37(a)(2)(iii)(A); *see also id.* § 100.26 (defining "public communication" to include "telephone bank to the general public"); *id.* § 100.28 (defining "telephone bank" to mean "more than 500 telephone calls of an identical or substantially similar nature within any 30-day window").

²³ *Id.* § 109.37(a)(3). Under section 109.21(d), the conduct standards are: (1) a request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; (5) use of a former employee or independent contractor; and (6) dissemination, distribution, or republication of campaign material. *Id.* § 109.21(d)(1)-(6).

²⁴ NCGOP Resp. at 1. The Tillis Committee contends that the robocall did not contain express advocacy and was not about the election, noting that Tillis's intent in recording the call was to comfort his constituents regarding the COVID-19 pandemic. Tillis Committee Resp. at 1. However, in light of the recommendation to find no RTB here, it is unnecessary for the Commission to consider these mitigating arguments.

²⁵ 11 C.F.R. § 109.37(a)(2)(iii)(A). Although we do not know precisely how many robocalls were made, the NCGOP's response acknowledging that it was a party coordinated communication suggests that the 500-call threshold for the telephone-bank standard is satisfied. *See id.* §§ 100.26, 100.28.

²⁶ *See id.* § 109.21(d)(2)(i) (defining "material involvement" to include where [a] candidate, authorized committee, or political party committee is materially involved in decisions regarding [t]he content of the communication"); Advisory Op. 2003-25 (Weinzapfel) at 6 (citing 11 C.F.R. § 109.21(d)(2)).

²⁷ *See supra* note 13.

²⁸ *See supra* notes 15, 20 and accompanying text.

1 or the Tillis Committee accepted, an excessive contribution in violation of 52 U.S.C. § 30116(a)
2 and (f).

3 **B. The Commission Should Dismiss the Allegation that the NCGOP Failed to**
4 **Timely Report a Coordinated Party Expenditure**

5 Political committees must file reports of receipts and disbursements as set forth in the Act
6 and Commission regulations.²⁹ A payment by a political party committee for a communication
7 that is coordinated with a candidate, and that is not otherwise exempt, must be reported by the
8 political party committee making the payment as either an in-kind contribution or a coordinated
9 party expenditure.³⁰ The authorized committee of the candidate on whose behalf the coordinated
10 party expenditures are made does not report the expenditures as contributions.³¹

11 The NCGOP disseminated the robocall on August 6, 2020, but failed to timely and
12 accurately report it. A monthly filer such as NCGOP should have reported an August 2020
13 coordinated party expenditure on its September monthly report as either as (1) a coordinated
14 party expenditure;³² or (2) a coordinated party expenditure and a debt.³³ The NCGOP did
15 neither; rather, in its October Monthly Report, the state party disclosed only a \$2,550

²⁹ 52 U.S.C. § 30104(a); 11 C.F.R. § 104.5.

³⁰ 11 C.F.R. § 109.37(b); *see also id.* part 100, subpart C and E (identifying exceptions to the definition of “Contribution” and “Expenditure” that are exempt under section 109.37(b)).

³¹ *See id.* § 104.3(a)(3)(iii).

³² Reports are to include coordinated party expenditures in the reporting period. 52 U.S.C. § 30104(b)(4)(H)(iv), (b)(6)(B)(iv); 11 C.F.R. § 104.3(b)(1)(viii), (3)(viii).

³³ *See* 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d) (requiring committees to disclose amount and nature of debt), 104.11(b) (requiring that debt or obligation to be disclosed on date that such debt or obligation is incurred) *see also How to Report: Coordinated Party Expenditures*, FEC, <https://www.fec.gov/help-candidates-and-committees/filing-political-party-reports/coordinated-expenditures/> (indicating that when a coordinated party communication is disseminated in one reporting period and then paid for in a later reporting period, the committee reports the coordinated expenditure on Schedule F as a memo entry and a debt on Schedule D (cross-referencing Schedule F) and indicates the date of original service/dissemination in the purpose field.) (last visited Feb. 17, 2021).

1 expenditure on September 15, 2020, for a robocall in support of Tillis.³⁴ Without the debt and
2 expenditure being reported for the period in which the robocall was disseminated, a member of
3 the public would be left to conclude that the coordinated party expenditure that the NCGOP
4 reported occurred in September. However, because this is the only reported coordinated
5 expenditure the NCGOP made in support of Tillis in 2020, the robocall reported in October
6 appears to be the one that the Party Committee acknowledges disseminating in August.³⁵

7 In light of the modest amount in violation, although the NCGOP reported the coordinated
8 party expenditure incompletely and in the wrong month, this matter does not warrant the
9 additional use of the Commission's limited resources, and we recommend that the Commission
10 dismiss as a matter of prosecutorial discretion the allegation that the NCGOP violated 52 U.S.C.
11 § 30104(b)(4) and 11 C.F.R. § 104.3(b).³⁶

12 **C. The Commission Should Dismiss the Allegation that the NCGOP Did Not**
13 **Include an Accurate Disclaimer in the Robocall**

14 All public communications by a political committee require a disclaimer.³⁷ A
15 “disclaimer” is a statement that must identify who paid for the communication; if the
16 communication is authorized by a candidate, an authorized committee of a candidate, or an agent
17 of the candidate or committee, but is paid for by any other person, the disclaimer must clearly
18 state that the communication is paid for by such other person and authorized by such candidate,

³⁴ See *supra* note 13.

³⁵ See *supra* note 15 and accompanying text.

³⁶ See *Heckler*, 470 U.S. at 831; see also Factual & Legal Analysis at 7, MUR 7417 (Indivisible Washington's 8th District, *et al.*) (exercising prosecutorial discretion and dismissing a failure to report an in-kind contribution “based on the likely small amounts at issue”).

³⁷ See 11 C.F.R. § 110.11(a)(1) (scope of disclaimer provision); see also *id.* § 100.26 (defining “public communication”).

1 authorized committee or agent.³⁸ In addition to this general disclaimer rule, Commission
2 regulations specify that communications treated as coordinated party expenditures and made
3 with the approval of the party's general election candidate, that candidate's committee, or agent
4 of either, must both identify the party committee that paid for the communication and state that
5 the candidate authorized the communication.³⁹

6 Because the robocall was a coordinated party expenditure made with the approval of the
7 party's general election senatorial candidate or his committee, it should have identified not only
8 the party committee that paid for the communication but also stated that Tillis or the Tillis
9 Committee authorized the communication. Instead, the robocall concluded with the sentence:
10 "[This call] was not authorized by any candidate or candidate's committee."⁴⁰ The NCGOP
11 acknowledges that the robocall's disclaimer was erroneous.⁴¹ Nevertheless, in light of the low
12 reported cost of the robocall, we do not recommend that the Commission use its limited
13 resources for this allegation. Thus, we recommend that the Commission dismiss as a matter of
14 prosecutorial discretion the allegation that the NCGOP violated 52 U.S.C. § 30120(a)(2) and
15 11 C.F.R. § 110.11(d)(2).⁴²

³⁸ See 52 U.S.C. § 30120(a)(2); 11 C.F.R. § 110.11(b)(2).

³⁹ 11 C.F.R. § 110.11(d)(2).

⁴⁰ *Supra* note 1.

⁴¹ NCGOP Resp. at 1; *see also* Tillis Resp. at 2.

⁴² See *Heckler*, 470 U.S. at 831; Factual & Legal Analysis at 12, MUR 6270 (Rand Paul, *et al.*) (exercising prosecutorial discretion and declining to investigate to determine, as between a candidate committee and a non-profit, who sent emails with flawed disclaimers because of the likely *de minimis* associated costs).

Under the Commission's Disclaimer Penalty Policy, where disclaimers are present but fail to include certain requirements, the penalty is calculated at 10% of the cost of the communication. See Commission's Disclaimer Penalty Policy at 1.b (Mar. 7, 2006). The penalty calculation in this matter would be \$200 after a 25% pre-probable cause conciliation discount and rounding.

1 **II. RECOMMENDATIONS**

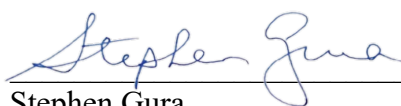
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- 3 1. Find no reason to believe that the North Carolina Republican Party and Zachary
- 4 Crotts in his official capacity as treasurer violated 52 U.S.C. § 30116(a) by making an
- 5 excessive contribution;
- 6
- 7 2. Find no reason to believe that Thom Tillis or Thom Tillis Committee and Collin
- 8 McMichael in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by
- 9 accepting an excessive contribution;
- 10
- 11 3. Dismiss the allegation that the North Carolina Republican Party and Zachary Crotts in
- 12 his official capacity as treasurer violated 52 U.S.C. § 30104(b)(4) and 11 C.F.R.
- 13 § 104.3(b) by failing to report a coordinated party expenditure;
- 14
- 15 4. Dismiss the allegation that the North Carolina Republican Party and Zachary Crotts in
- 16 his official capacity as treasurer violated 52 U.S.C. § 30120(a)(2) and 11 C.F.R.
- 17 § 110.11(d)(2) by distributing party coordinated communications without the
- 18 appropriate disclaimer;
- 19
- 20 5. Approve the attached Factual and Legal Analysis;
- 21
- 22 6. Approve the appropriate letters; and
- 23
- 24 7. Close the file.
- 25
- 26

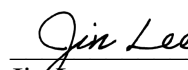
27 Lisa J. Stevenson
 28 Acting General Counsel

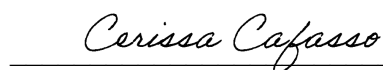
29 Charles Kitcher
 30 Acting Associate General Counsel for Enforcement

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 38 Stephen Gura
 39 Deputy Associate General Counsel for Enforcement

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 41 _____
 42 Jim Lee
 43 Acting Assistant General Counsel

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 45 _____
 46 Cerissa Cafasso
 Attorney

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