Federal Election Commission: Membership and Policymaking Quorum, In Brief

Updated December 4, 2020
Summary

The Federal Election Commission (FEC) is the nation’s civil campaign finance regulator. The agency ensures that campaign fundraising and spending is publicly reported; that those regulated by the Federal Election Campaign Act (FECA) and by commission regulations comply and have access to guidance; and that publicly financed presidential campaigns receive funding.

The FEC currently is operating without a policymaking quorum because only three of six commissioners remain in office. At least four agreeing votes are required to take policymaking or enforcement actions. As of this writing, three nominations are pending in the Senate. On September 16, 2020, President Trump nominated election lawyer Allen Dickerson to the commission. On October 30, he nominated FEC staffer Shana M. Broussard and Senate staffer Sean J. Cooksey to two other seats on the commission. In separate votes, the Senate Rules and Administration Committee ordered all three nominations favorably reported on December 3, 2020. If these or other nominees were confirmed to restore at least four commissioners to office, the FEC would again have a policymaking quorum.

This CRS report briefly explains the kinds of actions that FECA precludes when a quorum is not possible because fewer than four FEC members are in office. Among other powers, without a quorum, the commission cannot hold hearings, issue rules, or enforce campaign finance law and regulation. Campaign finance law and regulation remain in effect and may be enforced once a quorum is restored. Agency operations continue with remaining commissioners and staff.

The current quorum loss marks the third in the FEC’s history. The second occurred recently, between August 31, 2019, and June 5, 2020, when a confirmation briefly restored a fourth commissioner to office. In addition, the FEC lacked a policymaking quorum for six months in 2008.

This report will be updated in the event of substantial changes in the Federal Election Commission’s policymaking quorum or the status of commission nominations.
Contents

Introduction .................................................................................................................................................. 1
  A Note on Terminology .......................................................................................................................... 2

Recent Vacancies and Nomination Activity ......................................................................................... 2
  Background on Circumstances Surrounding the Petersen Vacancy .................................................. 4
  Background on Circumstances Surrounding the Hunter Vacancy and Other Potential Vacancies .................................................................................................................................................. 5

The Commission, Policymaking, and Appointments ............................................................................. 5
  Original, Invalidated Appointment Structure ...................................................................................... 5
  Current Appointment Structure .............................................................................................................. 6
    Party Balance and Terms ......................................................................................................................... 6
    Expired Terms and Holdover Status ...................................................................................................... 6
  At Least Four Agreeing Votes Required for Most Policymaking ....................................................... 7
    Historical Note: Loss of Policymaking Quorum in 2008 .................................................................. 8
    Concluding Comments ......................................................................................................................... 8

Tables

Table 1. Current Federal Election Commissioners and Vacancies ................................................. 2

Contacts

Author Information .................................................................................................................................. 9
Introduction

The Federal Election Commission (FEC) is an independent regulatory agency headed by six commissioners. Congress created the FEC in 1974, after controversial fundraising during 1960s presidential campaigns and the early 1970s Watergate scandal. The FEC is responsible for administering federal campaign finance law and for civil enforcement of the Federal Election Campaign Act (FECA).\(^1\) The FEC also discloses campaign finance data to the public, conducts compliance training, and administers public financing for participating presidential campaigns.

FECA establishes six-year terms for commission members. Commissioners may continue in “holdover” status after those terms end. Commissioners are appointed by the President and are subject to Senate confirmation. FECA requires that at least four of the six commissioners vote to make decisions on substantive actions. This includes deciding on enforcement actions, advisory opinions, and rulemaking matters. Because FECA also requires commission membership representing more than one political party, achieving at least four agreeing votes is sometimes difficult, even with six members present. Vacancies make the task harder by reducing opportunities for a coalition of at least four votes.

On May 19, 2020, the Senate confirmed James E. “Trey” Trainor III to a seat previously vacated by Matthew S. Petersen. The Petersen seat had been vacant since August 31, 2019. With only three of six commissioners remaining in office after Petersen’s departure, the FEC lost its policymaking quorum. The agency held its first open meeting with a restored policymaking quorum on June 18, 2020.

Trainor’s confirmation marked the end of the longest quorum loss in the FEC’s history, but the agency was only briefly restored to its full policymaking capacity. Effective July 3, 2020, Republican Commissioner Caroline C. Hunter resigned,\(^2\) which again reduced the commission’s membership to three and eliminated the possibility of a policymaking quorum. On June 26, the same day that Hunter announced her intention to resign, the White House announced the President’s intention to nominate Allen Dickerson, a Republican election lawyer, to the FEC.\(^3\) The Senate received the Dickerson nomination on September 16, 2020.\(^4\) Two other nominations—those of FEC staffer Shana M. Broussard and Senate staffer Sean J. Cooksey—followed on October 30, 2020. The Senate Rules and Administration Committee held a hearing on the nominees on November 18. In separate votes, the committee ordered all three nominations reported favorably on December 3. As of this writing, all three nominations are pending in the Senate.

The current quorum loss is the third in the agency’s history. Before the current episode, as noted above, the agency also lacked a policymaking quorum between August 2019 and May 2020. In 2008, the FEC lost its policymaking quorum for six months.

\(^1\) 52 U.S.C. §§30101-30146.
\(^4\) See Presidential Nomination (PN) 2237. It is unclear why there was a delay between the announced intention to nominate and the nomination itself. On reported recent disagreements about whether to fill single or multiple commission vacancies, see, Kenneth P. Doyle, “Congressional Standoff Could Delay Federal Election Oversight,” September 4, 2019, Bloomberg Government, accessed via CRS subscription.
This report provides a brief overview of policymaking implications when fewer than four Federal Election Commissioners remain in office. The topic may be relevant for congressional oversight of the agency and for Senate consideration of nominees. Other CRS products provide additional information about campaign finance policy, the FEC, and procedural issues. This report does not provide legal analysis.

A Note on Terminology

The terms FEC, commission, and agency often—including in other CRS products—are used interchangeably to refer to the Federal Election Commission. Because this report emphasizes policymaking and enforcement duties specified in statute, it generally reserves commission to denote appointed members of the FEC, as opposed to agency staff. In this report, agency and FEC generally refer to the commission and staff collectively.

Recent Vacancies and Nomination Activity

As of this writing, four of six FEC commissioners currently are in office, as shown in Table 1 below.

<table>
<thead>
<tr>
<th>Commissioner</th>
<th>Term Expiration</th>
<th>Date Confirmed</th>
<th>Party Affiliation</th>
<th>Vacancy Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>James E. “Trey” Trainor III</td>
<td>04/30/2023</td>
<td>05/19/2020</td>
<td>Republican</td>
<td></td>
</tr>
<tr>
<td>Steven T. Walther</td>
<td>04/30/2009</td>
<td>06/24/2008</td>
<td>Independent</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(remains in holdover status)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ellen L. Weintraub</td>
<td>04/30/2007</td>
<td>03/18/2003</td>
<td>Democrat</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(remains in holdover status)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vacancy</td>
<td></td>
<td></td>
<td></td>
<td>Previous occupant Ann M. Ravel (D); resignation effective 02/28/2017; Shana M. Broussard nominated 10/30/2020 for term expiring 04/30/2023</td>
</tr>
<tr>
<td>Vacancy</td>
<td></td>
<td></td>
<td></td>
<td>Previous occupant Lee E. Goodman (R); resignation effective 02/16/2018; Sean J. Cooksey nominated 10/30/2020 for term expiring 04/30/2021</td>
</tr>
</tbody>
</table>


Current and recent vacancies developed, in chronological order, as follows. As noted elsewhere in this report, if confirmed, new nominees could continue in office in holdover status beyond the expiration of their listed terms.

- Effective February 28, 2017, Democratic Commissioner Ann M. Ravel resigned, leaving the commission with five members.\(^7\) Ravel’s term would have expired on April 30, 2017. On October 30, 2020, President Trump nominated Shana M. Broussard to the Ravel seat. If confirmed, Broussard’s term would expire on April 30, 2023.\(^8\)

- On February 7, 2018, Republican Commissioner Lee Goodman announced his intention to resign, effective February 16, 2018.\(^9\) Once Goodman left the FEC, the commission had four remaining members. On October 30, 2020, President Trump nominated Sean J. Cooksey to the Goodman seat.\(^10\) If confirmed, Cooksey’s term would expire on April 30, 2021.

- As discussed in more detail below, President Trump nominated James E. “Trey” Trainor III to Republican Commissioner Matthew S. Petersen’s seat during the 115\(^{th}\) and 116\(^{th}\) Congresses. Petersen initially remained in office, and resigned effective August 31, 2019.\(^11\) The commission dropped to three members, thus losing its policymaking quorum. The Senate confirmed Trainor to the seat on May 19, 2020. He was sworn in on June 5, 2020, thus restoring the agency’s policymaking quorum.\(^12\)

- Also as discussed below, the commission again lost its policymaking quorum effective July 3, 2020, when Republican Commissioner Caroline C. Hunter resigned. The President nominated Allen Dickerson for the Hunter seat on September 16, 2020.\(^13\) If confirmed, Dickerson’s term would expire on April 30, 2025.

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Background on Circumstances Surrounding the Petersen Vacancy

Commissioner Petersen’s departure from the FEC, which preceded the Trainor confirmation, ended a two-year period of uncertainty about when a vacancy in his seat might occur. A brief description appears below for historical reference.

- On September 11, 2017, President Trump nominated Petersen for a federal judgeship. Petersen subsequently withdrew from consideration for the judgeship, reportedly writing, “until the time is otherwise appropriate, I look forward to returning to my duties at the Federal Election Commission.” Petersen remained on the commission in holdover status until his August 31, 2019, resignation.

- After Petersen was nominated to the federal judgeship, but before he withdrew from consideration for that position, President Trump nominated a replacement for Petersen at the FEC. On September 14, 2017, President Trump nominated James E. “Trey” Trainor III to the Petersen seat. Petersen continued serving at the commission, and the Trainor nomination was returned to the President at the end of the first session. The White House resubmitted the nomination on January 8, 2018, at the start of the second session of the 115th Congress, and the nomination was returned to the President at the end of the Congress. The White House resubmitted the Trainor nomination at the beginning of the 116th Congress, and again early in the second session of the 116th Congress. The Senate Rules and Administration Committee held a hearing on the Trainor nomination on March 10, 2020. It ordered the nomination reported favorably on May 7, 2020. The Senate confirmed Trainor to the seat on May 19, 2020.

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20 The Senate confirmed Trainor with a 49-43 vote. See record vote no. 96.
Background on Circumstances Surrounding the Hunter Vacancy and Other Potential Vacancies

Effective July 3, 2020, Republican Commissioner Caroline C. Hunter resigned, which again reduced the commission’s membership to three and eliminated the possibility of a policymaking quorum.

- On June 26, the same day that Hunter announced her intention to resign, the White House announced the President’s intention to nominate Allen Dickerson, a Republican election lawyer, to the FEC. On September 16, 2020, the President nominated Dickerson to the Hunter seat.
- On October 28, 2020, the White House announced the President’s intent to nominate two people to the commission: Broussard, an FEC Commissioner Walther staffer; and Cooksey, a Senator Hawley staffer. The Senate received both nominations on October 30. Broussard was nominated to the Ravel seat; Cooksey was nominated to the Goodman seat.

The Commission, Policymaking, and Appointments

Original, Invalidated Appointment Structure

Congress originally designed eight positions for the FEC: six commissioners and two nonvoting ex officio members (the Clerk of the House and Secretary of the Senate). Under that structure, two commissioners were appointed by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House.

Two federal court decisions altered the FEC’s original design. First and most significantly, in Buckley v. Valeo (1976) the Supreme Court of the United States invalidated the original appointments method, holding that congressional appointments violated the Constitution’s Appointments Clause. Almost 20 years later, a federal court again found fault with the FEC’s appointment structure. In 1993, the U.S. Court of Appeals for the District of Columbia held in *FEC v. NRA Political Victory Fund* that the presence of the two congressional ex officio members violated constitutional separation of powers. Congress did not amend FECA responding to this decision, although the ex officio members are no longer appointed.

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27 6 F.3d 821 (D.C. Cir. 1993); cert. denied (513 U.S. 88 (1994)). For legal analysis for *Buckley* and campaign finance
Current Appointment Structure

In a broad revision of FECA in 1976, undertaken in response to the *Buckley* decision, Congress adopted the current appointment method. Today, all commissioners are presidentially appointed subject to Senate advice and consent. Members of the congressional leadership or committees of jurisdiction (the House Committee on House Administration and Senate Rules and Administration Committee) apparently continue to influence the appointment process.

FECA specifies few qualifications for FEC commissioners, noting simply that they “shall be chosen on the basis of their experience, integrity, impartiality, and good judgment.” As one former general counsel notes, although many commissioners are lawyers, “a commissioner does not have to be a lawyer and the commission has a long history of having non-lawyers serve as members.” Commissioners typically have experience as congressional staffers, political professionals, election lawyers, or some combination thereof.

Party Balance and Terms

No more than three commissioners may be affiliated with the same political party. In practice, the commission has been divided equally among Democrats and Republicans, although one current commissioner identifies as an independent. FECA staggers commissioner terms so that two expire every other April 30 during odd-numbered years (e.g., 2019, 2021, etc.). This arrangement means that, at least as designed, two new commissioners would assume office biennially. However, the President is under no obligation to make biennial nominations.

Expired Terms and Holdover Status

Currently, FEC commissioners may serve a single six-year term. As another CRS report explains, for some federal boards and commissions, including the FEC, “[a]n individual may be nominated and confirmed for a seat for the remainder of an unexpired term in order to replace an appointee who has resigned (or died). Alternatively, an individual might be nominated for an

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33 Steven T. Walther identifies himself as an independent. Sen. Reid recommended Walther to the commission and Walther reportedly worked for Democratic clients before joining the FEC. Walther often votes with Democrats on the FEC, although he has emphasized his independence since early in his commission tenure. See, for example, Matthew Murray, “Walther Takes on Washington,” *Roll Call* online, January 13, 2009, http://www.rollcall.com/news/31322-1.html.
upcoming term with the expectation that the new term will be underway by the time of confirmation. Some FEC commissioners have assumed office when the term for which they were nominated was well underway. For example, on June 24, 2008, the Senate confirmed Donald F. McGahn and Steven T. Walther to terms that expired just 10 months later, on April 30, 2009. Both continued serving in their seats past the expiration of their terms, although they could have been replaced through subsequent appointments.

These and other commissioners could remain in office because FECA permits FEC members to serve in “holdover” status, exercising full powers of the office, after their terms expire “until his or her successor has taken office as a Commissioner.”

**At Least Four Agreeing Votes Required for Most Policymaking**

FECA requires affirmative votes from at least four commissioners to authorize most policymaking or enforcement activity. In particular, this includes

- holding hearings;
- making, amending, or repealing rules;
- initiating litigation or defending the agency in litigation, including appeals;
- issuing advisory opinions;
- conducting investigations, and making referrals to other enforcement agencies;
- approving enforcement actions and audits; and
- issuing and amending forms (e.g., those used in the disclosure process).

Matters without at least four votes for or against an action can have the effect of leaving questions of law, regulation, or enforcement unresolved, as some view the issues in question as having been neither approved nor rejected.

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38 A commissioner may remain in office after the expiration of his or her term unless or until (1) the President nominates, and the Senate confirms, a replacement; or (2) the President, as conditions permit, makes a recess appointment to the position. For additional discussion of recess appointments generally, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue. On ability to remain in office until a successor takes office, see 52 U.S.C. §30106(a)(2)(B). Commissioners appointed before December 31, 1997, or announced as intended nominees before November 30, 1997, were eligible for reappointment. See 111 Stat. 1305 and 111 Stat. 2523.


When fewer than four commissioners remain in office, existing campaign law and regulation remain in effect. Agency staff and remaining commissioners may continue to provide general information, and to prepare for a repopulated commission. In addition, as explained below, the commission revised its internal procedures before it last lost a policymaking quorum to clarify functions during a quorum loss.

**Historical Note: Loss of Policymaking Quorum in 2008**

The significance of the four-vote threshold first became evident in 2008. Following expired recess appointments and ongoing Senate consideration of FEC nominations, the agency had just two commissioners for the first six months of the year. In late 2007, in anticipation of only two commissioners remaining in office in 2008, commissioners amended the FEC’s rules of internal procedure to permit executing some duties if the commission lost its four-member policymaking quorum. These revisions to the FEC’s Directive 10 permit the commission to continue meeting with fewer than four members to approve general public information, such as educational guides; appoint certain staff; and approve other basic administrative and employment matters.41

During the loss of the commission’s policymaking quorum in 2008, the two remaining commissioners (David Mason (R) and Ellen Weintraub (D)) met publicly to discuss advisory opinions, but could not vote to approve or disapprove those opinions. At the time, the commissioners explained that although they recognized that the commission lacked a quorum, they were attempting to provide general feedback, particularly given the ongoing 2008 election cycle. That practice generated some controversy, however, as some practitioners contended that remaining commissioners did not have the authority to meet and provide guidance.42 (The commission did not hold public discussions such as these during the 2019-2020 quorum loss.)

After the Senate confirmed nominees in June 2008, the new commissioners faced a backlog of enforcement matters, litigation, advisory opinions, and rulemakings to implement portions of the Honest Leadership and Open Government Act (HLOGA).43 The commission returned to normal operations during the rest of 2008 and throughout 2009.

**Concluding Comments**

When the FEC loses its policymaking quorum, agency operations do not cease. The agency remains open for business with remaining commissioners and its regular staff. Previously authorized work requiring commission approval may continue. Although new enforcement or policy matters cannot advance until a quorum is reconstituted, a repopulated commission could

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consider older matters. In addition, the Justice Department may pursue criminal enforcement on its own authority, regardless of the FEC’s operating capacity for civil matters.

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44 The statute of limitations for civil and criminal violations is five years. See 28 U.S.C. §2462 and 52 U.S.C. §30145, respectively. Other actions, such as rulemaking activities that are already under way, may continue indefinitely. However, as noted above, new rulemakings could not be initiated or finalized without a quorum.

45 For an overview of various civil versus criminal provisions and administration/enforcement in campaigns and elections, see CRS Report R45302, *Federal Role in U.S. Campaigns and Elections: An Overview*, by R. Sam Garrett.