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The Federal Election Commission: Enforcement Process and Selected Issues for Congress

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Summary

The Federal Election Commission (FEC) is responsible for civil enforcement of the Federal Election Campaign Act (FECA) and other campaign finance statutes. Enforcement, one of the FEC's principal functions, is perhaps the most controversial thing the agency does. Enforcement matters not only for encouraging compliance with law and regulation, but also for what it represents about the state of campaign finance policy overall. Some agency critics argue that modest fines, protracted processes, and deadlocked commission votes demonstrate that the FEC cannot effectively enforce campaign finance law. Others contend that Congress designed the FEC, which includes six commissioners who typically represent the two major political parties, to be deliberate and driven by consensus so that enforcement would not be politicized.

Enforcement has drawn attention inside and outside the agency. In recent years, commissioners have sparred at open meetings and in the media about whether the agency's enforcement activities are inadequate or overzealous. The commission has struggled to staff some senior enforcement positions. Through oversight hearings, recent Congresses have monitored the FEC's enforcement activities and, in some cases, criticized the transparency surrounding those processes. Congress occasionally has considered legislation to restructure the agency, particularly to change the number of commissioners, thereby reducing possibilities for deadlocked votes. H.R. 2931 in the 114th Congress is the latest such proposal.

This report provides Congress with a resource for understanding the FEC's enforcement process and context for why enforcement is consequential. Enforcement represents broader debates about what the FEC does and what it should do, and what federal campaign finance policy is and should be. The FEC can determine how to prioritize enforcement activities and can manage its response to ongoing campaign finance policy disagreements. The agency has less or no control over other aspects of its environment, such as the enforcement process mandated in FECA. CRS Report R44318, *The Federal Election Commission: Overview and Selected Issues for Congress*, by R. Sam Garrett provides an overview of the FEC generally, including attention to organizational and administrative matters that are related to but distinct from the enforcement topics discussed here.

This report will be updated occasionally as events warrant.

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Introduction

Even as Congress finalized legislation creating the FEC in 1974, some Members of the House and Senate disagreed over how the agency should be constituted, what powers it should have, and how broad its enforcement authority should be.[1] Perhaps unsurprisingly, almost immediately, the FEC's enforcement activities generated controversy. For some, they were too vigorous; for others, too lax.[2] Partially due to enforcement controversies, Congress has occasionally considered restructuring the agency. In the 114th Congress, H.R. 2931 would replace the current six-member body with a five-member commission, including a chairperson with enhanced enforcement powers. Recent Congresses have also engaged in oversight concerning the FEC's enforcement practices and transparency.

The controversy surrounding the FEC's enforcement of campaign finance law and regulation continues. During 2015, as the FEC marked its 40th anniversary, prominent media accounts and opinion pieces chronicled tense relations among commissioners and stalemates over new regulations and enforcement.[3] In recent years, commissioners have sparred at open meetings and in the media about whether the agency's enforcement activities are inadequate or overzealous.[4] The debate over enforcement is not merely about internal agency disagreements. Rather, it represents broader controversies about what the FEC does and what it should do, and what federal campaign finance policy is and should be. Some also contend that enforcement establishes the boundaries of permissible campaign behavior.[5] This report is not about the FEC's individual enforcement controversies, but, rather, about why controversies surrounding the enforcement process might matter to Congress as it provides the agency with overall direction and shapes campaign finance policy generally.

Scope of the Report

This report highlights examples of FEC or congressional attention to enforcement topics, but it is not intended to provide comprehensive discussion of particular enforcement matters. Rather, it discusses selected major issues that appear to be most consequential for Congress. Other topics might be relevant for practitioners or agency officials but are generally not addressed here. Unless otherwise noted, the report does not address criminal enforcement handled by the Justice

[1] Congress established the FEC in the 1974 Federal Election Campaign Act (FECA) amendments. The agency opened its doors on April 14, 1975. For additional historical highlights, see Federal Election Commission, *Anniversary Timeline*, http://fec.gov/pages/40th_anniversary/40th_anniversary.shtml.

[2] For an overview, see Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (New York: Praeger, 1988), pp. 83-117.

[3] See, for example, Eric Lichtblau, "Paralyzed F.E.C. Can't Do Its Job, Chairwoman Says," *The New York Times*, May 3, 2015, p. A1; Andy Kroll, "The Chairwoman Who's At War With Her Own Agency," *National Journal*, October 10, 2015, p. 13; Kenneth P. Doyle, "Goodman: FEC Backlog Mainly Includes Cases Against Republicans," *Daily Report for Executives*, May 21, 2015, p. A-22; and Kenneth P. Doyle, "Petersen, Hunter Distance Themselves From Goodman on Partisanship at FEC," *Daily Report for Executives*, June 2, 2015, n.p.

[4] See, for example, Eric Lichtblau, "Paralyzed F.E.C. Can't Do Its Job, Chairwoman Says," *The New York Times*, May 3, 2015, p. A1; and Matthew S. Petersen, Caroline C. Hunter, and Lee E. Goodman, "Dissension at the F.E.C.," *The New York Times*, May 8, 2015, p. A24.

[5] See, for example, Michelle Conlin and Emily Flitter, "U.S. Authorities Unlikely to Stop 2016 Election Fundraising Free-for-All," Reuters wire report, June 4, 2015, http://www.reuters.com/article/2015/06/04/us-usa-election-enforcement-idUSKBN0OK0CI20150604#dv6GvRtMpw3wVQj1.97.

Department or activities regulated by agencies such as the Internal Revenue Service (IRS).[6] The report is not a legal analysis of commission activity. Other CRS products cited throughout this report provide additional information about related topics. In particular, another CRS product provides an overview of the FEC.[7] Finally, the report does not provide compliance guidance to those regulated by FECA or FEC rules.

A Note on Terminology

This report uses the terms "FEC," "commission," and "agency" interchangeably. Some discussions of the FEC's authority, which are generally beyond the scope of this report, use the term "commission" to denote members of the FEC as opposed to agency staff. This distinction is not central to this report but is relevant for some material in the "Transparency and the Enforcement Process" section.

Why Campaign Finance Enforcement Might Matter to Congress

Members of Congress have a dual stake in campaign finance policy: as regulators and as the regulated. By enacting legislation, appropriating funds, and conducting oversight, Congress establishes the rules that campaigns—including their own—must follow and provides resources for ensuring compliance. More generally, enforcement is one of the most prominent topics in federal campaign finance policy. Policy debates often characterize enforcement as an indicator of other issues, such as the health of the FEC or the extent of government regulation of political speech. Enforcement can also indicate to what extent emerging campaign practices will be permitted, as the FEC considers how existing law and regulation might apply to new circumstances. Proposals to restructure the FEC typically have enforcement implications. For all these reasons, even a basic understanding of enforcement can enhance familiarity with campaign finance policy overall. As noted elsewhere in this report, Congress has regularly considered legislation and held hearings that could affect the FEC's enforcement duties.

Latest Congressional Activity

Congress has considered various campaign finance legislation, and conducted FEC oversight, for decades.[8] Much of that activity has addressed campaign finance policy generally rather than FEC enforcement specifically. The same is true of more current legislation and hearings. Recent developments particularly relevant for enforcement include the following.

- In the 114th Congress, H.R. 2931 would replace the current six-member FEC with a five-member commission, including a chairperson with enhanced enforcement powers.

[6] This includes recent attention to IRS examinations of certain tax-exempt organizations.

[7] See CRS Report R44318, *The Federal Election Commission: Overview and Selected Issues for Congress*, by R. Sam Garrett.

[8] See CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett; and CRS Report R44318, *The Federal Election Commission: Overview and Selected Issues for Congress*, by R. Sam Garrett.

- The 113th Congress extended until 2018 operating authority for the FEC's Administrative Fine Program (AFP). The legislation also expanded the program to cover late reports filed by non-candidate committees and for independent expenditures.[9]
- During the 113th Congress, a Senate Judiciary Committee subcommittee held a hearing on criminal enforcement of campaign finance law. The hearing included witnesses from the Department of Justice, Internal Revenue Service, and interest groups, but did not focus on the FEC.[10]
- During the 112th Congress, the Committee on House Administration, Subcommittee on Elections, examined FEC enforcement through an oversight hearing. Subsequently, the FEC released additional information about its enforcement activities.[11]

The FEC: A Brief Overview

The FEC is a six-member independent regulatory agency. Commissioners are appointed by the President and subject to Senate confirmation. The Senate most recently confirmed commissioners in 2013 (the 113th Congress), as shown in **Table 1**. Another CRS report provides additional detail about the commission.[12]

Table 1. Current Members of the Federal Election Commission

Commissioner	Term Expires/Expired	Date Confirmed	Party Affiliation
Lee E. Goodman	04/30/2015 (remains in holdover status)	09/23/2013	Republican
Caroline C. Hunter	04/30/2013 (remains in holdover status)	06/24/2008	Republican
Matthew S. Petersen	04/30/2011 (remains in holdover status)	06/24/2008	Republican
Ann M. Ravel	04/30/2017	09/23/2013	Democrat
Steven T. Walther	04/30/2009 (remains in holdover status)	06/24/2008	Independent
Ellen L. Weintraub	04/30/2007 (remains in holdover status)	03/12/2003	Democrat

Source: Legislative Information System nominations database. CRS added party affiliation based on FEC seating charts.

[9] P.L. 113-72. On political-committee types and independent expenditures, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett.

[10] See U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, *Current Issues in Campaign Finance Law Enforcement*, hearing, 113th Cong., 1st sess., April 9, 2013, S.Hrg. 113-301 (Washington: GPO, 2013).

[11] U.S. Congress, House Committee on House Administration, Subcommittee on Elections, *Federal Election Commission: Reviewing Policies, Processes and Procedures*, hearing, 112th Cong., 1st sess., November 3, 2011 (Washington: GPO, 2012).

[12] See CRS Report R44318, *The Federal Election Commission: Overview and Selected Issues for Congress*, by R. Sam Garrett.

The Enforcement Process in Brief

Three major enforcement options are at the commission's disposal: (1) what the agency has termed the "general enforcement process" established in FECA;[13] (2) the Alternative Dispute Resolution (ADR) Program; and (3) the Administrative Fine Program (AFP). The first category includes the most complex and sometimes controversial matters that the commission might handle, designated as "Matters Under Review" (MURs). They may entail lengthy investigations or audits, protracted negotiations between the commission and H.R. 3487 respondents, substantial civil penalties, or litigation—although the pace can vary depending on individual circumstances. By contrast, matters handled under the AFP and ADR programs typically are simpler and less controversial. ADR cases can involve various issues; the program is designed to facilitate negotiation that leads to relatively speedy resolution of fairly simple matters.[14] AFP cases are limited to straightforward matters involving late filings.[15] A five-year statute of limitations applies to campaign finance enforcement matters.[16]

Overview and Initial Steps

The enforcement process typically begins when one of four entities files a complaint or makes an internal referral to the FEC. These include the following:

- a complaint from an individual or other group (e.g., an opposing campaign);
- a referral from another government agency (e.g., Department of Justice);
- a referral from the FEC Audit Division or Reports Analysis Division (RAD); or
- a violation that is self-reported by a political committee or other regulated entity (a *sua sponte* submission).[17]

Timing and Votes

The details of processing and resolving complaints vary based on whether the matter is handled through the MUR, ADR, or AFP methods.[18] In general, once complaints or referrals are complete,

- the commission notifies the respondent (the subject of the complaint or referral) of the receipt or referral;

[13] On the enforcement authority generally, see 52 U.S.C. § 30109. The quoted material appears in Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process*, Washington, DC, May 2012, p. 4, http://fec.gov/em/respondent_guide.pdf. The cited publication references enforcement provisions previously codified at 2 U.S.C. § 437g, now codified at 52 U.S.C. § 30109.

[14] For an overview, see Federal Election Commission, *Alternative Dispute Resolution Program*, brochure, http://www.fec.gov/pages/brochures/adr_brochure.pdf.

[15] For an overview, see Federal Election Commission, *How the Administrative Fine Program Works*, http://www.fec.gov/pages/brochures/admin_fines.shtml.

[16] On civil matters, see 28 U.S.C. § 2462. On criminal matters, see 52 U.S.C. § 30145.

[17] Self-reporting may result in negotiated penalties that are 25%-75% lower than would be assessed "for comparable matters arising by other means." See Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process*, Washington, DC, May 2012, p. 9, http://fec.gov/em/respondent_guide.pdf. See also Federal Election Commission, "Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions)," 72 *Federal Register* 16695, April 5, 2007.

[18] For additional detail about how complaints are received, processed, and resolved, see Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process*, Washington, DC, May 2012.

- the respondent has an opportunity to reply to the complaint and may choose to be represented by an attorney; and
- the commission determines which enforcement method, if any, to pursue: the MUR, ADR, or AFP processes.

Regardless of the enforcement mechanism, FECA dictates much of how the process must unfold and how long it takes. In particular, FECA specifies how complaints must be filed and, except for AFP cases, that the commission must seek voluntary compliance before imposing a penalty. [19] FECA also requires commissioners to vote on key enforcement decisions throughout the process. In particular, affirmative votes from at least four commissioners are required to

- find "reason to believe" (RTB) that a violation has occurred or is about to occur, which commences additional action (e.g., an investigation);[20]
- find probable cause that a violation has occurred or is about to occur;[21]
- resolve a matter (e.g., through a conciliation agreement, penalties, etc.);[22] and
- authorize filing a lawsuit if a matter cannot otherwise be resolved.[23]

Without an affirmative vote from at least four commissioners in each of these instances, substantive action stops. The "Deadlocked Votes" section contains additional detail.

Table 2 below lists the major steps and potential timelines required for cases routed through the MUR process, typically the most complex and consequential enforcement cases. The table excludes optional steps, such as hearings or presentation of legal questions to the commission, which require additional time.

Table 2. Typical Matter Under Review (MUR) Enforcement Process: Major Steps

		STEP * Commission vote required in FECA	MINIMUM TIME SPECIFIED IN FECA
1		Complaint/referral received	N/A
2		Office of General Counsel (OGC) notifies respondent of complaint	5 days
3		Respondent may reply to complaint	15 days
4	*	Commission votes on "reason to believe" (RTB) finding, commencing investigation	N/A
5		OGC investigates and/or initial conciliation is attempted	N/A
6		OGC files "probable cause" brief with the commission, copying respondent	15 days for respondent reply, if applicable

[19] On the enforcement authority generally, see 52 U.S.C. § 30109.

[20] See 52 U.S.C. § 30109(a)(2). Importantly, despite the terminology, which is specified in statute, "reason to believe" does not necessarily mean that the commission has determined that a violation occurred (or is about to occur). In cases in which the commission believes the facts are clear, it might choose to proceed directly to attempt to negotiate a conciliation agreement, for example, rather than first conducting an investigation. Therefore, not all RTB findings generate investigations. For an overview, see Federal Election Commission, *Filing a Complaint*, brochure, Washington, DC, June 2008, pp. 3-4, http://www.fec.gov/pages/brochures/complaint_brochure.pdf.

[21] 52 U.S.C. § 30109(a)(4).

[22] 52 U.S.C. § 30109(a)(4).

[23] 52 U.S.C. § 30109(a)(4).

		STEP * Commission vote required in FECA	MINIMUM TIME SPECIFIED IN FECA
7	*	Commission votes on "probable cause to believe" finding	N/A
8		If probable cause is found, OGC attempts to reach conciliation agreement with respondent	30-90 days *15 days if within 45 days of an election*
9	*	FEC considers conciliation agreement, if applicable	N/A
10	*	If conciliation is not agreed to, commission may authorize OGC to file suit	N/A
11		After resolution, MUR is closed and publicly disclosed	30 days after MUR is closed

Source: CRS summary based on 52 U.S.C. § 30109 and Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process*, Washington, DC, May 2012, http://fec.gov/em/respondent_guide.pdf.

Notes: The steps listed above provide a general overview of major elements of a generic MUR process. They do not reflect all agency practices, such as an additional step appearing in some commission documentation for a 60-day "pre-probable cause conciliation" effort between the investigation and filing the OGC brief. They also do not reflect steps such as complainant legal challenges to dismissed cases. For a more detailed discussion, see Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process*, Washington, DC, May 2012, http://fec.gov/em/respondent_guide.pdf.

Selected Major Topics of Debate in Enforcement

Transparency and the Enforcement Process

At least two transparency issues are central to the enforcement process. First, FECA bars the FEC or its personnel from releasing any information about individual enforcement matters until after cases are closed.[24] This confidentiality requirement was designed to prevent competing campaigns from using complaints as political weapons. Nonetheless, campaigns and other political actors routinely publicize complaints they have filed, even if the commission cannot comment. Second, Congress has dedicated some recent oversight activities to agency transparency concerning enforcement. Apparently both on its own initiative and in response to congressional interest, in recent years, the FEC has reexamined how it provides enforcement information to the public or those regulated by campaign finance law and commission rules. Highlights appear below.

Recent Congressional Oversight and FEC Enforcement Processes

- As noted previously, in November 2011, during the 112th Congress, the Committee on House Administration, Subcommittee on Elections, held an FEC oversight hearing.[25] Much of that hearing emphasized transparency surrounding the FEC's enforcement process.

[24] 52 U.S.C. § 30109(a)(12).

[25] U.S. Congress, House Committee on House Administration, Subcommittee on Elections, *Federal Election Commission: Reviewing Policies, Processes and Procedures*, hearing, 112th Cong., 1st sess., November 3, 2011 (Washington: GPO, 2012). The hearing record contains extensive FEC responses, submitted July 29, 2011, to written questions about topics ranging from administrative matters to enforcement issues. See pp. 107-168.

- After the November 2011 hearing, negotiations between the committee and commission appear to have resulted in the ongoing effort to approve and publicly release a new FEC enforcement manual. In May 2012, the FEC released on its website more than 1,200 pages of documents concerning its enforcement and audit procedures.[26]
- During the summer of 2013, controversy developed concerning an Office of General Counsel (OGC) draft of the enforcement manual and proposed revisions to that draft from some commissioners. A major source of controversy appeared to be the extent to which OGC staff should be restricted from sharing information with other agencies (particularly the Justice Department), or from conducting research that might constitute an "investigation" as contemplated in FECA, without specific commission authorization. Although the manual was scheduled for consideration at FEC open meetings at least as early as June 2013, it was held over due to disagreements among commissioners about whether a vote should occur, and if so, when. Debate over the matter continued at the FEC, sometimes including acrimonious public meetings among commissioners. In a June 17, 2013, memorandum to the commission, then-FEC General Counsel Anthony Herman called aspects of a proposal to restrict staff interactions with other agencies without commissioners' approval "troubling" and "unprecedented." He suggested that proposed additional requirements for subpoenas or commissioner approval for information-sharing could "increase administrative burden and legal risk for the Commission" and "would expose the Commission to allegations that politics and partisanship motivate its case-by-case decisions."[27] Then-Vice Chairman Donald McGahn disputed Herman's characterization and contended that FECA vested relevant decisionmaking authority only in the commissioners and that, in some cases, "staff viewed the Commission as an obstacle to be overcome, and not the deliberative body vested with decision-making authority that [FECA] contemplates."[28] Amid apparent stalemate among commissioners, Herman resigned as general counsel effective July 5, 2013.[29] Proposed changes to information-sharing policies reportedly remain under consideration.[30] The general counsel position remained vacant for more than two years. As noted elsewhere in this report, in August 2015 the FEC appointed an acting general counsel.

[26] See Federal Election Commission, *Documents on Enforcement & Compliance Procedures*, http://fec.gov/law/procedural_materials.shtml. For background, including debate about the release, see Kenneth P. Doyle, "FEC Reveals Hundreds of Internal Documents on Enforcement, Audit, Analysis Procedures." *Daily Report for Executives*, May 24, 2012, p. A11.

[27] Anthony Herman, General Counsel; and Daniel A. Petalas, Associate General Counsel for Enforcement; *Information Sharing with the Department of Justice*, Federal Election Commission, Agenda Document 13-21-D, Washington, DC, June 26, 20013, http://fec.gov/agenda/2013/mtgdoc_13-21-d.pdf.

[28] For an overview, see Matea Gold, "Discord Intensifies at Hobbled FEC," *The Washington Post*, July 14, 2013, p. A3. On McGahn's proposal and the quoted language specifically, see Donald F. McGahn, Vice Chairman, *Background Information Regarding Proposed Enforcement Manual*, Memorandum to the Federal Election Commission, p. 1, Washington, DC, July 25, 2013, http://www.fec.gov/members/former_members/mcgahn/statements/13-21-k.pdf.

[29] Federal Election Commission, "FEC General Counsel Announces Departure," press release, June 5, 2013, http://fec.gov/press/press2013/20130605HermanDeparture.shtml.

[30] See, for example, Kenneth P. Doyle, "Goodman Resurrects Long-Dormant Plan to Limit Enforcement Actions of FEC Staff," *Daily Report for Executives*, December 8, 2014, p. A-17.

Relationships with Other Agencies

- The FEC's relationships with other federal agencies that might share enforcement interests appear to have varied over time. The current state of those relationships does not appear to be a major component of the public record. In July 2011, the FEC submitted written responses to questions from the Committee on House Administration, Subcommittee on Elections, explaining that the agency's memorandum of understanding (MOU) with the Justice Department became "somewhat outdated" after Congress enacted the 2002 Bipartisan Campaign Reform Act (BCRA).[31] The commission noted that "[a]lthough several draft proposals were exchanged" between the FEC and DOJ, "those negotiations did not ultimately lead to a revised MOU, and those discussions have not yet been revived."[32] One 2015 media account reported that the MOU had not been updated and that commission referrals to DOJ for alleged "knowing and willful" FECA violations were rare.[33]

Enforcement Outreach and FEC Processes

- The FEC appears to have interpreted its confidentiality obligations differently over time. In brief, areas of debate have concerned which documents the commission releases and, in particular, whether documents that informed the commission's consideration but were not final (such as interim OGC reports) should be released. Litigation, which is beyond the scope of this report, has shaped some of the agency's disclosure policies.
- As of this writing, activity at recent FEC open meetings suggests that commissioners are attempting to negotiate mutually agreeable revisions to Directive 68, the agency's internal policy regarding how and when respondents and the commission receive status reports on pending cases.[34]
- In 2007, the FEC established probable cause hearings permitting respondents to address findings in certain OGC briefs.[35]
- The FEC established a pilot program for conducting audit hearings in 2009.[36]

[31] P.L. 107-155; 116 Stat. 81. BCRA amended FECA. The most significant statutory change since BCRA occurred in December 2014, when Congress permitted political parties and political action committees (PACs) to raise additional funds and, in some cases, create new accounts to do so. See CRS Report R43825, *Increased Campaign Contribution Limits in the FY2015 Omnibus Appropriations Law: Frequently Asked Questions*, by R. Sam Garrett.

[32] U.S. Congress, House Committee on House Administration, Subcommittee on Elections, *Federal Election Commission: Reviewing Policies, Processes and Procedures*, hearing, 112th Cong., 1st sess., November 3, 2011 (Washington: GPO, 2012), p. 133.

[33] Kenneth P. Doyle, "FEC Rarely Votes to Refer Criminal Cases to Justice," *Daily Report for Executives*, July 29, 2015, n.p.

[34] Proposed revisions to Directive 68 appeared on FEC open meeting agendas throughout the fall of 2015.

[35] Federal Election Commission, "Procedural Rules for Probable Cause Hearings," 72 *Federal Register* 64919, November 19, 2007.

[36] Federal Election Commission, "Procedural Rules for Audit Hearings," 74 *Federal Register* 33140, July 10, 2009.

- The FEC held hearings on its enforcement procedures in 2003 and 2009.[37] The agency also solicited public comments in 2013.[38]
- The FEC has substantially revised its website in recent years to include a variety of additional information about the agency's processes and campaign finance data, including some enforcement information.
- Since 2013, the FEC has permitted those with "a material dispute on a question of law" arising during Audit Division and Reports Analysis Division referrals to ask the commission to consider the disputed legal question before proceeding with an enforcement matter.[39]

Deadlocked Votes

Throughout its history, the commission has been criticized for failing to reach consensus on some key policy and enforcement issues, resulting in what are commonly termed "deadlocked" votes.[40] Affirmative votes from at least four commissioners are required to authorize most consequential agency activity, including making, amending, or repealing rules; issuing advisory opinions (AOs); and approving enforcement actions and audits.[41] Unlike matters that a majority of the commission has definitively approved or rejected, actions without at least four votes for or against can have the effect of leaving questions of law, regulation, or enforcement unresolved. In these cases, deadlocked votes essentially halt substantive commission action on the matters in question.[42]

The FEC does not regularly compile and release summary deadlocks data. Most recently, the commission appears not to have produced an official, publicly available statistical summary since 2009. Using those data, CRS found that in 2008-2009, the FEC deadlocked on approximately

[37] For transcripts, see Federal Election Commission, *Public Hearing on Enforcement Procedures*, Washington, DC, June 11, 2003, http://fec.gov/agenda/agendas2003/notice2003-09/enforce_trans.pdf; Federal Election Commission, *Public Hearing on Agency Practices and Procedures*, Washington, DC, January 14-15, 2009, http://fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf.

[38] Federal Election Commission, "Request for Comment on Enforcement Process," 78 *Federal Register* 4081, January 18, 2013.

[39] Federal Election Commission, "Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission," 78 *Federal Register* 63203, October 23, 2013.

[40] For an overview, see, for example, Michael M. Franz, "The Devil We Know? Evaluating the Federal Election Commission as Enforcer," *Election Law Journal*, vol. 8, no. 3 (2009), pp. 167-187; Thomas E. Mann, "The FEC: Administering and Enforcing Campaign Finance Law," in *The New Campaign Finance Sourcebook*, Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, and Trevor Potter (Washington: Brookings Institution Press, 2005), pp. 239-241; and Scott E. Thomas and Jeffrey H. Bowman, "Obstacles to Effective Enforcement of the Federal Election Campaign Act," *Administrative Law Review*, vol. 52, no. 2 (2000), pp. 575-608.

[41] See 52 U.S.C. § 30106(c); 52 U.S.C. § 30107(a)(6)-52 U.S.C. § 30107(a)(9); and 52 U.S.C. § 30109(a).

[42] On enforcement items, deadlocks are rarely the *final* vote on a matter, as the commission usually votes to close the file after a deadlock occurs. Campaign lawyers and some former commissioners reportedly have different interpretations of deadlocked votes. In enforcement matters, for example, some practitioners reportedly view deadlocks as an opportunity to challenge the boundaries of the law (because no violation was found), whereas others regard deadlocks as leaving the issue unresolved. See Kenneth P. Doyle, "Increasing Prevalence of Split FEC Votes On Key Issues Could Shape Next Campaigns," *Daily Report for Executives*, April 9, 2009, p. C-1; Nicholas Confessore, "Election Panel Enacts Policies by Not Acting," *The New York Times*, August 26, 2014, p. A1; Brad Smith, *What does it mean when the Federal Election Commission "Deadlocks",* Center for Competitive Politics blog, April 14, 2009, http://www.campaignfreedom.org/2009/04/14/what-does-it-mean-when-the-federal-election-commission-deadlocks/; and Bob Bauer, *'Desperate' at the FEC, Part II: The Risks of Unintended Consequences*, More Soft Money Hard Law blog, June 11, 2015, http://www.moresoftmoneyhardlaw.com/2015/06/desperate-fec-part-ii-risks-unintended-consequences/.

13% of closed MURs.[43] A CRS analysis of more recent FEC vote tallies found that in calendar year 2014, commissioners deadlocked on 24.4% of closed MURs.[44] Results from other analyses vary based on methodology, time period, and the types of votes studied.[45]

Deadlocks in some recent matters have fostered debate about what split votes suggest about agency enforcement. For some, deadlocks represent a failure to enforce campaign finance law. For others, they signal that the commission is carefully considering what the law permits and prohibits.

Overall, deadlocked votes might or might not reflect the overall functioning of the enforcement process. In particular, even MURs without deadlocks can be controversial, while those with deadlocks can include agreement on some questions. In one 2014 example, MUR 6660, the commission avoided deadlock, but commissioners released competing statements explaining the implications of their votes. Similarly, in two other MURs closed in 2014 (6722 and 6723), the commission considered allegations of impermissible coordination between political committees. On February 25, 2014, the commission voted unanimously that there was "no reason to believe" that impermissible coordination had occurred. In explaining their votes, however, three commissioners stated that "[S]ome activity that is plainly 'coordination' under the statute is not squarely covered by the Commission's coordination communications regulation," suggesting that substantive differences remained despite the agreeing votes.[46] Finally, particularly when votes occur on multiple motions affecting a MUR, substantive decisions can occur on some issues even when deadlocks preclude decisions on others.

Congress appears to have anticipated that the commission might be unable to reach consensus in some controversial cases, and perhaps intended for deadlocks to occur. According to one analysis, "In order to ensure that the Commission would not become a vehicle for partisan purposes, the Congress created an unusual conflict within the FEC" through the six-member structure.[47] Commenting on the four-vote requirement, former Commissioner Scott E. Thomas and his executive assistant, Jeffrey H. Bowman, continued, "These provisions were specifically designed to ensure that formal action on a matter before the commission could go forward only on the affirmative vote of a mixed majority of Commission members."[48] In addition, deadlocks might be

[43] See CRS Report R40779, *Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress*, by R. Sam Garrett. The report is archived but available to congressional clients for historical reference upon request.

[44] Using the FEC's Enforcement Query System (EQS), CRS accessed commission vote certifications for MURs closed in calendar year 2014. This analysis defined a deadlock as any matter including a vote without a majority of at least four members (e.g., 3-3; 2-3, etc.).

[45] See, for example, Kenneth P. Doyle, "Campaign Finance: Analysis: Deadlocks Are Only Part of Story at FEC," *Daily Report for Executives*, August 31, 2015, special report; Michael M. Franz, "The Devil We Know? Evaluating the Federal Election Commission as Enforcer," *Election Law Journal*, vol. 8, no. 3 (2009), pp. 167-187; Dave Levinthal, "How Washington Starves its Election Watchdog," Center for Public Integrity, December 17, 2013, http://www.publicintegrity.org/2013/12/17/13996/how-washington-starves-its-election-watchdog; and Public Citizen, "Roiled in Partisan Deadlock, Federal Election Commission is Failing," press release, n.d. (released 2015), http://www.citizen.org/documents/fec-deadlock-update-april-2015.pdf.

[46] "Statement of Reasons of Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub," Statement of Reasons document accompanying Matter Under Review 6722 and 6723, Federal Election Commission, April 3, 2014, p. 1. The document may be accessed via the FEC's Enforcement Query System at http://eqs.fec.gov/eqs/searcheqs.

[47] Scott E. Thomas and Jeffrey H. Bowman. "Obstacles to Effective Enforcement of the Federal Election Campaign Act." *Administrative Law Review*, vol. 52, no. 2 (2000), pp. 575-608.

[48] Scott E. Thomas and Jeffrey H. Bowman. "Obstacles to Effective Enforcement of the Federal Election Campaign Act." *Administrative Law Review*, vol. 52, no. 2 (2000), pp. 575-608.

viewed positively if enforcement actions being considered are perceived as unwarranted or excessive. Nonetheless, deadlocks mean that the commission has been unable to reach consensus about some element of law or regulation. As a result, at least in specific circumstances, deadlocks prevent campaign finance law from being enforced or preclude those seeking guidance from clearly knowing whether their planned activities will run afoul of the law. Another CRS report contains additional analysis of deadlocks generally.[49]

Timing and Penalties

As **Table 2** above shows, at minimum, resolving a MUR enforcement case could take months. In practice, resolution often takes longer. In some cases, the commission may be unable to resolve an enforcement action before the five-year statute of limitation expires.

In March 2015, citing FEC data, one account reported that the FEC had "a backlog of 191 serious enforcement cases, with more than a quarter of these still unresolved more than two years after allegations of campaign finance violations were first filed."[50] Some protracted enforcement cases appear to be the result of disagreement among commissioners—including on whether pending enforcement matters constitute a "backlog" or necessary deliberation.[51] In other instances, factors such as the complexity of the issues in question, the need for comprehensive audits, replies from and negotiations with respondents, and other factors explain timing. Recently, some commissioners have proposed that the FEC revise its policies concerning how quickly cases are handled and when the commission or the public is informed about enforcement progress.[52] Some commissioners have also proposed meeting more frequently to address enforcement matters.[53]

The FEC has noted that, except for AFP matters, the agency "does not impose fines," but instead "seeks the payment of civil penalties through voluntary settlements (called 'conciliation agreements') with respondents."[54] Those amounts are typically modest, as shown in **Figure 1** below. In 2014, for example, the commission assessed less than $600,000 in penalties in all closed enforcement cases—the smallest amount since before FY2000. Financial penalties peaked in the mid-2000s, likely the result of large assessments on some organizations that operated under Section 527 of the Internal Revenue Code (IRC) in the early 2000s while taking the position that they were not political committees subject to FECA. The decline in penalties since that time has

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[49] See CRS Report R44318, *The Federal Election Commission: Overview and Selected Issues for Congress*, by R. Sam Garrett.

[50] Kenneth P. Doyle, "FEC Backlog of 191 Enforcement Cases Includes Many Matters Pending for Years," *Daily Report for Executives*, March 4, 2015, pp. A-31.

[51] Kenneth P. Doyle, "FEC Backlog of 191 Enforcement Cases Includes Many Matters Pending for Years," *Daily Report for Executives*, March 4, 2015, pp. A-31.

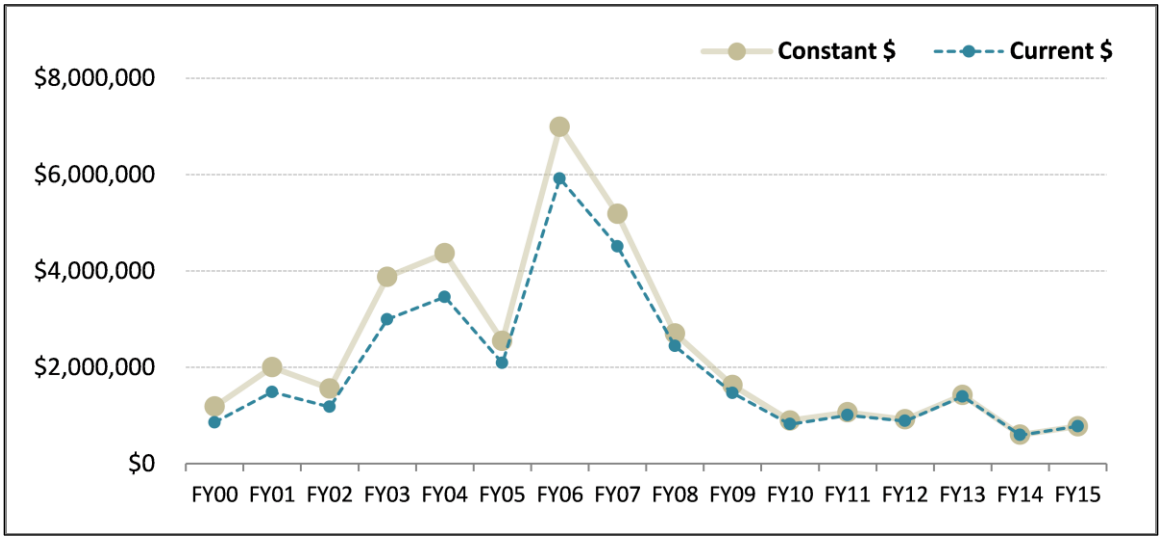
[52] For example, in 2015, Commissioner Steven Walther offered motions to expedite resolving certain enforcement matters pending before the commission for more than one year. For background, see Kenneth P. Doyle, "FEC Eyes Petition on Corporate Contributions," *Daily Report for Executives*, November 6, 2015, n.p.

[53] For additional discussion, see, "Statement of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman on the Timely Resolution of Enforcement Matters," July 16, 2015, Washington, DC, http://fec.gov/members/statements/ Statement_on_the_Timely_Resolution_of_Enforcement%20Matters_%28MSP%20CCH%20LEG%29.pdf; and spring/summer 2015 commission meeting minutes available at http://www.fec.gov/agenda/agendas.shtml regarding discussion of amending the FEC's Directive 74. (Note: The July 16, 2015, date on the Petersen, Hunter, and Goodman statement appears on Commissioner Petersen's collected statements and opinions at http://fec.gov/members/petersen/ statements.shtml but not on the document itself.) See also Kenneth P. Doyle, "FEC Deadlocks on Expediting Enforcement Cases," *Daily Report for Executives*, September 18, 2015, n.p.

[54] Federal Election Commission, *Guidebook for Complainants and Respondents of the FEC Enforcement Process*, Washington, DC, May 2012, p. 5, http://fec.gov/em/respondent_guide.pdf.

generated controversy, with some advocates claiming that lower amounts reflect lax enforcement, a scenario that is possible. It is also possible that decreased penalty amounts reflect better compliance. Particularly amid recent debate about whether the commission should publicize a penalty schedule, commissioners have debated whether existing penalties are sufficient and whether providing more information about how penalties are calculated would essentially publicize a "cost of doing business" for violating law or regulation. In addition, although monetary penalties are the most prominent component of FEC enforcement tools, the commission also could assess other forms of corrective action, such as requiring violators to attend training seminars.

Figure 1. FEC Civil Penalties in All Closed Enforcement Matters, FY2000-FY2015



Source: CRS figure using data in Federal Election Commission, "Federal Election Commission Enforcement Statistics 1977-2015," http://fec.gov/press/bkgnd/EnforcementStatistics.shtml? CRS adjusted original amounts for inflation (constant $).

Notes: The original source notes that the data are being transferred from an older FEC system to a new one and are subject to future review and potential modification.

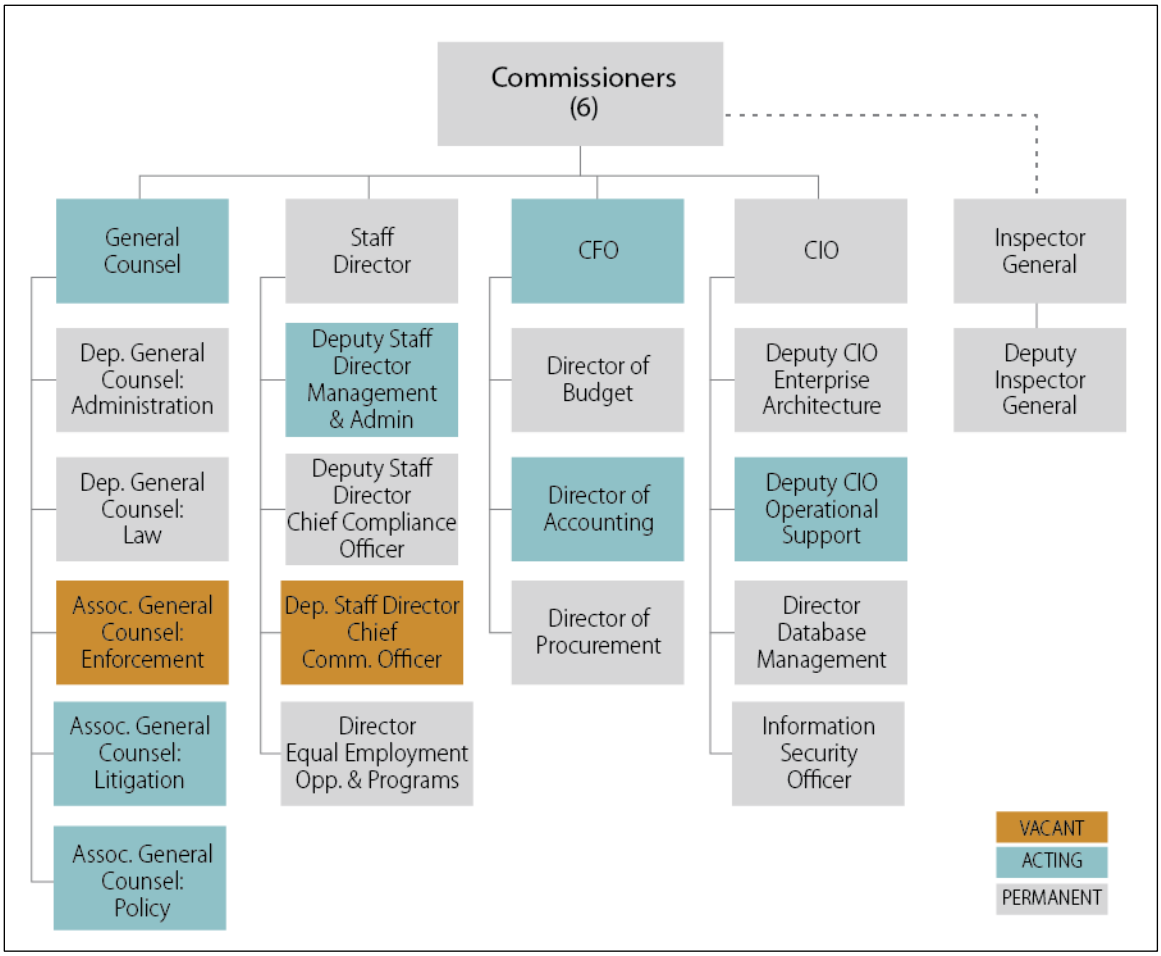
Vacancies Among Senior Enforcement Staff

As noted in **Figure 2** below, high-profile vacancies have occurred in some FEC senior staff positions. As of this writing, these include vacancies or acting appointments in the general counsel position, as well as the associate general counsel for enforcement. Amid a reported stalemate over how to fill the position, and reportedly reflecting other commissioners' divisions over enforcement, the general counsel position was vacant for more than two years between July 2013 and August 2015.[55] The commission appointed FEC attorney Daniel Petalas acting general counsel in August 2015.[56]

[55] See, for example, Kenneth P. Doyle, "FEC Slow to Announce New Counsel Following Departure of Anthony Herman," *Daily Report for Executives*, July 18, 2013, pp. A-1; and Dave Levinthal, "Gridlocked Elections Watchdog Goes Two Years Without Top Lawyer," Center for Public Integrity, June 30, 2015, http://www.publicintegrity.org/2013/12/17/13996/how-washington-starves-its-election-watchdog. The commission appoints the general counsel. See 52 U.S.C. § 30106(f).

[56] Federal Election Commission, "FEC Announces the Selection of Daniel A. Petalas as Acting General Counsel," press release, August 13, 2015, http://fec.gov/press/press2015/news_releases/20150813release.shtml.

Figure 2. Vacant or Acting Senior Staff Positions, Fall 2015



Source: CRS figure adapted from Federal Election Commission, "FEC Offices," http://fec.gov/about/offices/offices.shtml. Data are current as of November 2015.

Notes: The Staff Director and Chief Information Officer (CIO) are traditionally separate positions at the FEC. As the commission website explains, currently, "the same individual [Alec Palmer] is serving in both the position of the Staff Director and the position of the Chief Information Officer ... Accordingly, the organizational chart reflects both positions—the Staff Director and the Chief Information Officer—as reporting directly to the Commission." In addition, the Director of Equal Employment Opportunity (EEO) "reports directly to the Commission on all EEO matters," but to the Staff Director on administrative matters. See ibid.

Potential Considerations for Congress and Concluding Comments

Enforcement is important not only for encouraging compliance with law and regulation or correcting non-compliance, but also for what it represents about the state of campaign finance policy overall. For some, the FEC's enforcement process is unnecessarily complex and insufficiently transparent. For others, it is too lax to be effective. Whether observers prefer more vigorous, more limited, or unchanged campaign finance enforcement, there is general consensus that a clear, consistent enforcement process matters. Without transparent and consistent enforcement, political actors lack guidance about what they can and cannot do, when, and how.

If Congress wants to provide more direction surrounding enforcement, it could pursue legislation to clarify those issues on which policy stalemates have occurred. Nonetheless, pursuing legislative clarity on controversial issues might not be practically attainable in all circumstances. In addition, legislating individual policy issues would not necessarily address the fact that the commission routinely deadlocks on a variety of issues, which suggests that structural reform could be a more expedient route to curtailing split votes.

As such, some contend that more vigorous enforcement of campaign finance law requires restructuring the FEC. Most prominently, critiques typically propose eliminating the even-number commissioner structure to make deadlocks less likely.[57] For some, in choosing the current bipartisan structure, Congress intentionally made the FEC "weak" with the agency being "designed to promote deadlock along party lines on issues that really mattered."[58] Other observers warn that an odd number of commissioners could invite politicized enforcement. As one analysis explains, "The FEC's bipartisan design ... allows its regulations to carry weight. If not for this bipartisan design, every FEC action would be tinged with politics and viewed by some as illegitimate."[59]

Several questions could be relevant as the House and Senate examine how they want the FEC to enforce campaign finance law and regulation—if they choose to make any change at all. Potential questions include the following:

- How does Congress want the FEC to prioritize enforcement compared with other duties, such as disclosure?[60]
- What relationships does Congress want the FEC to have with other enforcement agencies, and for which areas of law and regulation should the FEC be responsible?
- Does the commission have a unified understanding of what the agency's enforcement priorities are and should be? Does Congress want to clarify its expectations in these areas through oversight, legislation, or both?
- Does the commission have adequate appropriations to carry out enforcement duties?
- Does the commission have adequate personnel to carry out enforcement duties?
- Does the commission have adequate statutory authority to carry out enforcement duties?

[57] Other occasional proposals include changes such as making the general counsel a tie-breaker in deadlocked votes and use of administrative law judges. Analysis of those proposals is beyond the scope of this report. For background, see, for example, Amanda S. La Forge, "The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations," *Administrative Law Journal of American University*, vol. 10 (1996), pp. 351-384; and Bradley A. Smith and Steven M. Hoersting, "A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission," *Election Law Journal*, vol. 1, no. 2 (2002), pp. 145-171.

[58] Campaign Legal Center, *Fix the FEC*, background memorandum, September 17, 2015, http://www.campaignlegalcenter.org/news/publications-speeches/fix-fec-background-memorandum-new-bipartisan-legislation-address-0#_ftn5.

[59] Scott Blackburn, *Delusions about 'Dysfunction': Understanding the Federal Election Commission*, Center for Competitive Politics, issue brief, Alexandria, VA, n.d., p. 2, http://www.campaignfreedom.org/wp-content/uploads/2015/10/2015-10-05_Two-Pager_Blackburn_Delusions-About-Dysfunction-Understanding-The-FEC.pdf. Although the brief is not dated, it was released in October 2015.

[60] In campaign finance parlance, "disclosure" is a term of art referring to public reporting of information about contributions and expenditures.

- To what extent should the commission wait for relevant pending litigation to resolve before reaching a determination in enforcement cases? Does Congress want to leave that determination to the commission or to specify a standard? If so, what?
- Do FECA's civil-enforcement requirements sufficiently reflect current needs? For example:
  - Do prohibitions on sharing information about open enforcement matters limit the potential for filing frivolous complaints for publicity; do they limit the commission from informing the public about its enforcement activities; or neither or both?
  - Do the required time frames (e.g., as shown in **Table 2**) allow for sufficient consideration by the commission and are they reasonable for respondents? Do those time frames, commission practices, or both or neither affect what is sometimes regarded as long delay in pending enforcement matters?
  - Does the requirement that the commission attempt to negotiate compliance undermine enforcement?
- Does Congress want to clarify which investigation and enforcement activities FEC staff can initiate versus those that require commissioner actions? Specifically, does Congress want to revisit the authorities of the commission versus those of the OGC or other enforcement staff?
- Does Congress want to reestablish the FEC's authority to conduct random audits?[61]
- Does Congress want to amend FECA (or enact another statute) to provide either greater flexibility or limitations in the enforcement process?

The FEC can determine how to prioritize enforcement activities, fill relevant staff vacancies, and whether or not commissioners can agree on enforcement actions. Much of the enforcement process, however, is set in statute and therefore beyond the agency's control. As long as campaign finance policy remains controversial, history suggests that so, too, will be enforcement.

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[61] Congress eliminated the FEC's random-audit authority as part of the 1979 FECA amendments (P.L. 96-187). On current audit authority, see 52 U.S.C. 30111(b).

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