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Federal Election Commission: Membership and Policymaking Quorum, In Brief

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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.

As of August 31, 2019, the Federal Election Commission is operating without a policymaking quorum. FECA requires that at least four of six commissioners agree to undertake many of the agency's key policymaking duties. As of August 31, 2019, three of six commissioners remain in office, after the fourth remaining commissioner resigned. Also as of this writing, one commission nomination is pending in the Senate.

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. This episode marks the second quorum loss in the agency's history—the first occurred for six months in 2008—leaving the commission unable to hold hearings, issue rules, and enforce campaign finance law and regulation. The agency remains open for business with remaining commissioners and regular staff, but new policy decisions and enforcement actions cannot be advanced or finalized.

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.

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Introduction

The Federal Election Commission (FEC) is an independent regulatory agency that is 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.

In 2008, the FEC lost its policymaking quorum for six months. As of August 31, 2019, the agency remains open and operating, but no quorum of commissioners is present to consider certain policymaking or enforcement matters.

It is unclear when or whether the President might nominate new Federal Election Commissioners or such nominations might receive Senate consideration.[2] At the time of Commissioner Matthew S. Petersen's resignation, effective August 31, 2019, the President had submitted one FEC nomination to the Senate during the 116th Congress. At the beginning of the 116th Congress, President Trump renominated James E. "Trey" Trainor III to the Petersen seat; Trainor's nominations during the 115th Congress did not advance.

This report provides a brief overview of policymaking implications when fewer than four Federal Election Commissioners remain in office.[3] 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.[4] 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

[1] 52 U.S.C. §§30101-30146.

[2] On reported 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.

[3] This report supersedes CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by R. Sam Garrett.

[4] See, respectively, CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett; CRS Report R44318, *The Federal Election Commission: Overview and Selected Issues for Congress*, by R. Sam Garrett; CRS Report R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress*, by R. Sam Garrett; and CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

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 August 31, 2019, the FEC is operating with three commissioners instead of six, as shown in **Table 1** below.

Table 1. Current Federal Election Commissioners and Vacancies

Commissioner	Term Expired	Date Confirmed	Party Affiliation	Vacancy Notes
Caroline C. Hunter	04/30/2013 (remains in holdover status)	06/24/2008	Republican	—
Steven T. Walther	04/30/2009 (remains in holdover status)	06/24/2008	Independent	—
Ellen L. Weintraub	04/30/2007 (remains in holdover status)	03/18/2003	Democrat	—
Vacancy	—	—	—	Previous occupant Ann M. Ravel (D); resignation effective 02/28/2017
Vacancy	—	—	—	Previous occupant Lee E. Goodman (R); resignation effective 02/16/2018
Vacancy	—	—	—	Previous occupant Matthew S. Petersen (R); resignation effective 08/31/2019; James E. "Trey" Trainor III (R) renominated to seat, 01/16/2019 and 01/08/2018 (initially nominated 09/14/2017); if confirmed, term would expire 04/30/2023

Source: Legislative Information System/Congress.gov nominations database. CRS added party affiliation based on FEC publications and press accounts.

The current vacancies developed as follows:

- Effective February 28, 2017, Democratic Commissioner Ann M. Ravel resigned, leaving the commission with five members.[5] Ravel's term would have expired on April 30, 2017. No nominee for the Ravel seat has been announced.

[5] Federal Election Commission, "Ann Ravel Departs Federal Election Commission," press release, February 28, 2017, https://www.fec.gov/updates/ann-ravel-departs-federal-election-commission/.

- On February 7, 2018, Republican Commissioner Lee Goodman announced his intention to resign, effective February 16, 2018.[6] Once Goodman left the FEC, the commission had four remaining members. No nominee for the Goodman seat has been announced.
- As discussed in more detail below, President Trump nominated James E. "Trey" Trainor III to Republican Commissioner Matthew S. Petersen's seat during the 115th and 116th Congresses, but the nomination did not advance (or has not advanced), and Petersen remained in office. Petersen resigned effective August 31, 2019.[7] The commission dropped to three members, thus losing its policymaking quorum.

It is unclear whether any other commissioners currently plan to leave. For several years, periodic reports have suggested that one or more other commissioners also plan to depart.[8]

Background on Circumstances Surrounding the Petersen Vacancy

Commissioner Petersen's departure from the FEC ends a two-year period of uncertainty about when a vacancy in his seat might occur. A brief description appears below for historical reference, but it is unclear whether additional activity will occur on a previously submitted nomination, or others.

- On September 11, 2017, President Trump nominated Petersen for a federal judgeship.[9] 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."[10] Petersen remained on the commission in holdover status until his resignation.
- After Petersen was nominated[11] 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.[12] The White House resubmitted the nomination on January 8,

[6] Federal Election Commission, "Lee Goodman to Depart Federal Election Commission," press release, February 7, 2018, https://www.fec.gov/updates/lee-goodman-depart-federal-election-commission/.

[7] Federal Election Commission, "Matthew Petersen to Depart Federal Election Commission," press release, August 26, 2019, https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/.

[8] See, for example, Dave Levinthal, "New Hope, New Problem: Will the Federal Election Commission Shut Down?" *Center for Public Integrity*, December 20, 2017, updated February 7, 2018, https://www.publicintegrity.org/2017/12/20/21410/new-hope-new-problem-will-federal-election-commission-shut-down.

[9] See Presidential Nomination (PN) 1017, http://www.lis.gov/nomis/; or congress.gov, selecting the "nominations" filter.

[10] Dave Levinthal, "New Hope, New Problem: Will the Federal Election Commission Shut Down?" *Center for Public Integrity*, December 20, 2017, updated February 7, 2018, https://www.publicintegrity.org/2017/12/20/21410/new-hope-new-problem-will-federal-election-commission-shut-down. For additional discussion, see, for example, Kenneth P. Doyle, "Lawyer With No Courtroom Experience Withdraws as Judge Nominee," *Daily Report for Executives*, December 19, 2017, obtained via CRS electronic subscription. The circumstances surrounding the judicial nomination and withdrawal are beyond the scope of this report.

[11] See Presidential Nomination (PN) 1017, http://www.lis.gov/nomis/.

[12] See "Nominations Returned to the Senate," *Congressional Record*, daily edition, vol. 163, no. 216 (January 3, 2018), pp. S25-S26. The September 2017 Trainor nomination was one of a large group returned to the President at the end of

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.[13] The White House resubmitted the Trainor nomination at the beginning of the 116th Congress.[14]

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.[15] 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.[16] Congress did not amend FECA responding to this decision, although the *ex officio* members are no longer appointed.

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.[17] 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.[18]

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the first session under Senate Rule XXXI. However, this rule was waived for another group of nominations, and these were kept in status quo into the second session. See Sen. Mitch McConnell, "Nominations Remaining in Status Quo," remarks in the Senate, *Congressional Record*, daily edition, vol. 163, no. 209 (December 21, 2017), p. S8241; and Sen. Mitch McConnell, "Nominations Remaining in Status Quo," remarks in the Senate, *Congressional Record*, daily edition, vol. 163, no. 215 (January 2, 2018), p. S8289. CRS Specialist Henry Hogue provided consultations on this information.

[13] See PNs 1024 and 1425, http://www.lis.gov/nomis/.

[14] See PN 197, https://www.lis.gov/nomis.

[15] *Buckley* is 424 U.S. 1 (1976). For a brief discussion of the ruling's implications for congressional appointments, see Congressional Research Service, *Constitution of the United States of America: Analysis and Interpretation*, "Article II-Executive Department," http://www.crs.gov/conan/default.aspx?doc=Article02.xml&mode=topic&s=2&c=2&t=3|2.

[16] 6 F.3d 821 (D.C. Cir. 1993); cert. denied (513 U.S. 88 (1994)). For legal analysis for *Buckley* and campaign finance issues, see CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker.

[17] 52 U.S.C. §30106(a)(1).

[18] Members of the congressional leadership reportedly suggest nominees, although documentation of the practice is sparse. In one example, from 2005, Sen. Reid stated that he was "very pleased that the president acted today upon my two recommendations for Commissioners." See Sen. Harry Reid, "Reid Statement on Nominations to the Federal Election Commission," press release, December 16, 2005, http://democrats.senate.gov/2005/12/16/reid-statement-on-nominations-to-the-federal-election-commission/#.Vk9Kbis4hjZ. On congressional influence on presidential appointments generally, see CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An*

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."[19] 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."[20] 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.[21] In practice, the commission has been divided equally among Democrats and Republicans, although one current commissioner identifies as an independent.[22] FECA staggers commissioner terms so that two expire every other April 30 during odd-numbered years (e.g., 2019, 2021, etc.).[23] 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.[24] 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 upcoming term with the expectation that the new term will be underway by the time of confirmation."[25] 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.[26] 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

Overview, by Henry B. Hogue and Maeve P. Carey.

[19] 52 U.S.C. §30106(a)(3).

[20] Larry Noble, "In Search of Qualified FEC Commissioners," Campaign Legal Center blog posting, June 30, 2015, http://www.campaignlegalcenter.org/news/blog/clc-blog-search-qualified-fec-commissioners. David Mason (1998-2008) was the most recent non-lawyer, at the time of service, appointed to the commission.

[21] 52 U.S.C. §30106(a)(1).

[22] 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.

[23] 52 U.S.C. §30106(a)(2)(A).

[24] 52 U.S.C. §30106(a)(2)(A).

[25] CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey, p. 11.

[26] "Confirmations," *Congressional Record*, vol. 154, part 10 (June 24, 2008), p. 13696.

or her successor has taken office as a Commissioner."[27] As **Table 1** above shows, as of this writing, all current commissioners are serving in holdover status.

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).[28]

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.[29]

With fewer than four commissioners, 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.

Loss of Policymaking Quorum in 2008

The significance of the four-vote threshold became particularly evident in 2008. Following expired recess appointments and amid 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

[27] 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.

[28] 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).

[29] Campaign lawyers and some former commissioners have different interpretations of deadlocked votes. In enforcement matters, for example, some practitioners 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. For additional discussion, see CRS Report R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress*, by R. Sam Garrett. See also 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 posting, 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 posting, June 11, 2015, http://www.moresoftmoneyhardlaw.com/2015/06/desperate-fec-part-ii-risks-unintended-consequences/.

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.[30]

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.[31]

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).[32] The commission returned to normal operations during the rest of 2008 and throughout 2009.

Concluding Comments

Without a policymaking quorum among members of the FEC, the commission is unable to execute its most consequential duties. Among others, current matters before the FEC include a proposed rulemaking on disclosure requirements for certain online political advertising,[33] as well as responding to developments during the 2018 election cycle and preparing for 2020.[34] Particularly during election years, advisory opinion requests are common.

Despite the lack of a policymaking quorum, FEC operations do not cease. The agency remains open for business with remaining commissioners and its regular staff. Although new enforcement or policy matters cannot advance until a quorum is reconstituted, a repopulated commission could

[30] Federal Election Commission, "Rules of Procedure," 73 *Federal Register* 5568, January 30, 2008. Section L (p. 5570) of the document refers to operations with fewer than four commissioners; that language was adopted in December 2007.

[31] See, for example, Letter from Donald F. McGahn II, Counsel, People for Pete Domenici, to Thomesenia P. Duncan, Office of General Counsel, Federal Election Commission, January 23, 2008, withdrawing advisory opinion request 2007-36, https://www.fec.gov/data/legal/advisory-opinions/2007-36/. (McGahn was later appointed to the commission.) See also, for example, CBS News, "FEC Fight Leaves Candidates Hanging," April 23, 2008, https://www.cbsnews.com/news/fec-fight-leaves-candidates-hanging/. The FEC's obligations under the Administrative Procedure Act (APA) are beyond the scope of this report.

[32] For historical background, see archived CRS Report RL34324, *Campaign Finance: Legislative Developments and Policy Issues in the 110th Congress*, by R. Sam Garrett; and CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by R. Sam Garrett.

[33] For brief discussion, see CRS In Focus IF10758, *Online Political Advertising: Disclaimers and Policy Issues*, by R. Sam Garrett. See also Federal Election Commission, "Internet Communication Disclaimers and Definition of "Public Communication," 83 *Federal Register* 12864, March 26, 2018.

[34] Several entities have publicized filing complaints with the commission related to 2016 and 2018. In these and other cases, even with a quorum, the commission might not find sufficient reason to proceed with enforcement. FECA prohibits the commission from disclosing information about ongoing enforcement matters. For additional discussion, see CRS Report R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress*, by R. Sam Garrett.

consider older matters.[35] In addition, the Justice Department may pursue criminal enforcement on its own authority, regardless of the FEC's operating capacity for civil matters.[36]

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[35] 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.

[36] 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.