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Federal Election Commission: Membership and Policymaking Quorum, In Brief

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Federal Election Commission: Membership and Policymaking Quorum, In Brief

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 covered 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.

Senate confirmations of three commissioners on December 9, 2020, restored the FEC to a policymaking quorum. Previously, the commission lacked a policymaking quorum because only three commissioners remained in office. At least four agreeing votes are required to take policymaking or enforcement actions. The Senate most recently confirmed a new commissioner on May 24, 2022, although that action did not affect the FEC’s policymaking quorum.

The most recent quorum loss marked the third in the FEC’s history. The second occurred 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.

If, in the future, fewer than four commissioners remained in office, the agency would again be unable to reach a policymaking quorum. This CRS report, which remains available for historical reference, briefly explains the kinds of actions that FECA precludes when a quorum is not possible because fewer than four FEC members are in office.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.

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 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.

The Senate most recently confirmed a new commissioner, Dara Lindenbaum, on May 24, 2022. Because Lindenbaum was replacing retiring Commissioner Steven Walther, the confirmation did not affect the FEC’s policymaking quorum. As discussed below, nominations activity in 2020 most recently affected the agency’s policymaking quorum.

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. The Senate confirmed Broussard, Cooksey, and Dickerson on

¹ 52 U.S.C. §§30101-30146.

² Federal Election Commission, “Caroline C. Hunter to Depart Federal Election Commission,” press release, June 26, 2020, <https://www.fec.gov/updates/caroline-c-hunter-depart-federal-election-commission/>.

³ The White House, “President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts,” press release, June 26, 2020, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-43/>.

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.

December 9, 2020, thereby restoring the FEC’s policymaking quorum. The confirmations also marked the first time since 2017 that a full slate of six FEC commissioners was in office.

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

This report provides a brief overview of policymaking implications when fewer than four Federal Election Commissioners remain in office.⁵ It remains available for historical reference in the event that the FEC again loses a policymaking quorum. Other CRS products provide additional information about campaign finance policy, the FEC, and procedural issues.⁶ 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

Table 1 below reflects the latest Senate action on FEC nominations, as of this writing.

Table 1. Current Federal Election Commissioners and Recent Vacancies

Commissioner	Term Expiration	Date Confirmed	Party Affiliation	Recent Vacancy Notes
Dara Lindenbaum	04/30/2027	05/24/2022	Democrat	Previous occupant Steven T. Walther (I); retirement effective 08/01/2022*
Shana M. Broussard	04/30/2023	12/09/2020	Democrat	Previous occupant Ann M. Ravel (D); resignation effective 02/28/2017
Sean J. Cooksey	04/30/2021	12/09/2020	Republican	Previous occupant Lee E. Goodman (R); resignation effective 02/16/2018
Allen Dickerson	04/30/2025	12/09/2020	Republican	Previous occupant Caroline C. Hunter (R); resignation effective 07/03/2020

⁵ This report supersedes CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by R. Sam Garrett.

⁶ 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.

Commissioner	Term Expiration	Date Confirmed	Party Affiliation	Recent Vacancy Notes
James E. “Trey” Trainor III	04/30/2023	05/19/2020	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	—

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

Note: * The table relies on the “retirement” terminology included in a commission press release. See Federal Election Commission, “Steven T. Walther Retires from the Commission,” press release, August 1, 2022, <https://www.fec.gov/updates/steven-t-walther-retires-from-the-commission/>. Despite being confirmed on May 24, 2022, Lindenbaum was not sworn in at the commission until August 2, 2022, after Commissioner Walther’s August 1, 2022, departure. See Federal Election Commission, “Dara Lindenbaum Sworn In as Commissioner,” press release, August 2, 2022, <https://www.fec.gov/updates/dara-lindenbaum-sworn-in-as-commissioner/>; and Federal Election Commission, “Steven T. Walther Retires from the Commission,” press release, August 1, 2022, <https://www.fec.gov/updates/steven-t-walther-retires-from-the-commission/>. The table and this report do not otherwise address periods between confirmation and assuming office.

Vacancies that precipitated the 2019 and 2020 quorum losses 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. The Senate confirmed Broussard on December 9, 2020, to a term expiring 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 The Senate confirmed Cooksey on December 9, 2020, to a term expiring on April 30, 2021.¹¹
- 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. Petersen initially remained in office, and resigned effective August 31, 2019.¹² The commission dropped to three members, thus

⁷ 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/>.

⁸ See Presidential Nomination (PN) 2302, <https://www.congress.gov/>. The Senate confirmed Broussard with a 92-4 vote (record vote 259).

⁹ 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/>.

¹⁰ See Presidential Nomination (PN) 2303, <https://www.congress.gov/>.

¹¹ The Senate confirmed Cooksey with a 50-46 vote (record vote 260).

¹² Federal Election Commission, “Matthew Petersen to Depart Federal Election Commission,” press release, August 26,

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.¹³

- 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, 2020.¹⁴ The Senate confirmed Dickerson on December 9, 2020, to a term expiring on April 30, 2025.¹⁵

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.¹⁶ 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."¹⁷ Petersen remained on the commission in holdover status until his August 31, 2019, resignation.
- After Petersen was nominated¹⁸ 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.¹⁹ The White House resubmitted the nomination on January 8, 2018, at the start of the second session of the 115th Congress, and the nomination

2019, <https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/>.

¹³ On the swearing-in date, see Federal Election Commission, "James E. Trainor III Sworn In As Commissioner," press release, June 5, 2020, <https://www.fec.gov/updates/james-e-trainor-iii-sworn-commissioner/>.

¹⁴ See Presidential Nomination (PN) 2237, <https://www.congress.gov/>.

¹⁵ The Senate confirmed Dickerson with a 49-47 vote (record vote 258).

¹⁶ See Presidential Nomination (PN) 1017, <https://www.congress.gov/>.

¹⁷ 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.

¹⁸ See Presidential Nomination (PN) 1017, <https://www.congress.gov/>.

¹⁹ 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 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.

was returned to the President at the end of the Congress.²⁰ 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.²¹ 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, 2020.²²

Background on Circumstances Surrounding the Hunter Vacancy and Other Nominations Activity

Effective July 3, 2020, Republican Commissioner Caroline C. Hunter resigned,²³ 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.²⁴ On September 16, 2020, the President nominated Dickerson to the Hunter seat.²⁵
- On October 28, 2020, the White House announced the President's intent to nominate two people to the commission: Broussard, then an FEC Commissioner Walther staffer; and Cooksey, then a Senator Hawley staffer.²⁶ The Senate received both nominations on October 30. Broussard was nominated to the Ravel seat; Cooksey was nominated to the Goodman seat.²⁷

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

²⁰ See PNs 1024 and 1425, <https://www.congress.gov/>.

²¹ See PNs 197 and 1600, <https://www.congress.gov/>.

²² The Senate confirmed Trainor with a 49-43 vote. See record vote no. 96.

²³ Federal Election Commission, "Caroline C. Hunter to Depart Federal Election Commission," press release, June 26, 2020, <https://www.fec.gov/updates/caroline-c-hunter-depart-federal-election-commission/>.

²⁴ The White House, "President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts," press release, June 26, 2020, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-43/>.

²⁵ See Presidential Nomination (PN) 2237, <https://www.congress.gov/>.

²⁶ The White House, "President Donald J. Trump Announces Intent to Nominate Individuals to Key Administration Posts," press release, October 28, 2020, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-individuals-key-administration-posts-102820/>.

²⁷ See Presidential Nominations (PNs) 2302 and 2303, <https://www.congress.gov/>.

appointments method, holding that congressional appointments violated the Constitution's Appointments Clause.²⁸ 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.²⁹ 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.³⁰ 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.³¹

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.”³² 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.”³³ 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.³⁴ In practice, the commission has been divided equally among Democrats and Republicans, although former Commissioner Steven Walther identified as an independent.³⁵ FECA staggers commissioner terms

²⁸ *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,” <https://constitution.congress.gov/search/constitutionannotated>.

²⁹ 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.

³⁰ 52 U.S.C. §30106(a)(1).

³¹ 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. On congressional influence on presidential appointments generally, see CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey.

³² 52 U.S.C. §30106(a)(3).

³³ 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.

³⁴ 52 U.S.C. §30106(a)(1).

³⁵ Steven T. Walther identified himself as an independent. Sen. Reid recommended Walther to the commission and Walther reportedly worked for Democratic clients before joining the FEC. Walther often voted with Democrats on the FEC, although he emphasized his independence throughout 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>. On announcing his departure, Walther noted that he had “served as a politically independent Commissioner, and my departure affords the President the opportunity to fill that vacancy and reestablish the historic composition of the Commission to three Democrats and three Republicans.” See Federal Election Commission, untitled statement issued

so that two expire every other April 30 during odd-numbered years (e.g., 2023, 2025, etc.).³⁶ 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.³⁷ 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.”³⁸ 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, 2009.³⁹ 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.”⁴⁰

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).⁴¹

by Vice Chair Steven T. Walther, January 21, 2022, https://www.fec.gov/resources/cms-content/documents/January_21_2022_Press_Release_Steven_T_Walther.pdf.

³⁶ 52 U.S.C. §30106(a)(2)(A).

³⁷ 52 U.S.C. §30106(a)(2)(A).

³⁸ CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey, p. 11.

³⁹ “Confirmations,” *Congressional Record*, vol. 154, part 10 (June 24, 2008), p. 13696.

⁴⁰ 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.

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).

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.⁴²

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 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 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.⁴³

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.⁴⁴ (The commission did not hold public discussions such as these during later quorum losses.)

⁴² 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/>.

⁴³ 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.

⁴⁴ 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.

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).⁴⁵ 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 consider older matters.⁴⁶ In addition, the Justice Department may pursue criminal enforcement on its own authority, regardless of the FEC's operating capacity for civil matters.⁴⁷

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⁴⁵ 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.

⁴⁶ 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.

⁴⁷ 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.