



CRS Report for Congress

The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications

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Summary

Three recess appointments to the Federal Election Commission (FEC) expired at the end of the first session of the 110th Congress, leaving the agency with just two commissioners. Because the Federal Election Campaign Act (FECA) requires that at least four commissioners vote affirmatively to execute some of the agency's major functions, the FEC is currently unable to issue regulations, approve enforcement actions, and administer aspects of the presidential public campaign financing program. The Commission also cannot issue advisory opinions, which various campaigns and other groups have requested, and could continue requesting, in anticipation of the 2008 elections. Regardless of the Commission's status, existing campaign finance law and regulations remain in effect. Remaining commissioners and staff can also continue routine business and to prepare for additional appointments to the Commission. This report will be updated in the event of significant changes in the Commission's operating status.

The Current Commission and First-Session Nominations: Brief Overview

Throughout the first session of the 110th Congress, the Senate considered four nominations to the six-seat FEC.¹ Nominees Robert D. Lenhard (D), Hans A. von Spakovsky (R), and Steven T. Walther (D) served in recess appointments at the agency during that time and until their appointments expired at the end of the first session.² The

¹ No more than three of the six commissioners may be affiliated with the same political party. See 2 U.S.C. § 437c(a)(1). Due to a resignation, the Commission had five members instead of six for much of 2007.

² On recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

fourth nominee, David M. Mason (R), has served at the agency since 1998 and was renominated.³

Throughout the first session of the 110th Congress, the von Spakovsky nomination generated controversy. In particular, some Senators and others debated von Spakovsky's actions on voting rights issues while serving at the Justice Department.⁴ Much of a June 13, 2007, Senate Rules and Administration Committee hearing and subsequent markup focused on von Spakovsky. On September 26, 2007, after being unable to reach agreement on reporting the nominations individually, the committee reported all four nominees en bloc without recommendation. In the closing days of the first session, the Senate was unable to reach a compromise over the nominees, including whether they should be considered on the floor separately or as a group.⁵ The apparent stalemate over the nominations has continued into the second session of the 110th Congress.⁶

The Mason, von Spakovsky, and Walther nominations remain pending in the Senate, but because the three recess appointments expired at the end of the first session, just two commissioners — Mason (R) and Ellen L. Weintraub (D) — are still in office. Both were previously confirmed by the Senate and continue serving in holdover status following expired terms. Unlike Weintraub, Mason is eligible for re-appointment because he began serving at the FEC before term limits took effect. Mason and Weintraub may continue serving as long as they are willing (or, in Mason's case, confirmed or rejected) or until replacements are appointed.⁷ Lenhard reportedly requested in April 2008 that his nomination be withdrawn.⁸

³ On Commission terms, see 2 U.S.C. § 437c(a)(2)(A) and 111 Stat. 1305. For “holdover” provisions, see 2 U.S.C. § 437c(a)(2)(B).

⁴ The Rules and Administration Committee posted a transcript of the hearing on its website at [<http://rules.senate.gov/hearings/2007/061307correctedTranscript.pdf>]. On the hearing and controversy surrounding the von Spakovsky nomination, see, for example, Kenneth P. Doyle, “Senate Rules Hearing on FEC Nominees Focuses on Von Spakovsky Role at Justice,” *Daily Report for Executives*, June 14, 2007, p. A-12.

⁵ Sen. Robert Bennett, “FEC Vacancies,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (December 18, 2007), pp. S15820-S158222; and Sen. Harry Reid, “Federal Election Commission Nominees,” remarks in the Senate, *Congressional Record*, daily edition, vol. 153 (December 19, 2007), p. S15981.

⁶ See, for example, Mary Jacoby, “Election Agency Lacks Quorum To Rule on Key Issues This Year,” *Wall Street Journal*, February 26, 2008, p. A8; and Matthew Mosk, “Money Matters,” *Roll Call*, April 2, 2008, at [http://www.rollcall.com/issues/53_113/money_matters/22760-1.html].

⁷ Mason serves as Commission chairman for 2008. The Commission elected Mason at its December 14, 2007, meeting. Walther was elected vice chairman, but, as noted above, his recess appointment expired. After an internal rules change discussed below, Mason and Weintraub in early 2008 elected Weintraub as vice chair.

⁸ Matthew Murray, “Democratic FEC Nominee Withdraws; Reid Blasts White House,” *Roll Call*, April 14, 2008, at [http://www.rollcall.com/issues/1_1/breakingnews/22987-1.html?type=pf].

Effects of a Commission with Fewer than Four Members

Functions that Can Continue Unaffected. Even a two-member Commission has not halted the FEC's work on some issues. FECA does not appear to require a four-commissioner majority to permit the FEC to carry out basic information-gathering functions, such as requiring written reports, gathering evidence in enforcement cases, and authorizing subpoenas.⁹ With fewer than four commissioners, agency staff and remaining commissioners can also continue to provide general information, and to prepare for a repopulated Commission. Current campaign law and regulations remain in effect.

In addition, in December 2007, when the FEC still had five commissioners, the Commission voted to amend its rules of internal procedure to permit remaining commissioners to execute some duties. Revisions to the FEC's so-called "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.¹⁰

Functions That Require a Four-Commissioner Majority. Since January 2008, the Commission has been unable to make major policy decisions. FECA requires affirmative votes from at least four commissioners to: (1) make, amend, or repeal rules, (2) approve enforcement actions, (3) initiate, or defend itself in, certain court actions, (4) issue advisory opinions, (5) develop forms, (6) conduct hearings and investigations, and (7) refer cases of apparent criminal conduct to law enforcement.¹¹ FECA also requires a minimum four-vote majority to administer at least some elements of the presidential public financing program, including certifying payments to eligible candidates.¹²

Policy Implications

Under FECA, the emphasis is not so much on how many members the Commission has at any one time, but on whether at least four commissioners vote affirmatively on agency decisions. Reaching a four-vote consensus can be difficult when all six commissioners are present, but a Commission with fewer than four members cannot approve even some non-controversial items. This includes certifying presidential public financing funds for general-election nominees. (However, the certifications would be

⁹ 2 U.S.C. § 437c(c); and 2 U.S.C. § 437d(a)(1)-2 U.S.C. § 437d(a)(1)(5). Duane Pugh, Deputy Director, Congressional Affairs, FEC, provided consultations on some points in this section (telephone conversations with R. Sam Garrett, December 10, 2007).

¹⁰ 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.

¹¹ 2 U.S.C. § 437c(c); 2 U.S.C. § 437d(a)(6)-2 U.S.C. § 437d(a)(9); and 2 U.S.C. § 437g(a).

¹² 2 U.S.C. § 437c(c). Wanda Thomas, director of the FEC's public financing program, provided consultations on some points related to presidential public financing (telephone conversation with R. Sam Garrett, December 11, 2007; and by e-mail, April 10, 2008).

unnecessary if both nominees chose not to participate in public financing.¹³) Enforcement actions, rulemakings, and advisory opinions can also be affected.

The FEC's operating status has already affected the campaigns of some publicly funded *primary* candidates, but effects on *general-election* public financing remain to be seen. The Commission has been unable to approve monthly matching-fund (primary) payments in 2008 because, as noted above, FECA requires at least four affirmative votes to do so.¹⁴ If the lack of a quorum continues into the general-election period, the agency could also be unable to certify payments to the Democratic and Republican nominees, if they choose to accept public funds. However, those payments are not made until after the candidate is formally nominated, which means that the quorum issue could continue into the summer without immediate consequences for distributing public funds in the general election.

The FEC also cannot initiate or approve enforcement actions or rulemakings related to federal campaigns. Several rulemakings are before the Commission, although they do not necessarily require immediate action. The Honest Leadership and Open Government Act (HLOGA) required the Commission to issue regulations on campaign bundling by March 2008, but the lack of a quorum prevented the agency from acting.¹⁵ In addition, in late 2007, the Commission approved new campaign travel rules, but a four-commissioner majority is required to approve an "explanation and justification" (E&J) document that would clarify and accompany those rules. The rules cannot be published in the *Federal Register* without an approved E&J.

As noted previously, FECA also requires at least four affirmative votes to approve advisory opinion (AO) requests. Because political committees (and others) frequently rely on AOs to determine whether planned campaign activities are permissible, a prolonged inability by the Commission to consider the requests could preclude clear guidance during the 2008 election cycle. Remaining commissioners have discussed pending AO requests at open FEC meetings so that those making the requests can have general (even if not Commission-approved) guidance. Remaining commissioners' willingness to discuss requests, however, does not provide the same legal protection as would an approved AO. In addition, some in the regulated community have asserted that

¹³ On presidential public financing, see Federal Election Commission, "Public Funding of Presidential Elections," brochure, updated February 2007, at [http://www.fec.gov/pages/brochures/public_funding_brochure.pdf], visited December 13, 2007; and CRS Report RL32786, *The Presidential Election Campaign Fund and Tax Checkoff: Background and Current Issues*. Now-retired CRS specialist Joseph E. Cantor authored that report; R. Sam Garrett is available to answer questions regarding its content.

¹⁴ Publicly financed primary campaigns have received funds that were certified in 2007. FEC press officer Bob Biersack provided consultations on current disbursement status (e-mail correspondence with R. Sam Garrett, April 17, 2008). See also Kenneth P. Doyle, "FEC Owes \$7.4 Million in Matching Funds Unpaid Due to Lack of Commission Quorum," *Daily Report for Executives*, April 17, 2008, p. A-3.

¹⁵ On HLOGA rulemakings related to campaign finance, see CRS Report RL34324, *Campaign Finance: Legislative Developments and Policy Issues in the 110th Congress*, by R. Sam Garrett; and CRS Report RL34166, *Lobbying Law and Ethics Rules Changes in the 110th Congress*, by Jack Maskell.

the Commission does not have the authority to consider AO requests without at least four commissioners present. In January 2008, an attorney representing a Senate campaign committee withdrew a previously submitted AO request and contended that the Directive 10 changes discussed above could not supercede federal regulations regarding minimum attendance at the Commission's meetings, a debate that is beyond the scope of this report.¹⁶

Conclusion

The Federal Election Commission has been without a quorum of four commissioners since January 2008. Two commissioners remain in office, a number that is insufficient under FECA to conduct most of the agency's policy-related business. Commission staff and the remaining two commissioners have continued to provide information to the regulated community and to prepare for additional commissioners. In the interim, however, the absence of a quorum at the FEC has had implications for administering aspects of the presidential public financing program, rulemakings, and enforcement actions. A commission with at least a four-member majority may, however, consider all those issues at a later date. In the interim, Congress could adjust the quorum requirement through legislation, if it chose to do so. Congress could also directly legislate certain matters that would normally be left to the FEC (e.g., certifying eligibility for public financing).

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¹⁶ See 11 C.F.R. § 2.2(d) and letter from Donald F. McGahn II, counsel, People for Pete Domenici, to Thomasenia P. Duncan, general counsel, FEC, January 23, 2008. A copy of the letter is included in the Commission's file on the original request at [<http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2287>]. The request number is AOR 2007-36.