



CRS Report for Congress

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

R. Sam Garrett
Analyst in American National Government
Government and Finance Division

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 was unable to issue regulations, approve enforcement actions, and administer aspects of the presidential public campaign financing program. The Commission also could not issue advisory opinions. Existing campaign finance law and regulations remained in effect. Remaining commissioners and staff continued routine business.

On June 24, 2008, the Senate confirmed five nominees to the FEC. Those five new commissioners will join a sixth member who continues to serve in holdover status. Therefore, the commission is now restored to full decision-making strength. This report will not be updated unless the Commission again loses its quorum.

The Commission and Recent 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 fourth nominee, David M. Mason (R), served at the agency since 1998 and was

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.

renominated (although his re-nomination was withdrawn in May 2008, as was von Spakovsky's).

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.³ 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.⁴ The apparent stalemate over the nominations continued into the second session of the 110th Congress.⁵

The Lenhard, Mason, von Spakovsky, and Walther nominations remained pending in the Senate early in the second session of the 110th Congress, but because the three recess appointments expired at the end of the first session, just two commissioners — Mason (R) and Ellen L. Weintraub (D) — remained in office. Both were previously confirmed by the Senate and could continue serving in holdover status following expired terms.

Few developments occurred in early 2008. However, additional nomination activity took place beginning in April. First, Lenhard requested that his nomination be withdrawn.⁶ Second, on May 6, 2008, President George W. Bush made three new nominations to the FEC and withdrew Mason's re-nomination. Donald F. McGahn II (R), an election lawyer, was nominated to the Mason seat.⁷ At the same time, the President withdrew Lenhard's name and nominated Cynthia L. Bauerly (D), a Senate staffer, to that seat. Caroline C. Hunter (R), then a member of the Election Assistance Commission (EAC), was nominated to the FEC seat formerly held by Michael E. Toner. (Toner resigned from the Commission in 2007.) On May 16, 2008, von Spakovsky requested

³ 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.

⁴ 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.

⁵ 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].

⁶ 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].

⁷ The chairmanship is not connected to particular seats. Therefore, McGahn will not automatically become chair. The commissioners elects the chair and vice chair. Under FECA, the chair and vice chair must be from opposing parties. See 2 U.S.C. § 437c(a)(5).

that his nomination be withdrawn.⁸ On May 22, 2008, following a hearing the previous day, the Senate Rules and Administration Committee favorably reported the Bauerly, Hunter, and McGahn nominations. Also on May 22, 2008, the White House announced the President's intention to nominate Matthew S. Petersen (R), a Senate staffer, to the seat formerly held by von Spakovsky.⁹ Walther's nomination also continued to remain pending.

On June 24, 2008, the Senate confirmed Bauerly, Hunter, McGahn, Petersen, and Walther. The five new commissioners joined Ellen Weintraub, who continues to serve at the FEC in holdover status.¹⁰

Effects of a Commission with Fewer than Four Members

Functions that Could Continue Unaffected. Even a two-member Commission was not halted entirely. 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.¹¹ With fewer than four commissioners, agency staff and remaining commissioners could also continue to provide general information, and to prepare for a repopulated Commission. Existing campaign law and regulations remained 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.¹²

Functions That Require a Four-Commissioner Majority. 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

⁸ See, for example, Matthew Murray, "FEC May Be Back in Business Soon," *Roll Call*, May 19, 2008, p. A1.

⁹ White House, Office of the Press Secretary, "Personnel Announcement," May 22, 2008, at [<http://www.whitehouse.gov/news/releases/2008/05/20080522-9.html>]. No hearing was held on Petersen.

¹⁰ "Confirmations," *Congressional Record*, daily edition, vol. 154 (June 24, 2008), p. S6096.

¹¹ 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).

¹² 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.

(7) refer cases of apparent criminal conduct to law enforcement.¹³ 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.¹⁴

Conclusion

The Federal Election Commission was without a quorum of four commissioners for more than six months in 2008. Commission staff and the remaining two commissioners 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 delayed administering aspects of the presidential public financing program, rulemakings, and enforcement actions.¹⁵ Immediate issues facing the repopulated Commission include rulemaking to implement portions of the Honest Leadership and Open Government Act of 2007 (HLOGA), pending enforcement cases and advisory opinion requests, and administering the presidential public campaign financing program.¹⁶ The Commission may also need to respond to ongoing litigation surrounding the Bipartisan Campaign Reform Act.¹⁷

¹³ 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).

¹⁴ 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). On presidential public financing, see CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by R. Sam Garrett.

¹⁵ This assumes that a quorum would have chosen to address those issues and that a majority could have reached agreement on a resolution.

¹⁶ HLOGA is P.L. 110-81. For additional discussion of required 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.

¹⁷ On BCRA, see P.L. 107-155; 116 Stat. 81. For additional information, see CRS Report RL31402, *Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law*, by Joseph E. Cantor and L. Paige Whitaker. Cantor is now retired from CRS. Contact R. Sam Garrett with questions regarding Mr. Cantor's portfolio.