

## Changes at the FEC in 2020

December 9, 2020

Today, the U.S. Senate voted to confirm three new nominees to serve as Commissioners of the Federal Election Commission (FEC or Commission). The nominees are Shana Broussard, Sean Cooksey, and Allen Dickerson. They are expected to be appointed by the White House soon. After the three new Commissioners are sworn in, they will fill three empty seats on the Commission and restore a quorum for the agency to conduct business. The six-member Commission had lacked the necessary quorum of at least four Commissioners for 13 of the last 15 months – it had a quorum for only two months since September 2019. The addition of three new Commissioners will restore the full complement of six Commissioners to the agency.

Ms. Broussard has served inside the FEC as counsel to a Commissioner for several years and prior to that as an enforcement attorney. She comes to the position with substantial experience in the agency's work and knowledge of federal campaign finance law. Notably, she will be the first African American Commissioner in the agency's 45-year history. Mr. Cooksey most recently served as chief counsel to U.S. Senator Josh Hawley. He previously served as deputy counsel to U.S. Senator Ted Cruz, an attorney with the law firm Gibson Dunn & Crutcher, and law clerk to Judge Jerry E. Smith on the U.S. Court of Appeals for the Fifth Circuit. Mr. Dickerson comes to the Commission from the Institute for Free Speech, where he directed national litigation in support of First Amendment rights. He previously was an attorney at the law firm Kirkland & Ellis. He currently serves as a Captain in the Judge Advocate General's Corps of the U.S. Army.

"The President is appointing three highly qualified lawyers and individuals of excellent character to the Commission. The Commission and the public will benefit from their service," said Lee Goodman, partner in Wiley's Election Law & Government Ethics Practice and

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Citizens and organizations with matters pending before the agency can expect the agency to take action in 2021. However, the new Commission faces a backlog of enforcement matters that has accumulated to nearly 400 pending complaints, with 200 of those ready for Commission consideration and action. In her testimony to the U.S. Senate Rules Committee, Ms. Broussard, who currently serves as counsel to a Commissioner, indicated that the Commission's first order of business should be to address matters facing imminent expiration of their respective five-year statute of limitations with prioritization of the most serious alleged violations. That suggests the Commission still has matters dating back to the 2016 election on its docket. The enforcement backlog is likely to preoccupy the Commission for the better part of 2021, leaving little bandwidth for other regulatory business, such as rulemakings. Before losing a quorum, the Commission had stalled in its work on clarifying the rules for digital advertisements, a project the Commission might want to resume this year. The Commission also is facing several lawsuits that were filed while it lacked a quorum, which will require attention. Of particular interest will be whether the Commission can once again muster four votes to represent the agency in pending lawsuits where default is imminent.

One of the first orders of business for the agency will be to elect a Chair and Vice Chair for 2021. The chairmanship rotates between the political parties each year, with 2021 being the Democrats' turn. Ms. Broussard is a candidate to serve as Chair and is particularly well-suited because she has experience working inside the agency for many years. The principal role of the Chair is to set the Commission's agenda in consultation with a Republican Vice Chair.

For over 30 years, our attorneys have represented clients before the Federal Election Commission (FEC) in enforcement actions, advisory opinion requests, and rulemaking proceedings. Our Practice, which includes two former FEC Chairmen and several attorneys who served at the highest levels of the agency, has extensive familiarity with the FEC and possesses unique insight into how the agency operates and makes decisions. We provide clients with a unique combination of talent – unrivaled substantive understanding of federal campaign finance law and exceptional representational capability – to respond efficiently and effectively in any FEC matter. For more information on our FEC Representation capabilities, [click here](#).

Below is an overview of the additional changes at the Federal Election Commission (FEC) in 2020.

- On June 26, 2020, long-time Commissioner Caroline Hunter announced she is stepping down at the end of the month after more than a decade of service. Shortly thereafter, the White House announced the President's intent to nominate Allen Dickerson to replace her.
- On May 19, 2020, the U.S. Senate confirmed Republican election lawyer James "Trey" Trainor to fill one of three vacant positions on the six-member Federal Election Commission.

## Changes at the FEC

June 26, 2020 was a day for big changes at the Federal Election Commission (FEC). Long-time Commissioner Caroline Hunter announced she is stepping down at the end of the month after more than a decade of service. Shortly thereafter, the White House announced the President's intent to nominate Allen Dickerson to replace her. The moves come at a critical time for the FEC which lacked a quorum for ten months, resumed a quorum in June, and now faces the loss of a quorum again.

Commissioner Hunter, a Republican, was first appointed to the FEC in 2008. "Caroline has been a stalwart defender of limited government and agency accountability," said Michael Toner, chair of Wiley's Election Law and Government Ethics Practice and former FEC Chairman. She announced she will be stepping down at the end of June to join a non-profit organization, Stand Together in Arlington, Virginia.

Allen Dickerson has been the Legal Director for the Institute for Free Speech, where he leads a nationwide First Amendment litigation practice. Previously, he was an Associate with Kirkland & Ellis, LLP. He also serves as Captain in the Judge Advocate General's Corps, United States Army Reserve.

"Allen has a brilliant legal mind and an established commitment to the proper balance between regulation and free speech," said Lee Goodman, a former Chairman of the FEC. "Allen Dickerson and Trey Trainor will work well together on the Republican side of the commission and bring much needed stability to the agency."

The White House's decision to nominate Dickerson solo, without pairing him with a Democratic nominee, is a significant development. With Hunter's departure, the six-member Commission is down to three commissioners. Four commissioners are required to make a quorum that can conduct agency business. The three remaining commissioners are its new Chairman, Trey Trainor, a Republican, and incumbent commissioners Ellen Weintraub, a Democrat, and Steven Walther, an independent who traditionally has voted with the Democrats. Weintraub has served 18 years, since 2002, while Walther has served since 2006. Both serve long past their original six-year terms.

That composition leaves the White House and Senate some important decisions about how to remake the Commission. The White House could nominate five new commissioners, three Democrats and two Republicans, to join Chair Trainor, who joined the Commission this month. Alternatively, the White House could nominate one Democrat to fill the empty Democratic seat and two new Republicans to fill the two empty Republican seats. The White House's announcement that it is nominating only Dickerson at this time indicates an incremental approach. Dickerson would join Trainor to fill two Republican seats, while Weintraub and Walther would continue serving past their terms in Democratic seats. The quorum would be restored with the bare minimum of four commissioners. Whether the Senate agrees with this approach remains to be determined.

For the foreseeable future, the agency once again will be without a quorum for at least some period of time this summer. The agency can resume regulatory business once Dickerson is formally nominated, confirmed by the Senate, and sworn into a seat. That process may take time.

## Senate Confirms New FEC Commissioner, Restores Quorum to Agency

On May 19, 2020, the U.S. Senate confirmed Republican election lawyer James “Trey” Trainor to fill one of three vacant positions on the six-member Federal Election Commission. Once sworn into office, Trainor’s appointment will not only even out the agency’s current partisan imbalance, but it will restore a functioning quorum of four commissioners to an agency unable to act on most matters since last August.

President Trump first nominated Trainor to the Commission in September 2017, but he did not receive a confirmation hearing before the Senate Rules Committee until March 10 of this year. A native Texan and graduate of what is now the Texas A&M University School of Law, Trainor has spent much of his 15-year legal career advising candidates, PACs, and other organizations on compliance with state and federal campaign finance laws. Trainor has also worked in the Texas legislature, was General Counsel for the Texas Secretary of State, and was a Special Assistant to then-Secretary of Defense Jim Mattis in 2017.

“Trey is an experienced lawyer who will bring sound judgment and an even keeled temperament to the Commission. He respects the rule of law and the First Amendment. The Commission will benefit from his service,” says Lee E. Goodman, former FEC Chairman.

When he takes office, Trainor will likely have much work ahead of him. According to published reports, there are currently 350 matters on the Commission’s enforcement docket, four requests for advisory opinions are pending, and a number of rulemaking and litigation matters await action.

Even after Trainor’s confirmation, two vacancies remain on the Commission – one for a seat traditionally held by Republicans, the other by Democrats. It is unclear whether President Trump intends to nominate one or more individuals for these seats prior to Election Day this November.