

To: Dave Lewis and Neal Devins  
From: Nick Bednar  
Date: 10/17/2018  
Re: Statutory Characteristics and Current Configurations of Independent Commissions

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## QUESTIONS PRESENTED AND METHODOLOGY

I was asked to collect data on the (1) characteristics and (2) current configurations of 24 independent commissions. With respect to characteristics, I was asked to collect data on:

1. Whether the commission has for-cause protections?;
2. Whether the commission has party-balancing requirements?;
3. What are the commission's quorum rules?;
4. What are the appointment and removal rules for the commission's chair?; and
5. What are the term-limit rules for the commissioners?

In addition to these requirements, I collected basic information on (1) how many commissioners the commission has, (2) the term length of each commissioner, and (3) miscellaneous appointment requirements. To collect this data, I relied on the Agency Structure Codebook for the *ACUS Sourcebook of United States Executive Agencies*.<sup>1</sup> I confirmed the accuracy of statutory citations listed in the *Sourcebook* on Westlaw. In some cases, the *Sourcebook* did not contain information on quorum requirements. This occurred most frequently when the agency adopted quorum requirements in procedural rules because the *Sourcebook* reviews structural elements contained within the agency's enabling statute. In these cases, I searched the Code of Federal Regulations for quorum requirements using various searches related to "quorum," "voting," "majority," and other similar terms.

I also examined case law on quorum requirements to assess (1) whether the Supreme Court has adopted common-law quorum requirements in the case of statutory silence and (2) whether courts have upheld commission-created quorum requirements. I did not examine case law for every agency. Instead, I simply sought to gather an overview of how courts approach quorum requirements. I incorporate my observations in the "Quorum Requirements" section of my "Summary of Findings." If you would like additional research on cases concerning quorum with respect to all twenty-four agencies, I would be happy to provide a supplemental memo.

With respect to current configurations, I was asked to collect data on:

1. How many commission slots are currently filled?;
2. Does the commission have a quorum?;
3. Has the commission had problems with a quorum in the near past?;
4. Is there a quorum problem coming? If so, when?;
5. Has the President nominated individuals to the commission?;

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<sup>1</sup> DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, AGENCY STRUCTURE CODEBOOK (2012), <https://www.vanderbilt.edu/csdi/ACUSB.pdf>.

To collect this data, I mostly used the commissions' websites. Most commission websites contain a history of commissioners, which lists the date the commissioner took office and the date he or she left office. Some commissions did not have this information on their websites. I also searched Google and Westlaw for news articles, journal articles, and case law to look for specific evidence about how the lack of a quorum affected the commission's performance.

To assess whether the President nominated individuals to the commission, I used the nominations search feature provided by Congress.gov.<sup>2</sup> I searched the name of the commission. I looked for nominations to the commission during the Trump presidency and the final year of the Obama presidency. I recorded the nominee's name, the Congressional action number (PN#####), the date of nomination and the Senate's most recent action with respect to the nomination.

I coded this data in a dataset that contains the following variables:

- AGENCY: Name of the agency.
- CREATION\_DATE: The date the agency was created.
- ENABLING\_ACT: Citation to the statutory provision that creates the agency.
- TOTAL\_MEM: The total number of members for the commission, including both commission members and ex officio members.
- NUM\_COMMN\_MEM: The total number of members of the commission, excluding ex officio members.
- EXOFFICIO\_MEM: The number of ex officio members of the commission.
- FOR\_CAUSE: Whether the commission has for-cause protections. (1=Yes; 0=No).
- PARTY\_BALANCING: Whether the commission has party-balancing requirements (1=Yes; 0=No).
- MEM\_EXPERTISE: Whether the enabling act requires appointees to have a certain expertise. (1=Yes; 0=No).
- MEM\_GEOGRAPHIC: Whether the enabling act requires geographic diversity among appointees. (1=Yes; 0=No).
- MEM\_USCITIZEN: Whether appointees must be U.S. Citizens. (1=Yes; 0=No).
- MEM\_CIVILIAN: Whether appointees must be civilians. (1=Yes; 0=No).
- MEM\_CONFLICT: Whether the enabling act contains provisions concerning conflict of interests. (1=Yes; 0=No).
- TERM\_LENGTH: The length of members' terms in years.
- TERM\_STAGGERED: Whether the enabling act creates staggered terms. (1=Yes; 0=No).
- TERM\_REAPPOINTMENT\_LIMITS: Whether the enabling act limits the ability of the president to reappoint members. (1=Yes; 0=No).
- TERM\_VACANCY\_REMAINDER: Whether appointees to vacant positions fill the remainder of the unexpired term. (1=Yes; 0=No).
- TERM\_HOLDOVER: Whether members are permitted to continue serving until a replacement is appointed and qualified. (1=Yes; 0=No).

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<sup>2</sup> *Nominations*, CONGRESS.GOV, <https://www.congress.gov/search?q=%7B%22source%22%3A%22nominations%22%7D> (last visited Oct. 19, 2018).

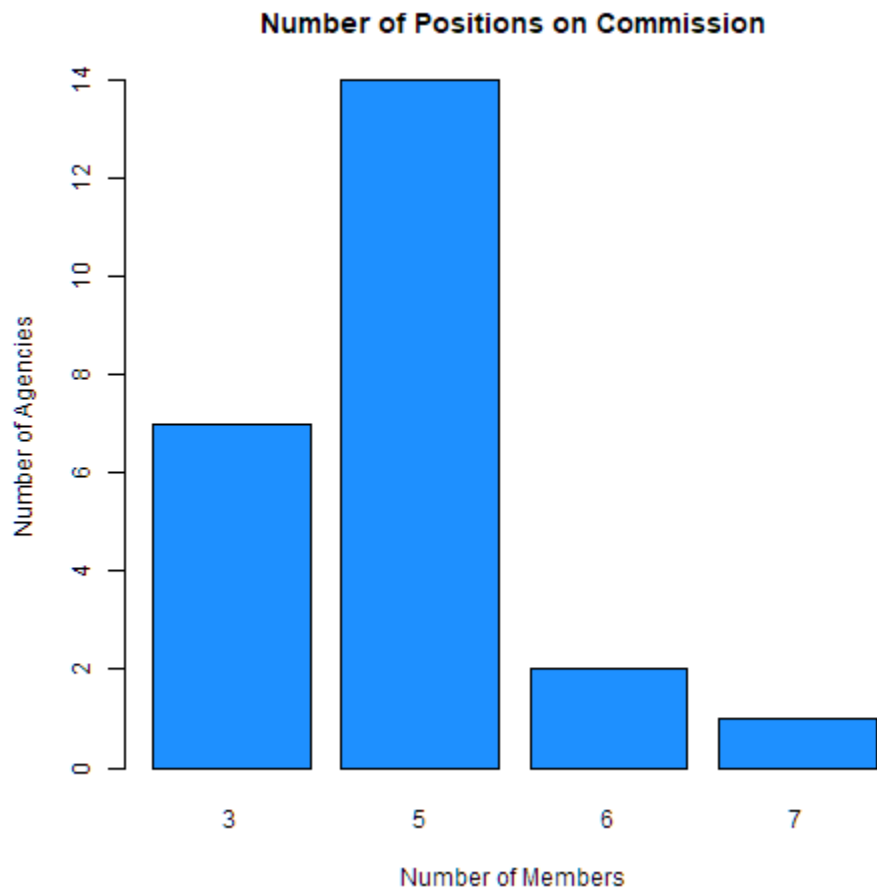
- TERM\_HOLDOVER\_LIM: Whether there are limits on the ability of members to continue serving until a replacement is appointed. (1=Yes; 0=No).
- CHAIR\_PRESAPP\_SEN: Whether the chairperson is appointed by the President by and with the advice and consent of the Senate. (1=Yes; 0=No).
- CHAIR\_PRES\_DESIGNATE: Whether the enabling act specifies that the President designates the chairperson, but does not provide that the appointment requires advice and consent of the Senate. (1=Yes; 0=No).
- CHAIR\_MEM\_ELEC: Whether the enabling act specifies that the chairperson is chosen by the other members of the commission. (1=Yes; 0=No).
- CHAIR\_LENGTH: The length of the chairperson's term as chairperson (If "NA", then no specified term).
- CHAIR\_REMOVAL\_CAUSE: Whether the enabling act has for-cause protections for the chairperson. (1=Yes; 0=No).
- CHAIR\_PRES\_REMOVAL: Whether the president may remove the chairperson as chair. (1=Yes; 0=No).
- CHAIR\_PARTY: Whether the enabling act has party-based limitations on who may serve as chair. (1=Yes; 0=No).
- QUORUM\_STATUTE: Whether the enabling act has quorum provisions. (1=Yes; 0=No).
- QUORUM\_RULE: Whether the commission's own regulations have quorum provisions. (1=Yes; 0=No).
- QUORUM\_PROGRESSIVE: Whether the commissions has a progressive quorum requirement. (1=Yes; 0=No).
- NO\_QUORUM\_UNANIMOUSVOTE: Whether the commission can continue to act by unanimous vote absent a quorum. (1=Yes; 0=No).
- NO\_QUORUM\_LIMITEDACTION: Whether the commission may continue to act in a limited fashion absent a quorum. (1=Yes; 0=No).
- QUORUM\_LOSS: Whether the agency has lost its quorum for more than 30 days since 2000. (1=Yes; 0=No).

Throughout my analysis, I have included areas of yellow highlighting. Highlighting indicates that I was not able to find the data that I was looking for.

I wrote a "Summary of Findings" that identifies common trends that I observed while conducting this research.

## SUMMARY OF FINDINGS

### *Commission Positions*



The number of members (excluding ex officio members) on a commission ranges from three to seven, with five members being the most common. Two agencies—the Federal Election Commission and the U.S. International Trade Commission—have an even number of commissioners.

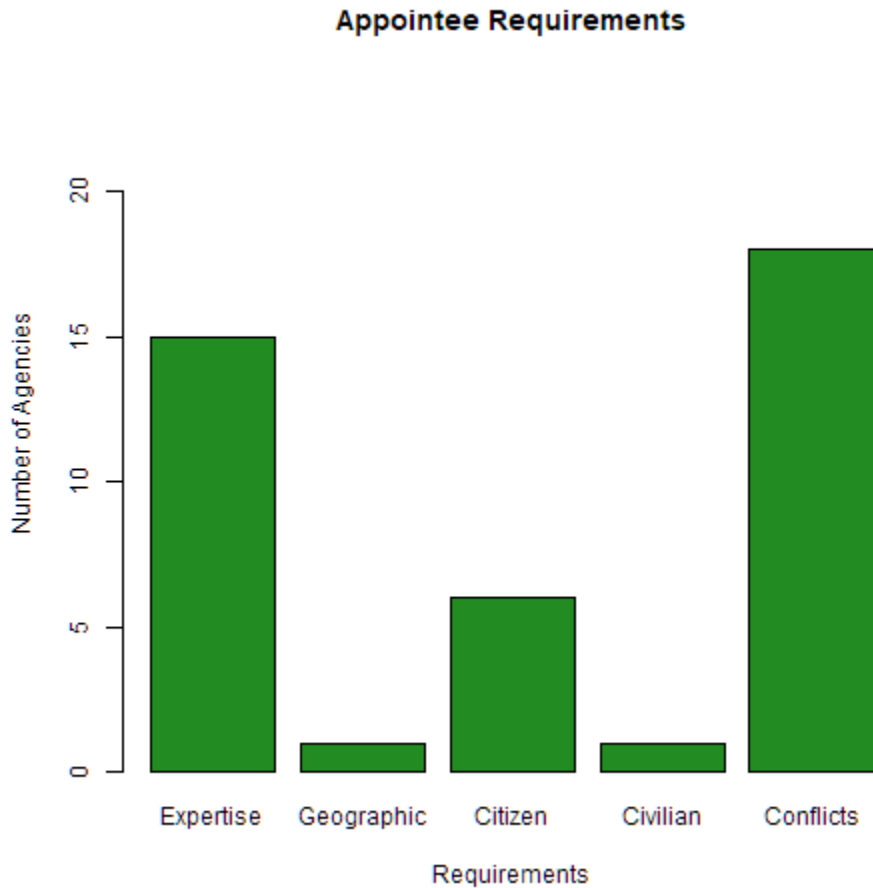
Beyond members appointed by the President, the Federal Deposit Insurance Corporation and the Federal Election Commission each have two ex officio members. The Comptroller of the Currency and the Director of the Consumer Financial Protection Bureau serve on the Board of Directors of the Federal Deposit Insurance Corporation.<sup>3</sup> The Secretary of the Senate and the Clerk of the House of Representatives serve as non-voting members of the Federal Election Commission.<sup>4</sup>

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<sup>3</sup> 12 U.S.C. § 1812(a)(1).

<sup>4</sup> 52 U.S.C. § 30106(a)(1)).

Enabling acts often require the president to appoint commissioners with certain qualifications, requirements, or limitations. I coded for five such characteristics: (1) requirements that appointees have expertise in a given area, (2) requirements that appointees be from diverse geographic regions, (3) requirements that appointees be U.S. Citizens, (4) requirements that the appointees be civilians, and (5) provisions preventing appointees from participating in activities that would constitute a conflict of interest.



Fifteen commissions (62.5%) have expertise requirements. These expertise requirements vary significantly. Some require the president to ensure that the appointees have diverse expertise. The enabling act for the Commodity Futures Trading Commission requires the president to appoint individuals with knowledge in “futures trading or its regulation, or the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights, and interests” and to “ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas.”<sup>5</sup> Some enabling acts require that appointees have highly

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<sup>5</sup> 7 U.S.C. § 2(a)(2)(A).

specialized knowledge. Appointee to the Chemical Safety and Hazard Investigation Board must have knowledge in the “fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation.”<sup>6</sup> Other expertise requirements offer little guidance for the president. The enabling act for the Federal Mine Safety and Health Review Commission merely requires that the President appoint persons who are “qualified to carry out the functions of the Commission.”<sup>7</sup> It would be interesting to examine whether commissions with expertise requirements are viewed as having “greater expertise.”

Only the Federal Reserve Board requires the president to appoint individuals from diverse geographic locations. The Board’s enabling act does so by preventing the president from selecting more than one member from any one federal reserve district.<sup>8</sup>

Six commissions (25%) require that the president appoint U.S. Citizens: (1) Defense Nuclear Facilities Safety Board, (2) Farm Credit Administration, (3) Federal Communications Commission, (4) Federal Deposit Insurance Corporation, (5) Nuclear Regulatory Commission, and (6) U.S. International Trade Commission. The citizen requirement makes sense with respect to three of these commissions. The Defense Nuclear Facilities Safety Board and the Nuclear Regulatory Commission regulate nuclear arms and nuclear energy, which raise national-security concerns. Membership on the U.S. International Trade Commission potentially poses a conflict of interest for individuals who are not U.S. citizens. However, I am not certain why Congress required members of the other three agencies to be U.S. citizens. Two of these agencies—the Farm Credit Administration and the Federal Deposit Insurance Corporation—regulate financial matters. However, other financial agencies, such as the Federal Reserve Board and the Commodity Futures Trading Commission do not require members to be U.S. citizens.

Only the Defense Nuclear Facilities Safety Board requires that the president appoint civilians.<sup>9</sup> The Defense Nuclear Facilities Safety Board is the only independent commission with a military-focused mission. Civilian membership on the Board reinforces normative desirability of civilian control of the military.<sup>10</sup>

Eighteen commissions (75%) have controls to prevent conflicts of interest among appointees. Most of these provisions simply prevent the appointee from accepting employment

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<sup>6</sup> 42 U.S.C. § 7412(r)(6)(B).

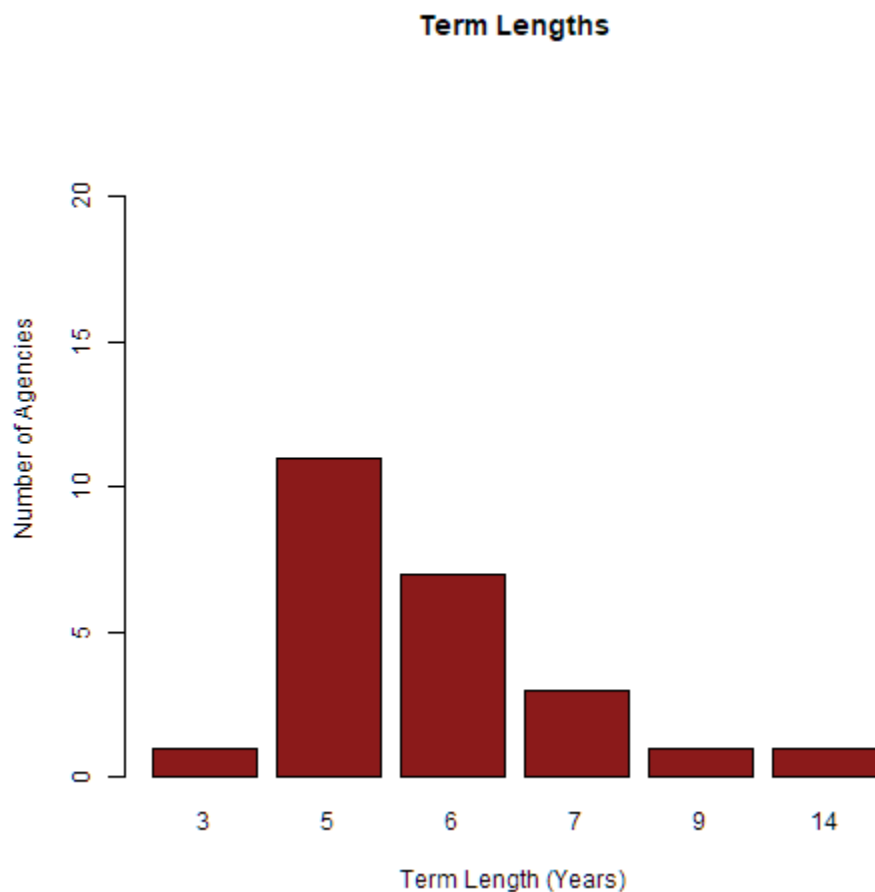
<sup>7</sup> 30 U.S.C. § 823(a).

<sup>8</sup> 12 U.S.C. § 241.

<sup>9</sup> 42 U.S.C. § 2286(b)(1).

<sup>10</sup> See generally Colonel Charles J. Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994) (describing these principles).

elsewhere while acting as a member of the commission.<sup>11</sup> The enabling act for the Federal Election Commission prevents members from engaging “in any other business, vocation, or employment.”<sup>12</sup> Other enabling acts, however, tailor conflict-of-interest provisions to more carefully prevent conflicts with the commission’s mission. For example, members of the Federal Communications Commission cannot hold financial interests in telecommunications companies.<sup>13</sup>



Appointees’ term-lengths vary by commission from 3 years to 14 years. The mean term length is 6 years and the median term length is 5.5 years. Seventeen commissions (70.8%) have staggered terms so that terms expire at specified intervals. For example, the Federal Reserve Board’s

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<sup>11</sup> The *ACUS Sourcebook* did not code these provisions as conflicts of interest. In this research, I did code these provisions as conflicts of interests. However, one could easily exclude these provisions.

<sup>12</sup> 52 U.S.C. § 30106(c)(3).

<sup>13</sup> 47 U.S.C. § 154(b)(4).

enabling act fixes terms so that one term expires every two years.<sup>14</sup> Twenty-two agencies (91.7%) limit appointments to unexpired terms to the remainder of the unexpired term, rather than starting the length of the term over with the new appointment.

Six commissions (25%) limit the ability of president to reappoint members after the expiration of their terms. Some of these statutes limit members to a single term. For example, the Federal Maritime Commission limits members to two terms.<sup>15</sup> Other enabling acts, however, simply state that members cannot be appointed to succeed themselves.<sup>16</sup> It is not clear to me whether these provisions are intended to completely prohibit reappointments or whether they simply prevent the president from immediately reappointing the member. In other words, could the president reappoint a member who formerly served on the Board after the term of a different member expired?

Twenty commissions (83.3%) permit members to continue to serve after the expiration of their terms. Nine of these commissions (45%) have limitations on how long the member can continue to serve after the expiration of his or her term. For example, the enabling act of the Federal Maritime Commission allows members to continue to serve “until a successor is appointed and qualified, but for a period not to exceed one year.”<sup>17</sup>

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<sup>14</sup> 12 U.S.C. § 242 (“[T]he President shall fix the term of the successor to such member at not to exceed fourteen years, as designated by the President at the time of nomination, but in such manner as to provide for the expiration of the term of not more than one member in any two-year period.”).

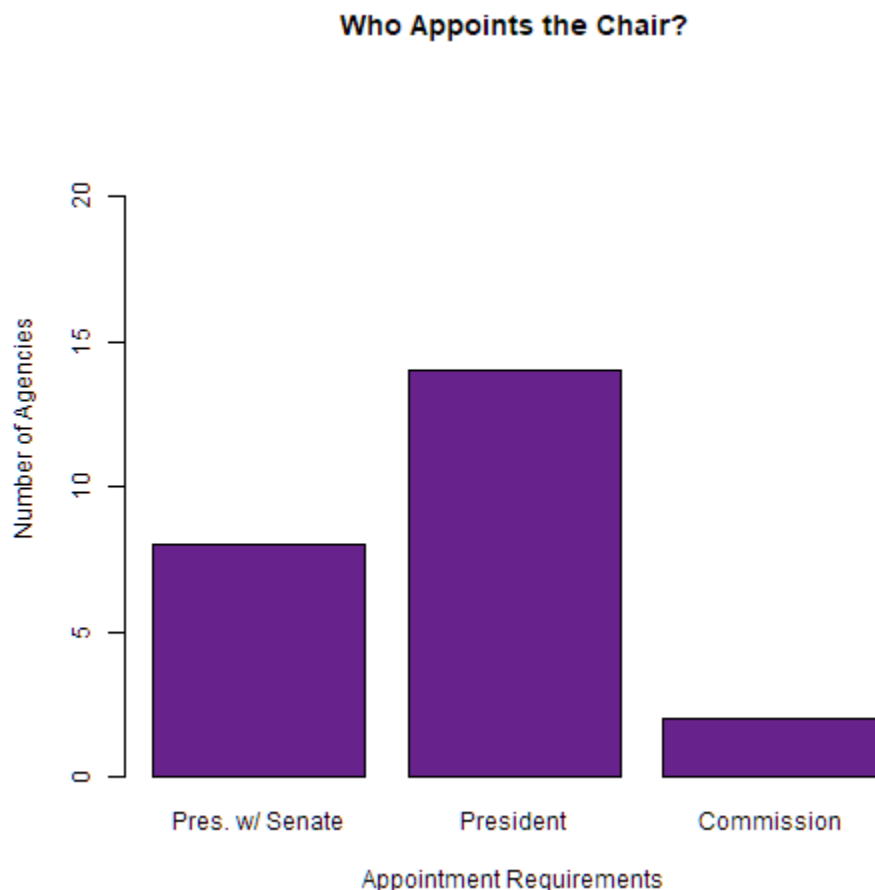
<sup>15</sup> 46 U.S.C. § 302(b)(3)).

<sup>16</sup> 12 U.S.C. § 2242(b).

<sup>17</sup> 46 U.S.C. § 301(b)(2).



## Chairperson



Chairpersons are appointed in one of three ways. Eight commissions (33.3%) require that the president appoint the chairperson by and with the advice and consent of the Senate. Fourteen commissions (58.3%) merely require that the president “designate” the chairperson. Enabling acts with these kinds of provision are not clear as to whether the designation requires advice and consent of the Senate. In fact, some enabling acts do not even specify that the president designates the chairperson. In the case of the Securities and Exchange Commission, courts have read in a requirement that the president designates the chairperson.<sup>18</sup> Two commissions (8.3%)—the Federal Election Commission and the National Mediation Board—require the members of the commission to select a chairperson.

Twelve enabling acts (50%) prevent the president from removing the chairperson except for cause. However, these provisions all seem to suggest that removal of the chairperson would require complete removal of the chairperson from the commission. Four enabling acts (16.7%) explicitly state that the chairperson serves at the “pleasure” of the president, meaning that the president may remove the chairperson without cause.

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<sup>18</sup> SEC v. Blinder, Robinson & Co, Inc., 855 F.2d 677, 681 (10th Cir. 1988) (“[A]s the President has the power to choose the chairman of the SEC from its commissioners to serve an indefinite term, it follows that the chairman serves at the pleasure of the President.”).

Two commissions—the Federal Election Commission and the U.S. International Trade Commission—have unique party requirements for the chairperson. The Federal Election Commission requires that the chairperson and the vice-chairperson affiliate with different parties.<sup>19</sup> The U.S. International Trade Commission requires that the chairperson alternate between individuals of different parties.<sup>20</sup>

### ***For-Cause Protections and Party-Balancing Requirements***

Certain controls—notably for-cause protections and party-balancing requirements—seek to insulate commissions from the passions of politics. Members of sixteen commissions (66.7%) can only be removed by the president for cause. The enabling acts of nineteen commissions (79.2%) limit the number of appointees who may be from the same party.

Yet only eleven commissions (45.8%) have both for-cause protections and party-balancing requirements. Eight commissions (33.3%) have party-balancing requirements but do not have for-cause protections. This suggests that the president could remove members who adhere too closely to the opposing-party line and, then, appoint more moderate members of the opposing party. Structurally, this seems like a bizarre result. Practically, I have not conducted any research to determine whether presidents have removed partisan members in favor of more moderate members.

Concerns surrounding the ability of the president to remove partisan dissidents may explain a peculiar court-driven phenomenon with respect to the Securities and Exchange Commission. The enabling act for the Securities and Exchange Commission requires party-balancing. The act does not contain for-cause protections. Nevertheless, courts—including the Supreme Court—consistently state that the president may only remove members of the Securities and Exchange Commission for cause.<sup>21</sup> I have not found a case where a court has been asked to review the removal of an officer and, therefore, courts make these assumptions in dicta.

The fact that courts willingly read for-cause protections into the Securities and Exchange Commission’s enabling act is remarkable in current times. Recently, courts have taken to striking for-cause protections from enabling acts, concluding that these protections unconstitutionally

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<sup>19</sup> 52 U.S.C. § 30106(a)(5).

<sup>20</sup> 19 U.S.C. § 1330(c)(3).

<sup>21</sup> See *SEC v. Blinder, Robinson & Co, Inc.*, 855 F.2d 677, 681–82 (10th Cir. 1988) (suggesting that SEC commissioners are subject to for-cause restrictions). In *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, a majority of the Supreme Court assumed that SEC Commissioners were subject to for cause protections. 561 U.S. 477, 487 (2010). Justice Breyer questioned the majority’s assumption that SEC commissioners are subject to for-cause protections. *Id.* at 545–46 (2010) (Breyer, J., dissenting) (“One last question: How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only ‘for cause’? . . . It is certainly not obvious that the SEC Commissioners enjoy ‘for cause’ protection.”).

insulate the agency from control of the president.<sup>22</sup> Kristin Hickman argues that this remedy—“judicial refashioning of agency design via the severance remedy”—makes agency officials more politically accountable than Congress intended.<sup>23</sup> To the extent we wish to understand whether Congress achieved its goal of political insulation, we ought to consider the role courts play in refashioning commissions—both by insulating agencies further (in the case of the Securities and Exchange Commission) and chipping away at these protections.

*Collins v. Mnuchin* may provide a framework for empirically assessing which agencies are at risk of having their design altered by the courts.<sup>24</sup> In that case, the Fifth Circuit severed the for-cause protections from the Federal Housing Finance Agency, holding that the agency’s insulation from the executive branch made it unconstitutionally structured.<sup>25</sup> The court assessed five structural elements that—in combination—violated the separation of powers:

- (1) For-cause protections;
- (2) Single-director leadership structure;
- (3) Lack of party-balancing requirements;
- (4) Funding stream outside the normal appropriate process; and
- (5) The purely oversight role played by an executive agency.<sup>26</sup>

Under *Collins*, an agency with these five characteristics is unconstitutionally insulated from presidential authority.

Using *Collins* as a framework, I looked for agencies that satisfied three of these conditions: (1) for-cause protections, (2) lack of party-balancing requirements, and (3) a purely oversight role played by an executive agency. No commission in the dataset has a single-director leadership similar to that of the Federal Housing Finance Agency. Also, I have not coded the commissions’ funding sources to determine whether any commissions have abnormal sources of funding. Five agencies meet the three criteria I selected:

1. Board of Governors of the Federal Reserve.
2. Chemical Safety and Hazard Investigation Board.
3. Federal Mine Safety and Health Review Commission.
4. National Labor Relations Board.

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<sup>22</sup> See generally *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 561 U.S. 477 (2010); *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018); *PHH Corp. v. Consumer Fin. Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018).

<sup>23</sup> Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1476–77 (2018)

<sup>24</sup> 896 F.3d 640 (5th Cir. 2018).

<sup>25</sup> *Id.* at 646.

<sup>26</sup> *Id.* at 665.

## 5. Occupational Safety and Health Review Commission.

All five of these agencies have struggled in recent years when interacting with the other branches. The Federal Reserve Board, the Federal Mine Safety and Health Review Commission, the National Labor Relations Board, and the Occupational Safety and Health Review Commission have all lacked quorum on a number of occasions since 2000. President Trump has proposed abolishing the Chemical Safety and Hazard Investigation Board. And, the Supreme Court has restricted the National Labor Relation Board's ability to delegate authority to its members when it lacks a quorum.<sup>27</sup> All of this is to suggest that, perhaps, the more Congress insulates an agency, the more the courts and the President seek to interfere with the ability of that agency to perform its duties.

### *Quorum Requirements*

Quorum requirements vary substantially among commissions. Fifteen commissions (62.5%)—such as the Board of Governors of the Federal Reserve System—have statutory quorum requirements. Other commissions' enabling acts do not specify quorum requirements, but the commissions themselves have adopted quorum requirements in rules. Six commissions (25%) without statutory-quorum requirements have adopted quorum requirements in their regulations. Six other agencies (25%) have statutory quorum requirements but have expanded on these requirements in regulations.

However, not all agencies have codified quorum requirements. Three commissions—(1) Federal Labor Relations Authority, (2) Federal Mine Safety and Health Review Commission, and (3) Postal Regulatory Commission—lack either statutory or regulatory requirements. That does not mean that the agency lacks quorum requirements. Although the Federal Mine Safety and Health Review Commission appears to lack any sort of codified requirement, its website clearly indicates that it has such a quorum requirement.<sup>28</sup> Where might this unspoken quorum requirement come from?

In *Federal Trade Commission v. Flotill Products, Inc.*,<sup>29</sup> the Supreme Court endorsed—but did not mandate—common-law quorum requirements for independent commissions that lacked statutory quorum requirements. The Federal Trade Commission has five commissioners.<sup>30</sup> A full FTC heard a complaint alleging that Flotill Products violated Section 2(c) and Section 2(d) of the Robison-Patman Act, but two commissioners retired before the FTC rendered its decision.<sup>31</sup>

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<sup>27</sup> *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681–82 (2010);

<sup>28</sup> *General Notice*, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, <https://www.fmsshrc.gov/> (last visited Oct. 30, 2018).

<sup>29</sup> 389 U.S. 179 (1967).

<sup>30</sup> 15 U.S.C. § 41.

<sup>31</sup> *Flotill Prods.*, 389 U.S. at 180.

The remaining three commissioners concluded that Flotill Products violated Section 2(d) but only two commissioners concluded that it violated Section 2(c). Flotill Products sought review of the FTC's decision, arguing that it did not have a quorum when it made its decision. The Court of Appeals refused to enforce the FTC's order because "an order of the Commission must be supported by three members in order to constitute an enforcement order of the FTC. Two of five is too few."<sup>32</sup>

Writing for the Court, Justice Brennan held that the three-member decision was supported by a quorum and, accordingly, reversed the Court of Appeals' refusal to enforce the Commission's decision. Justice Brennan began by noting that the Federal Trade Commission Act does not contain a provision related to quorum requirements.<sup>33</sup> The Court refused to read a provision allowing the Commission to "exercise all the powers of the Commission" during a vacancy as a quorum provision,<sup>34</sup> because other enabling statutes contained similar provisions while still specifying a quorum.<sup>35</sup> However, the FTC adopted a procedural rule requiring a quorum of three commissioners. Justice Brennan stated that the Court of Appeals had erred in assuming that the common-law required the FTC to "act only on the concurrence of a majority of the full Commission 'absent statutory authority or instruction to the contrary.'"<sup>36</sup> Rather, he noted, "The almost universally accepted common-law rule is the precise converse—that is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."<sup>37</sup> The Court concluded that the statute was silent with respect to the quorum issue and that, if Congress objected to the FTC's use of the common-law rule it "would have at some time addressed itself to the question during the more than half century of the Commission's existence."<sup>38</sup> "Thus, if any conclusion is to be drawn, it is that Congress has been and is content to acquiesce in the Commission's practice of following the long-established common-law rule."<sup>39</sup> Because three members rendered the decision, the Supreme Court held that

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<sup>32</sup> *Flotill Prods., Inc., v. Fed. Trade Comm'n*, 358 F.2d 224, 230 (9th Cir. 1966) (en banc), *rev'd* 389 U.S. 179 (1967).

<sup>33</sup> *Flotill Prods.*, 389 U.S. at 181 (citing 15 U.S.C. § 41 ("A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all powers of the Commission.")).

<sup>34</sup> *Id.* at 181 n.3. While I have not coded this type of statutory provision in my analysis, it is worth nothing that it is very common.

<sup>35</sup> For an example of such a statute, see the enabling act for the FCC. 47 U.S.C. § 147(h) ("Three members of the Commission shall constitute a quorum thereof."; *id.* (c)(3) ("No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all powers of the Commission.")).

<sup>36</sup> *Id.* at 182 (quoting *Flotill Prods.*, 358 F.2d at 228).

<sup>37</sup> *Id.* at 183.

<sup>38</sup> *Id.* at 189.

<sup>39</sup> *Id.* at 189–90.

a quorum supported the FTC’s decision—including the conclusions agreed to by only two members. The common-law rule adopted in *Flotill Products* remains good law.<sup>40</sup>

*Flotill Products* does not appear to restrict agencies to the common-law rule in the face of statutory silence. Rather, it appears that the agency is left with the discretion to decide its quorum rules when Congress has not specified them in the enabling act. The D.C. Circuit adopted this reading of *Flotill Products* in *Falcon Trading Group, Ltd. v. SEC*:

The Supreme Court implicitly acknowledged this principle in *FTC v. Flotill Prods., Inc.*,<sup>41</sup> when the Court concluded that “[w]here the enabling statute is silent on the question,” a collective body “is justified in adhering to [the] common-law rule” that “a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183, 88 S.Ct. at 404 (emphasis added). The Court did not, as the petitioners contend, require that an agency adopt the common-law rule, which in any event may very well permit a quorum made up of a majority of those members of a body in office at the time. See, e.g., *Lee v. Board of Educ.*, 181 Conn. 69, 434 A.2d 333, 340–41 (1980); *Swedback v. Olson*, 107 Minn. 420, 120 N.W. 753 (1909).<sup>42</sup>

Therefore, it seems that the commission is free to adopt whatever quorum requirement it wishes absent a statutory-quorum requirement. However, a commission cannot adopt alternate quorum requirements if constrained by statute.<sup>43</sup>

Some commissions have provisions that allow a quorum-less commission to exercise some amount of authority. The enabling statute for the Board of Governors of the Federal Reserve System allows the Board to exercise authority without a quorum if the members unanimously agree on the proposed action.<sup>44</sup> In other cases, the commission may only exercise a limited amount of authority. The FTC’s regulations allow it to “delegation[] its functions, subject to certain

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<sup>40</sup> Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1182–87 (2000) (summarizing quorum requirements in independent agencies and describing the common-law rule).

<sup>41</sup> 389 U.S. 179, 183, 88 S.Ct. 401, 404, 19 L.Ed.2d 398 (1967),

<sup>42</sup> *Falcon Trading Grp., Ltd. v. SEC*, 102 F.3d 579, 582 n.2 (D.C. Cir. 1996)

<sup>43</sup> *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681–82 (2010); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 474–75 (D.C. Cir. 2009).

<sup>44</sup> 12 U.S.C. § 248(r)(1).

limitations, when no quorum is available for the transaction of business.”<sup>45</sup> Seven commissions (29.2%) have provisions that allow them to take limited action absent a quorum.

Other quorum requirements are progressive and written in such a way that the commission never loses its quorum due to vacancies. The FDIC bylaws offer the best example of a progressive quorum requirement:

A majority of the members of the Board of Directors in office shall constitute a quorum for the transaction of business. In the event there are only three members in office, those members shall constitute a quorum. In the event there are only two members in office, those members shall constitute a quorum. In the event there is only one member in office, that member shall constitute a quorum.<sup>46</sup>

The SEC has a similarly progressive quorum requirement.<sup>47</sup> In designing its rule, the SEC stated that it intended “to preserve the flexibility necessary to take effective action in the event, however unlikely, that there would be a period with only one commissioner in office.”<sup>48</sup> As the SEC’s justifications demonstrate, commissions prefer these progressive quorum requirements to prevent losing a quorum due to vacancies stemming from the political branches’ failure to nominate or confirm commissioners. Six commissions (25%) have progressive quorum requirements.

Commissions do not like losing quorum. A lack of quorum prevents commissions from exercising power to further their regulatory missions. Losing quorum is becoming an increasingly common phenomenon for independent commissions. Among commissions without a progressive quorum (18 commissions), at least ten (55.6%) have lost quorum for a period of at least 30 days since 2000.

Commissions resist the loss of quorum by (1) using other structural elements to ward off the negative effects of quorum loss, or (2) adjusting their procedural rules to prevent the loss of a quorum.

In 2007, the NLRB attempted to ward off the loss of its quorum by delegating authority to a subgroup of members. The NLRB’s enabling act authorizes it to delegate the full power of the Board to a subgroup of three members, who may act with a quorum of two members.<sup>49</sup> In December 2007, the NLRB had four members, with two members intending to retire. On

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<sup>45</sup> 16 C.F.R. § 0.7.

<sup>46</sup> BYLAWS OF THE FEDERAL DEPOSIT INSURANCE COMPANY art. IV, § 6(d) (May 8, 2018), <https://www.fdic.gov/about/governance/bylaws.pdf>.

<sup>47</sup> 17 C.F.R. § 200.41.

<sup>48</sup> SEC, *Establishment of Commission Quorum Requirement*, 60 Fed. Reg. 17201 (Apr. 5, 1995).

<sup>49</sup> 29 U.S.C. § 153(b).

December 20, 2007, the NLRB's four members delegated all authority to a group of three members, which included the two members who would remain on the Board and one member who planned to retire. In the minutes for its meeting, the Board cited 29 U.S.C. § 153(b) and an Office of Legal Counsel memorandum as the source of its power to confer the Board's authority to the subgroup. Indeed, in 2003, the Office of Legal Counsel opined that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." The two members retired. The Board lacked its statutory three-person quorum from January 1, 2008 to March 26, 2010, but the two remaining members continued to exercise the Board's authority as members of the subgroup.

In *New Process Steel, L.P. v. NLRB*,<sup>50</sup> the Supreme Court held that the subgroup of two members could not exercise the full authority of the Board once the subgroup's membership fell below three members. Writing for the Court, Justice Stevens stated, "It is undisputed that the first sentence of [§ 153(b)] authorized the Board to delegate its powers to the three-member group effective on December 28, 2007, and the last sentence authorized two members of that group to act as a quorum of the group during the next three days if, for example, the third member had to recuse himself from a particular matter." He concluded that the only logical reading of the statute required the subgroup to maintain a membership of three members while it exercised the Board's authority. Most notably, Justice Stevens noted that the NLRB's reading of the statute would render the statute's quorum requirements insignificant:

The contrary reading, on the other hand, allows two members to act as the Board *ad infinitum*, which dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention. That reading also makes the three-member requirement in the delegation clause of vanishing significance, because it allows a *de facto* delegation to a two-member group, as happened in this case. Under the Government's approach, it would satisfy the statute for the Board to include a third member in the group for only one minute before her term expires; the approach gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Hence, while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of § 3(b)'s provisions functionally void.

Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language. Congress instead imposed the requirement that the Board delegate authority to no fewer than three members, and that it have three participating members to constitute a quorum. Those provisions are at best an unlikely way of conveying congressional approval of a two-member Board. Indeed,

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<sup>50</sup> 560 U.S. 674 (2010).



had Congress wanted to provide for two members alone to act as the Board, it could have maintained the NLRA's original two-member Board quorum provision, see 29 U.S.C. § 153(b) (1946 ed.), or provided for a delegation of the Board's authority to groups of two. The Rube Goldberg-style delegation mechanism employed by the Board in 2007—delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group—is surely a bizarre way for the Board to achieve the authority to decide cases with only two members. To conclude that Congress intended to authorize such a procedure to contravene the three-member Board quorum, we would need some evidence of that intent.<sup>51</sup>

The Supreme Court seems to have killed the delegation trick—at least in cases where the commission's quorum is specified by statute.

However, in *Railroad Yardmasters of America v. Harris*, the D.C. Circuit affirmed the National Mediation Board's delegation of authority to a single member of the Board.<sup>52</sup> The *New Process Steel* and *Railroad Yardmasters* are interesting examples of how commissions use other statutory provisions—notably delegation provisions—to resist the loss of quorum.

In other situations, the commission may adopt new procedural rules to alleviate the burdens of quorum. Down to two members and facing challenges to its quorum rules,<sup>53</sup> the FTC promulgated rules in February 2018 that allow it to delegate limited authority when no quorum is present.<sup>54</sup> Following *New Process Steel*, the NLRB adopted comprehensive regulations on how the Board would handle loss of quorum in the future.<sup>55</sup>

In many circumstances, a loss of quorum is the function of divided government. Toward the end of President Obama's second term (beginning around 2015), the Senate stopped confirming many of his nominees. As terms expired and commissioners retired, more and more commissions became at risk of losing quorum. In polarized times, political posturing prevents agencies from exercising their basic authority.

Some have suggested that commissions with party-balancing requirements may use quorum-avoidance tools to implement more politically contentious policies. In theory, a balanced commission resists falling into the trap of partisan politics. At least, Congress hoped as much when

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<sup>51</sup> *Id.* at 681–82.

<sup>52</sup> 721 F.2d 1332 (D.C. Cir. 1983).

<sup>53</sup> *In the Matter of 1-800 Contacts, Inc.*, No. 9372, 2018 WL 1028985 (F.T.C.), at \*21 (Feb. 9, 2018)

<sup>54</sup> 16 C.F.R. § 0.7.

<sup>55</sup> 29 C.F.R. § 102.178–182.

designing these commissions. A recent experience with the Federal Communications Commission suggests that quorum-avoidance tools may undermine this goal. The Federal Communications Commission's regulations permit the chair to convene a Board of Commissioners to act for the commission in the absence of a quorum.<sup>56</sup> The Board of Commissioners may engage in rulemaking if “the public interest would be disserved by waiting the convening of a quorum.”<sup>57</sup> The retirement of Democratic Commissioner Mignon Clyburn created rumors that the remaining GOP commissioners—Chairman Ajit Pai and Commissioner Mike O’Rielly—would convene a Board of Commissioners during the quorum-less period to rollback Obama-era rules, notably net neutrality.<sup>58</sup>

In light of all this, one can ask: Do quorum requirements matter much in restricting agency actions? To be sure, plenty of cases have challenged agency actions occurring during a lack of quorum. Nevertheless, courts sometimes seem shy to enforce quorum requirements. In *EEOC v. Joseph Horne Co.*, the Fourth Circuit affirmed the decision of a quorum-less EEOC, agreeing with the district court’s holding that “since the two votes approving denial of the petition would likely have prevailed in any event, any absence of the third member was immaterial and only a De minimis deviation from EEOC’s then regulation.”<sup>59</sup> At the same time, *Joseph Horne Co.* is nearly forty-years old and was decided at a time when courts were incredibly deferential to agencies. More recent cases—such as *New Process Steel*—show that courts are much more willing to enforce quorum requirements.

## FINDINGS

### I. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

#### A. Statutory Characteristics

##### 1. *Commission Membership*

7 Members. “The Board of Governors of the Federal Reserve System shall be composed of seven members, to be appointed by the president by and with the advice and consent of the Senate.” (12 U.S.C. § 241). President may fill vacancies during recess of the Senate. “The President shall have power to fill all vacancies that may happen on the Board of Governors of the Federal Reserve System during the recess of the Senate by granting commissions which shall expire with the next session of the Senate.” (12 U.S.C. § 245).

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<sup>56</sup> 47 C.F.R. § 0.212.

<sup>57</sup> *Id.* (b)(1).

<sup>58</sup> Margaret Harding McGill & Nancy Scola, *FCC Quorum Politics*, POLITICO (May 30, 2017), <https://www.politico.com/tipsheets/morning-tech/2017/05/30/fcc-quorum-politics-220565>

<sup>59</sup> 607 F.2d 1075, 1076 (4th Cir. 1979).

2. *Party Balancing Requirements*

None.

3. *For-Cause Protections*

Yes. “[T]hereafter each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.” (12 U.S.C. § 242).

4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “Of the persons thus appointed, 1 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of 4 years.” (12 U.S.C. § 242).

*Term Length:* 4 years. (12 U.S.C. § 242).

*Removal:* President may remove for cause. “[T]hereafter each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.” (12 U.S.C. § 242).

5. *Quorum Rules*

*Statutory Requirements:* Yes. Establishes voting requirements and allows unanimous voting absent a quorum. (12 U.S.C. § 248(r)).

*Rule Requirements:* Yes. Establishes an action committee that permits the Board to take certain actions absent a quorum. (12 C.F.R. § 265.4(b)(1)). Other rules establish voting requirements. (12 C.F.R. § 261b.2(d)).

*Quorum Rule:* Number of required affirmative votes depends on the action. “Any action that this chapter provides may be taken only upon the affirmative vote of 5 members of the Board may be taken upon the unanimous vote of all members then in office if there are fewer than 5 members in office at the time of the action.” (12 U.S.C. § 248(r)(1)). “The term number of individual agency members required to take action on behalf of the agency means in the case of the Board, a majority of its members except that (1) Board determination of the ratio of reserves against deposits under section 19(b) of the Federal Reserve Act requires the vote of four members, (2) Board action with respect to advances, discounts and rediscounts under sections 10(a), 11(b), and 13(3) of the Federal Reserve Act requires the vote of five members and (3) Board action with respect to the percentage of individual member bank capital and surplus which may be represented by loans secured by stock and bond collateral under section 11(m) of the Federal Reserve Act requires the vote of six members. In the case of subdivisions of the Board, the term means the number of members constituting a quorum of the designated subdivision.” (12 C.F.R. § 261b.2(d)).

*Progressive Quorum:* None.

*Unanimous Voting Absent a Quorum:* The Board may take action upon the unanimous vote of all members then in office. “Any action that this chapter provides may be taken only upon the affirmative vote of 5 members of the Board may be taken upon the unanimous vote of all members then in office if there are fewer than 5 members in office at the time of the action.” (12 U.S.C. § 248(r)(1)). “Any action that the Board is otherwise authorized to take under section 343(3) of this title may be taken upon the unanimous vote of all available members then in office. . .” (12 U.S.C. § 248(r)(2)(A)).

*Limited Action Absent a Quorum:* Absent a quorum, an action committee may take certain actions on behalf of the board. “Three member Action Committee. Any three Board members designated from time to time by the Chairman (the “Action Committee”) are authorized: (1) Absence of quorum. To act, upon certification by the Secretary of the Board of an absence of a quorum of the Board present in person, by unanimous vote on any matter that the Chairman has certified must be acted upon promptly in order to avoid delay that would be inconsistent with the public interest except for matters: (i) Relating to rulemaking; (ii) Pertaining principally to monetary and credit policies; and (iii) For which a statute expressly requires the affirmative vote of more than three Board members.” (12 C.F.R. § 265.4(b)(1)).

## 6. *Term Rules*

*Length:* 14 years. “The Board of Governors for the Federal Reserve System shall be composed of seven members, to be appointed by the President . . . for terms of fourteen years except as hereinafter provided . . .” (12 U.S.C. § 241).

*Reappointment:* Prohibited after serving a full fourteen-year term. “Any person appointed as a member of the Board after August 23, 1935, shall not be eligible for reappointment as such member after he shall have served a full term of fourteen years.” (12 U.S.C. § 242).

*Staggered:* Staggered appointments every two years. “Upon the expiration of the term of any appointive member of the Federal Reserve Board in office on August 23, 1935, the President shall fix the term of the successor . . . in such manner as to provide for the expiration of the term of not more than one member in any two-year period.” (12 U.S.C. § 242).

*Vacancy Rules:* “Whenever a vacancy shall occur, other than by expiration of term . . . a successor shall be appointed by the President, by and with the advice and consent of the Senate, to fill such vacancy and when appointed he shall hold office for the unexpired term of his predecessor.” (12 U.S.C. § 244).

*Continuation Until Replacement:* Permitted. “Upon the expiration of their terms of office, members of the Board shall continue to serve until their successors are appointed and have qualified.” (12 U.S.C. § 242).

## 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “In selecting members of the Board, the President shall appoint at least 1 member with demonstrated primary experience working in or supervising community banks having less than \$10,000,000,000 in total assets.” (12 U.S.C. § 241). “[T]he president shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests and geographical divisions of the country.” (12 U.S.C. § 241).”

*Geographic Requirements:* “In selecting members of the Board, not more than one of whom shall be selected from any one federal reserve district. . . .” (12 U.S.C. § 241).

## B. Current Configuration<sup>60</sup>

### 1. *What is the Current Composition of the Commission?*

The Board currently has four of seven members.

- Jerome H. Powell (Chairman) (Appointed to fill unexpired term on May 25, 2012; Reappointed on June 16, 2014; Appointed Chairman on February 5, 2018; Term expires January 31, 2028).
- Richard H. Clarida (Vice Chairman) (Appointed to fill unexpired term on September 17, 2018; Term expires January 31, 2022).
- Randal K. Quarles (Vice Chairman for Supervision) (Appointed to fill unexpired term on October 13, 2017; Reappointed on July 23, 2018; Term expires on January 31, 2032).
- Lael Brainard (Member) (Appointed to fill unexpired term on June 16, 2014. Term expires on January 31, 2026).

### 2. *Does the Commission Have a Quorum?*

The Board currently does not have the five-member quorum anticipated by 12 U.S.C. § 248(r)(1). However, the Board may still act by unanimous vote of all members. *Id.*

### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

Since 2000, the Commission has not had a quorum on the following occasions:

- February 1, 2001 to December 6, 2001 (4 members).
- January 22, 2009 to January 27, 2009 (4 members).
- September 2, 2010 to October 3, 2010 (4 members).
- March 14, 2014 to May 27, 2014 (4 members).
- May 29, 2014 to June 15, 2014 (4 members).
- April 6, 2017 to October 12, 2017 (4 members).
- October 17, 2017 to Present (Fluctuating between 3 and 4 members).

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<sup>60</sup> To determine information about the Board’s current configuration, I used information provided on the Federal Reserve’s website: <https://www.federalreserve.gov/aboutthefed/bios/board/boardmembership.htm>.

4. *Is there a Quorum Problem Approaching?*

The Board currently lacks a quorum, but that problem will be resolved if either Michelle Bowman or Jean Nellie Liang is confirmed. However, the Board will still not be able to take some actions until it has 6 members. (12 C.F.R. § 261b.2(d)).

5. *Has the President Advanced Nominees?*

Yes.

- Jean Nellie Liang (PN2543): Nominated 9/28/2018; Referred to Committee 9/28/2018.
- Richard Clarida (PN1862 and PN1862): Nominated 4/24/2018; Confirmed on 8/28/2018.
- Michelle Bowman (PN1860): Nominated 4/24/2018; Cloture filed on 10/11/2018.
- Randal Quarles (PN1354): Nominated 1/8/2018; Confirmed on 7/17/2018.
- Jerome Powell (PN1353): Nominated 1/8/2018; Confirmed on 7/17/2018.
- Marvin Goodfriend (PN1348): Nominated 1/8/2017; Placed on Executive Calendar 2/8/2018.
- Marvin Goodfriend (PN1279): Nominated 11/29/2017; Returned to the President on 01/03/2018.
- Jerome H. Powell (PN1201): Nominated 11/02/2017; Returned to the President on 01/03/2018.
- Randal Quarles (PN734 and PN736): Nominated 07/11/2017; Confirmed on 10/05/2017.
- Randal Quarles (PN735): Nominated 07/11/2017; Returned to the President on 01/03/2018.
- Kathryn M. Dominguez (PN674): Nominated 7/21/2015; Returned to the President on 1/3/2017.
- Allan R. Landon (PN3 and PN2): Nominated 1/7/2015; Returned to the President on 1/3/2017.

## **II. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD**

### **A. Statutory Characteristics**

1. *Commission Membership*

5 members. “The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate.” (42 U.S.C. § 7412(r)(6)(B)).

2. *Party Balancing Requirements*

None.

3. *For-Cause Protections*

Yes. “Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office.” (42 U.S.C. § 7412(r)(6)(B)).

4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate. . . .

*Term Length:* Unspecified

*Removal:* President may remove for cause. “Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office.” (42 U.S.C. § 7412(r)(6)(B)).

5. *Quorum Rules*

Statutory Requirements: None.

*Rule Requirements:* Yes. (40 C.F.R. § 1600.5(a)).

*Quorum Rule:* Defines quorum to require three members. “A quorum of the Board for the transaction of business shall consist of three Members; provided, however, that if the number of Board Members in office is fewer than three, a quorum shall consist of the number of Members in Office; and provided further that on any matter of business as to which the number of Members in office, minus the number of Members who have disqualified themselves for consideration of such matter is two, two Members shall constitute a quorum for purposes of such matter. Once a quorum is constituted, a simple majority of voting Members is required to approve an item of the Board’s business. A tie vote results in no action.” (40 C.F.R. § 1600.5(a)).

*Progressive Quorum:* Yes. “[I]f the number of Board Members in office is fewer than three, a quorum shall consist of the number of Members in Office.” (40 C.F.R. § 1600.5(a)).

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

6. *Term Rules*

*Length:* 5 Years. “The term of office of members of the Board shall be 5 years.” (42 U.S.C. § 7412(r)(6)(B)).

*Reappointment:* No limitations.

*Staggered:* None.

*Vacancy Rules:* None.

*Continuation Until Replacement:* None.

7. *Misc. Appointment Requirements*

*Expertise Requirements:* “Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation.” (42 U.S.C. § 7412(r)(6)(B)).

B. Current Configuration<sup>61</sup>

1. *What is the Current Composition of the Commission?*

The Board currently has three of five members:

- Kristen Kulinowki
- Manuel “Manny” Ehrlich
- Rick Engler

2. *Does the Commission Have a Quorum?*

Yes. The Board has a quorum of three members. (40 C.F.R. § 1600.5(a))

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the CSHIB’s past commissioners and their dates in office to answer this question.

4. *Is there a Quorum Problem Approaching?*

Need information on when the current CSHIB members’ terms expire. However, given that Trump wants to eliminate the CSHIB, they agency seems in trouble regardless.

5. *Has the President Advanced Nominees?*

President Trump has not nominated anyone to the Board. However, the lack of nominees for the Board is consistent with President Trump’s desire to eliminate the Board. The President’s FY 2018 Budget for “Other Independent Agencies” states, “The President’s Budget Proposes to eliminate funding for several independent agencies, including the Chemical Safety and Hazard Investigation Board, as part of the Administration’s plans to move the Nation towards fiscal responsibility and

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<sup>61</sup> To determine information about the Board’s current configuration, I used information provided on the CSHIB’s website: <https://www.csb.gov/about-the-csb/board-members>.



redefine the proper role of the Federal Government.”<sup>62</sup> The Senate returned President Obama’s final nominee at the end of his presidency.

- Rachael A. Meidl (PN1915): Nominated 11/29/2019; Returned to the President on 1/3/2017.

### III. COMMODITY FUTURES TRADING COMMISSION

#### A. Statutory Characteristics

##### 1. *Commission Membership*

5 members. “The Commission shall be composed of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate.” (7 U.S.C. § 2(a)(2)(A)).

##### 2. *Party Balancing Requirements*

Yes. “Not more than three members of the Commission shall be members of the same political party.” (7 U.S.C. § 2(a)(2)(A)).

##### 3. *For-Cause Protections*

None.

##### 4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “The President shall appoint, by and with the advice and consent of the Senate, a member of the Commission as Chairman, who shall serve as Chairman at the pleasure of the President. . . .” (7 U.S.C. § 2(a)(2)(B)).

*Term Length:* Unspecified.

*Removal:* President may remove the chairperson at will. “At any time, the President may appoint, by and with the advice and consent of the Senate, a different Chairman, and the Commissioner previously appointed as Chairman may complete that Commissioner’s term as a Commissioner.” (7 U.S.C. § 2(a)(2)(B)).

##### 5. *Quorum Rules*

*Statutory Requirements:* None.

*Rule Requirements:* Defines quorum. (17 C.F.R. § 147.2). Absent a quorum, an action committee may take certain actions on behalf of the board. (17 C.F.R. § 140.11).

*Quorum Rule:* Defines quorum to require “at least the minimum number of Commissioners.” It is not clear what this number is. “Quorum means at least the

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<sup>62</sup> BUDGET FOR FISCAL YEAR 2018, 1128 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/oia.pdf>

minimum number of Commissioners required to take action on behalf of the Commission.” (17 C.F.R. § 147.2). Marshall Berger and Gary Edles deduce that this means three commissioners constitutes a quorum.<sup>63</sup> A March 2017 Report from the Bipartisan Policy Center states, “A majority of commissioners, except when there are two commissioners, in which case a quorum is both commissioners. It is not clear how quorum would be handled if there were only one commission serving.”<sup>64</sup> The report cites Berger and Edles’ new book (which offers the same definition as their 2000 article), but seems to modify the definition to provide that a quorum constitutes both commissioners when there are only two members.

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* Yes. “(a) Authority of senior Commissioner. When it is not feasible to convene a quorum of the Commission, the Senior Commissioner present at the principal offices of the Commission (or, during non-business hours, available in the Washington, DC area) may take emergency action on behalf of and in the name of the Commission in accordance with the procedures set forth in this section. Members of the Commission shall be considered senior in the following order: The Chairman, the Vice–Chairman, and other Commissioners in order of their length of service on the Commission. Where two or more Commissioners have commenced their service on the same date, the Commissioner whose unexpired term in office is the longest will be considered senior.” (17 C.F.R. § 140.11(a)).

## 6. Term Rules

*Length: 5 Years.* “Each Commissioner shall hold office for a term of five years.” (7 U.S.C. § (a)(2)(A))

*Reappointment:* No limitations.

*Staggered:* Staggered every year. “[T]he terms of office of the Commissioners first taking office after the enactment of this paragraph shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of

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<sup>63</sup> Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN L. REV. 1111, 1243 (2000).

<sup>64</sup> JUSTIN SCHARDIN & ASHMI SHETH, FINANCIAL REGULATORS STRUGGLING WITH LONGER VACANCIES AT THE TOP 12, BIPARTISAN POLICY CENTER (2017), <https://bipartisanpolicy.org/wp-content/uploads/2017/03/BPC-Financial-Regulatory-Vacancies.pdf> (citing MARSHALL J. BERGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 401 (2015)).

two years, one at the end of three years, one at the end of four years, and one at the end of five years.” (7 U.S.C. § 2(a)(2)(A)).

*Vacancy Rules:* “[A]ny Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. . . .” (7 U.S.C. § (a)(2)(A)(i)).

*Continuation Until Replacement:* Commissioners may continue to serve until a successor is appointed, but may not continue to serve beyond the expiration of the next session of Congress. “Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office . . . .” (7 U.S.C. § (a)(2)(A))

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “In nominating persons for appointment, the President shall (i) select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one or more commodities or other goods and articles, services, rights, and interests covered by this chapter; and (ii) seek to ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas.” (7 U.S.C. § 2 (a)(2)(A)).

*Conflict of Interest:* “No Commissioner or employee of the Commission shall accept employment or compensation from any person, exchange, or clearinghouse subject to regulation by the Commission under this chapter during his term of office, nor shall he participate, directly or indirectly, in any registered entity operations or transactions of a character subject to regulation by the Commission.” (7 U.S.C. § 2(a)(2)(A)(8)).

### B. Current Configuration<sup>65</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commission currently has five of five members:

- J. Christopher Giancarlo (Appointed June 16, 2014; Term expires April 13, 2019).
- Brian D. Quintenz (Appointed August 15, 2017; Term expires April 15, 2020).
- Rostin Behnam (Appointed September 6, 2017; Term expires June 19, 2021).
- Dawn DeBerry Stump (Appointed September 5, 2018; Term expires April 13, 2022).

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<sup>65</sup> To determine information about the Board’s current configuration, I used information provided on the CFTC’s website: <https://www.cftc.gov/About/Commissioners/index.htm>.

- Dan M. Berkovitz (Appointed September 7, 2018; Term expires April 13, 2023).

2. *Does the Commission Have a Quorum?*

The Commission has a quorum. All seats of the Commission are filled.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Yes. From February 18, 2017 to August 14, 2017, the Commission had two members (J. Christopher Giancarlo and Sharon Y. Bowen). The failure to obtain a quorum contributed to the resignation of Commissioner Bowen. According to the Wall Street Journal, Bowen “said she was leaving early due to frustrations with the pace of work at the commission, which has been hampered by its lack of a quorum.”<sup>66</sup> At the time of the announcement, President Trump had two nominations pending.

Since 2000, the Commission has not had a quorum on the following occasions:

- July 24, 2004 to November 20, 2004 (2 members).
- June 28, 2007 to August 7, 2007 (2 members).
- March 22, 2014 to June 4, 2014 (2 members).
- February 18, 2017 to August 14, 2017 (2 members).

4. *Is there a Quorum Problem Approaching?*

The President has nominated and the Senate has confirmed four nominees since 2017. There is no imminent quorum problem. Assuming that all commissioners stay until the ends of their terms, there will not be a quorum problem until June 19, 2021, when Commissioner Rostin Behnam’s term expires.

5. *Has the President Advanced Nominees?*

Both President Trump and President Obama were fairly diligent in nominating individuals to the Commission. The recent quorum problem seems to have been caused by the Senate refusing to confirm President Obama’s final two nominees. This is somewhat interesting because the Senate ultimately confirmed one of President Obama’s nominees (Brian D. Quintenz

- Dan M. Berkovitz (PN1858): Nominated 4/24/2018; Confirmed on 08/28/2018.
- Rostin Behnam (PN746): Nominated 7/13/2017; Confirmed on 08/03/2017.
- Dawn DeBerry Stump (PN594): Nominated 06/12/2017; Confirmed on 08/28/2018.
- Brian D. Quintenz (PN456): Nominated 5/16/2017; Confirmed on 08/03/2017.

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<sup>66</sup> Gabriel T. Rubin, *CFTC Democratic Commissioner Sharon Bowen to Step Down*, WALL STREET J. (June 20, 2017), <https://www.wsj.com/articles/cftc-democratic-commissioner-sharon-bowen-to-step-down-1497980061>.

- J. Christopher Giancarlo (PN402): Nominated 5/10/2017; Confirmed on 08/03/2017.
- Brian D. Quintenz (PN20): Nominated 01/17/2017; Withdrawn on 02/28/2017.
- Christopher J. Brummer (PN19): Nominated 01/17/2017; Withdrawn on 02/28/2017.
- Brian D. Quintenz (PN1196): Nominated 03/03/2016; Returned to President on 01/03/2017.
- Christopher J. Brummer (PN 1194 and PN1195): Nominated 03/03/2016; Returned to President on 01/03/2017.

#### IV. CONSUMER PRODUCT SAFETY COMMISSION

##### A. Statutory Characteristics

###### 1. *Commission Membership*

5 members. “An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate.” (15 U.S.C. § 2053(a)).

###### 2. *Party Balancing Requirements*

Yes. “Not more than three of the Commissioners shall be affiliated with the same political party.” (15 U.S.C. § 2053(c)).

###### 3. *For-Cause Protections*

Yes. “Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” (15 U.S.C. § 2053(a)).

###### 4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission.” (15 U.S.C. § 2053(a)).

*Term Length:* Unspecified.

*Removal:* President may remove for cause. “An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” (15 U.S.C. § 2053(a)).”

###### 5. *Quorum Rules*

*Statutory Requirements:* Yes. (15 U.S.C. § 2053(d)).

*Rule Requirements:* Yes, but merely parrots the statute. (16 C.F.R. § 1000.9).

*Quorum Rule:* Defines quorum to require three members. “[T]hree members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the sixth month period beginning on the date of the vacancy which caused the number of Commission members to decline to two.” (15 U.S.C. § 2053(d)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

## 6. *Term Rules*

*Length:* 7 years. “[E]ach of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which is predecessor was appointed.” (15 U.S.C. § 2053(b)(1)).

*Reappointment:* No limitations.

*Staggered:* Yes. “(A) the Commissioners first appointed under this section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after October 27, 1972, the term of each to be designated by the President at the time of nomination; and (B) each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which his predecessor was appointed.” (15 U.S.C. § 2053(b)(1)).

*Vacancy Rules:* “Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.” (15 U.S.C. § 2053(b)(2)).

*Continuation Until Replacement:* Commissioners may continue to serve until the earlier of one-year after expiration of their term or a successor is appointed. “A Commissioner may continue to serve after the expiration of this term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire under this subsection.” (15 U.S.C. § 2053(b)(2)).

## 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “[T]he President shall consider individuals, who by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission.” (15 U.S.C. § 2053(a)).

*Conflict of Interest:* “No individual (1) in the employ of, or holding any official relation to, any person engaged in selling or manufacturing consumer products, or (2) owning stock or bonds of substantial value in a person so engaged, or (3) who is in any other manner pecuniarily interested in such a person, or in a substantial supplier of such a person, shall hold the office of Commissioner. A Commissioner may not engage in any other business, vocation, or employment.” (15 U.S.C. § 2053(c)).

## B. Current Configuration<sup>67</sup>

### 1. *What is the Current Composition of the Commission?*

The Commission currently has five of five members:

- Ann Marie Buerkle (Appointed July 2, 2013; Term expires October 2018).
- Elliot F. Kaye (Appoint July 30, 2013; Term expires October 2020);
- Robert S. Adler (Appointed August 18, 2009; Term expires October 2021);
- Dana Baiocco (Appointed June 1, 2018 (retroactively to October 27, 2017); Term expires October 2024); and
- Peter Feldman (Appointed October 5, 2018; Term expires October 2026).

### 2. *Does the Commission Have a Quorum?*

The Commission has a quorum. All seats of the Commission are filled.

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<sup>67</sup> To determine information about the Board’s current configuration, I used information provided on the CPSC’s website: <https://www.cpsc.gov/About-CPSC/Commissioners>.

Several commissioners posed problems.

- The exact date of Marietta S. Robinson’s term resignation is not listed on the CSPC website, except to say “May 2018.”
- Joseph Mohorvic does not have a sworn-in date listed. He was confirmed the same date (July 28, 2013) as Elliot F. Kaye, who was sworn in on July 30, 2013. A news release from July 31, 2013 describes Mohorvic as having been sworn in recently. I, therefore, used July 30, 2018 as the swear-in date for Mohorvic, but it could have been July 31, 2013. His biography also does not list his resignation date. Other news sources confirm he resigned effective October 20, 2017. <http://www.productsafetyletter.com/Free/5257.aspx>.
- The Commission had a temporary quorum for a year following the resignation of Harold D. Stratton. <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/01/AR2008020103151.html>

3. *Has the Commission Had a Quorum Problem in the Near Past?*

The Commission suffered from a lack of quorum from February 4, 2008 to June 22, 2009. This is rather notable for the CPSC because its statute provides protections that allow for the agency to continue to act with two members as though it has a quorum for one year after the resignation of the third member. Overall, the agency was consistently understaffed during the Bush Administration.

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. Assuming that all commissioners stay until the ends of their terms, there will not be a quorum problem until October 2022, one year after Commissioner Robert S. Adler's term expires.

5. *Has the President Advanced Nominees?*

Yes.

- Peter A. Feldman (PN2073): Nominated 06/07/2017; Confirmed on 09/26/2018
- Peter A. Feldman (PN2048): Nominated 06/04/2018; Confirmed on 09/25/2018.
- Ann Marie Buerkle (PN1360 and PN1361): Nominated 01/18/2018; Placed on Executive Calendar on 01/18/2018.
- Dana Baiocco (PN1358): Nominated on 01/08/2018; Confirmed on 5/22/2018.
- Dana Baiocco (PN1033): Nominated on 09/28/2017; Returned to the President on 01/03/2018.
- Ann Marie Buerkle (PN824 and PN825) Nominated on 07/27/2017; Returned to the President on 01/03/2018.

## V. DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### A. Statutory Characteristics

1. *Commission Membership*

5 members. "The Board shall be composed of five members appointed from civilian life by the President, by and with the advice and consent of the Senate." (42 U.S.C. § 2286(b)(1)).

2. *Party Balancing Requirements*

Yes. "Not more than three members of the Board shall be of the same political party." (42 U.S.C. § 2286(b)(1)).

3. *For-Cause Protections*

None.

4. *Chair Appointment and Removal Rules*



*Appointment:* President designates a chairperson. “The President shall designate a Chairman and Vice Chairman of the Board among members of the Board.” (42 U.S.C. § 2286(c)(1)).

*Term Length:* Unspecified.

*Removal:* Unspecified.

#### 5. *Quorum Rules*

*Statutory Requirements:* Yes. (42 U.S.C. § 2286(e)).

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum to require three members. “Three members of the Board shall constitute a quorum, but a lesser number may hold hearings.” (42 U.S.C. § 2286(e)).

GAO has raised concerns about the DNSFB’s approach to quorum: “Because DNSFB’s enabling statute defines a quorum as three Board members, under the Board’s voting procedure a recommendation would always pass with the approval of two Board members because two is a majority of a quorum of three. However, we found that this procedure does not align with DNSB officials’ understanding implementation of it. Our review of voting records and interviews with DNFSB officials showed that the Board has interpreted the procedure to mean approval requires the majority of those voting once a quorum has been established, as opposed to a majority of a quorum.”<sup>68</sup>

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

#### 6. *Term Length*

*Length:* 5 years. “[T]he members of the Board shall serve for terms of five years.” (42 U.S.C. § 2286(d)(1)).

*Reappointment:* Statute explicitly permits reappointment. “Members of the Board may be reappointed.” (42 U.S.C. § 2286(d)(1)).”

*Staggered:* Yes. “Of the members first appointed (A) one shall be appointed for a term of one year; (B) one shall be appointed for a term of two years; (C) one shall

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<sup>68</sup>U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 15-181, DEFENSE NUCLEAR FACILITIES SAFETY BOARD: IMPROVEMENTS NEEDED TO STRENGTHEN INTERNAL CONTROL AND PROMOTE TRANSPARENCY 12 (2012), <https://www.gao.gov/assets/670/667970.pdf>.

be appointed for a term of three years; (D) one shall be appointed for a term of four years; and (4) one shall be appointed for a term of five years. (42 U.S.C. § 2286(d)(2)).

*Vacancy Rules:* “Any member appointed to fill a vacancy occurring before the expiration of the term of office for which member’s predecessor was appointed shall be appointed only for the remainder of such term.” (42 U.S.C. § 2286(d)(3)).

*Continuation Until Replacement:* Permitted. “A member may serve after the expiration of that member’s term until a successor has taken office.” (42 U.S.C. § 2286(d)(3)).

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* The appointee must be civilians with expertise in the field of nuclear safety. “The Board shall be composed of five members appointed from civilian life by the President, by and with the advice and consent of the Senate, from among United States citizens who are respected experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the board.” (42 U.S.C. § 2286(b)(1)).

*U.S. Citizen Requirements* Yes. (42 U.S.C. § 2286(b)(1)).

*Civilian Requirement:* Yes. (42 U.S.C. § 2286(b)(1)).

*Conflicts of Interest:* “No member of the Board may be an employee of, or have any significant financial relationship with, the Department of Energy or any contractor of the Department of Energy.” (42 U.S.C. § 2286(b)(3)).

### B. Current Configuration<sup>69</sup>

#### 1. *What is the Current Composition of the Commission?*

The Board currently has four of five members:

- Bruce Hamilton (Confirmed April 13, 2015; Term expired October 18, 2016).<sup>70</sup>
- Jessie Hill Roberson (Confirmed March 19, 2010; Term expired October 18, 2013).
- Daniel J. Santos (Confirmed June 5, 2014; Term expired October 18, 2017).
- Joyce L. Connery (Confirmed August 5, 2015; Term expires October 18, 2019).

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<sup>69</sup> To determine information about the Board’s current configuration, I used information provided on the DNSFB’s website: <https://www.dnfsb.gov/about/board-members>.

<sup>70</sup> I could only find confirmation dates. I could not find dates of when the commissioners were sworn in.

2. *Does the Commission Have a Quorum?*  
The Commission has a quorum.
3. *Has the Commission Had a Quorum Problem in the Near Past?*  
Need information on the DNFSB's past commissioners and their dates in office to answer this question.
4. *Is there a Quorum Problem Approaching?*  
Three of the Board's four members are currently serving expired terms. If two members retire, the Board would be without a quorum. This problem is exacerbated by the fact that the Senate has not considered President Trump's nominees.
5. *Has the President Advanced Nominees?*  
President Trump has nominated three individuals to serve on the Board, including two current members. The Senate has not taken any action on these nominees.
  - Lisa Vickers (PN2554): Nominated 10/05/2018; Received in Senate 10/05/2018.
  - Jessie Hill Roberson (PN2553): Nominated 10/05/2018; Received in Senate 10/05/2018.
  - Joseph Bruce Hamilton (PN2552): Nominated 10/05/2018; Received in Senate 10/05/2018.
  - Joseph Bruce Hamilton (PN1912): Nominated 11/29/2016; Returned to the President on 01/03/2017.
  - Gail H. Marcus (PN1396): Nominated 04/28/2016; Returned to the President on 04/28/2016.

## VI. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### A. Statutory Characteristics

1. *Commission Membership*  
5 members. "There is hereby created a Commission known as the Equal Employment Opportunity Commission, which shall be composed of five members . . . ." (42 U.S.C. § 2000e-4(a)).
2. *Party Balancing Requirements*  
Yes. "[The EEOC] shall be composed of five members, not more than three of whom shall be members of the same political party." (42 U.S.C. § 2000e-4(a)).
3. *For-Cause Protections*  
None.
4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman.” (42 U.S.C. § 2000e-4(a)).

*Term Length:* Unspecified.

*Removal:* Unspecified.

#### 5. *Quorum Rules*

*Statutory Requirements:* Yes. (42 U.S.C. § 2000e-4(c))

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum to require three members. “A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.” (42 U.S.C. § 2000e-4(c)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

#### 6. *Term Length*

*Length:* 5 Years. “Members of the Commission shall be appointed by the President and with the advice and consent of the Senate for a term of five years.” (42 U.S.C. § 2000e-4(a)).

*Reappointment:* No limitations.

*Staggered:* The statute codified in the U.S. Code does not specify staggered terms. However, according to the ACUS Sourcebook<sup>71</sup> and Berger and Edles<sup>72</sup>, the Equal Employment Opportunity Act of 1972 requires staggered terms. Equal Employment Opportunity Act of 1972, Pub. L. 96-261, 86 Stat. 103 § 8(d).

*Vacancy Rules:* “Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed . . . .” (42 U.S.C. § 2000e-4(a)).

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<sup>71</sup> DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, AGENCY STRUCTURE CODEBOOK 91 n.72 (2012),

<sup>72</sup> Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1246 (2000).

*Continuation Until Replacement:* Permitted, but with limitations. “[A]ll members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.” (42 U.S.C. § 2000e-4(a)).

7. *Misc. Appointment Requirements*  
None.

B. Current Configuration<sup>73</sup>

1. *What is the Current Composition of the Commission?*

The Commission currently has three of five commissioners:

- Victoria A. Lipnic (Appointed April 2010; Term expires July 1, 2020).
- Chai R. Feldblum (Appointed April 2010; Term expired July 1, 2018).
- Charlotte A. Burrows (Appointed December 2014; Term expires July 1, 2019).

2. *Does the Commission Have a Quorum?*

The Commission has a quorum of three members.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the EEOC’s past commissioners and their dates in office to answer this question.

A district court decision from 2011 demonstrates that the EEOC lacked a quorum for at least three months at some point since 2010.<sup>74</sup> This case prompted a dispute as to the extent of authority that the EEOC could exercise without a quorum.<sup>75</sup>

4. *Is there a Quorum Problem Approaching?*

The EEOC is operating with a bare-minimum quorum and Chai R. Feldblum’s term has expired. In 2017, President Trump nominated Feldblum for another term but the Senate has not acted on the nomination. The EEOC could face a quorum problem if Feldblum or another nominee is not quickly confirmed.

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<sup>73</sup> To determine information about the Commissions’ current configuration, I used information provided on the EEOC’s website: <https://www.eeoc.gov/eeoc/commission.cfm>.

<sup>74</sup> EEOC v. Aerotek, Inc., No. 10 C 1709, 2011 WL 124266, at \*2 (Jan. 12, 2011).

<sup>75</sup> EEOC v. Aerotek, Inc., No. 11-1349, 498 F. App’x 645, 648 (7th Cir. 2013) (“[W]e save the issue of whether the EEOC may conduct its business without a three-member quorum for another day.”).

5. *Has the President Advanced Nominees?*

President Trump has nominated multiple individuals to serve on the EEOC. However, the Senate has not acted on these nominees.

- Sharon Fast Gustafson (PN1763): Nominated 03/20/2018; Hearings held on 04/10/2018.
- Chai Rachel Feldblum (PN1318): Nominated 12/11/2017; Received in Senate on 12/11/2017.
- Daniel M. Gade (PN859): Nominated 08/02/2017; Placed on Senate Executive Calendar on 10/18/2017.
- Janet Dhillon (PN724): Nominated 06/29/2017; Placed on Senate Executive Calendar on 10/18/2017.
- Constance Smith Barker (PN1625): Nominated 07/13/2017; Returned to the President on 01/03/2017.

## VII. FARM CREDIT ADMINISTRATION

### A. Statutory Characteristics

1. *Commission Membership*

3 members. “The Board shall consist of three members, who shall be citizens of the United States and broadly representative of the public interest. Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate.” (12 U.S.C. § 2242(a)).

2. *Party Balancing Requirements*

Yes. “Not more than two members of the Board shall be members of the same political party.” (12 U.S.C. § 2242(a)).

3. *For-Cause Protections*

None.

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “Of the person thus appointed, one shall be designated by the President to serve as Chairman of the Board for the duration of the member’s term.” (12 U.S.C. § 2242(a)).

*Term Length:* Duration of the member’s term. (12 U.S.C. § 2242(a)).

*Removal:* Unspecified.

5. *Quorum Rules*

*Statutory Requirements:* Yes. (12 U.S.C. § 2242(c)).

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum to require two members. “The Board may transact business if a vacancy exists, provided a quorum is present. A quorum shall consist of two members of the Board.” (12 U.S.C. § 2242(c)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

## 6. *Term Rules*

*Length:* 6 years. “The term of office of each member of the Board shall be six years. . . . (12 U.S.C. § 2242(b)).

*Reappointment:* Members cannot be appointed to succeed themselves. “Members of the Board shall not be appointed to succeed themselves, except that members first appointed under subsection (a) of this section for a term of less than six years may be reappointed for a full six-year term and members appointed to fill unexpired terms of three years or less may be reappointed for a full six-year term.” (12 U.S.C. § 2242(b)).

*Staggered:* Yes. “[T]he terms of the two members, other than the Chairman, first appointed under subsection (a) of this section shall expire, one on the expiration of two years after the date of appointment, and one on the expiration of four years after the date of appointment.” (12 U.S.C. § 2242(b)).

*Vacancy Rules:* “Any vacancy shall be filled for the unexpired term on like appointment.” (12 U.S.C. § 2242(b)).

*Continuation Until Replacement:* Permitted. “Any member of the Board shall continue to serve as such after the expiration of the member’s term until a successor has been appointed and qualified.” (12 U.S.C. § 2242(b)).

## 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “The President shall appoint members of the Board who (1) are experienced or knowledgeable in agricultural economics and financial reporting and disclosure; (2) are experienced or knowledgeable in the regulation of financial entities; or (3) have a strong financial, legal, or regulatory background.” (12 U.S.C. § 2242(e)).

*U.S. Citizen Requirement:* “The Board shall consist of three members, who shall be citizens of the United States and broadly representative of the public interest.” (12 U.S.C. § 2242(a)).

*Conflict of Interest:* “It shall be unlawful for the governor, or any officer or employee of the Farm Credit Administration to speculate directly or indirectly, in

any agricultural commodity or product thereof, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product.” (12 U.S.C. § 1141j(b)). “The members of the Board shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any institution of the Farm Credit System.” 12 U.S.C. § 2242(a).

## B. Current Configuration<sup>76</sup>

### 1. *What is the Current Composition of the Commission?*

The Administration currently has three of three members:

- Dallas P. Tonsager (Appointed March 13, 2015; Term expires May 21, 2020).
- Jeffery S. Hall (Appointed March 17, 2015; Term expires October 13, 2018).
- Glen R. Smith (Appointed Dec. 8, 2017; May 21, 2022).

### 2. *Does the Commission Have a Quorum?*<sup>77</sup>

Yes. All three slots of the Administration are currently full.

### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

No. Since 2000, the Administration has not had a quorum problem. Some caselaw shows, however, that the Administration did not have a quorum during periods of the 1980s and 1990s.<sup>78</sup>

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<sup>76</sup> To determine information about the Board’s current configuration, I used information provided on the FCA’s website <https://www.fca.gov/about/history-of-fca-governance>. There are some conflicting dates between the years-of-service section and the narrative section. For example, the years-of-service section for Kenneth A. Spearman lists October 8, 2009 as his starting date, but the narrative portion states that he was appointed by President Obama on October 13, 2009. For consistency, I used the years-of-service section.

Also, because of the way that I have coded start/end dates for individuals, there were 4 members on March 27, 2010 because Nancy L. Pellett retired and Jill Long Thompson began that day. Hence March 27, 2010 is coded twice—once as an end date for the panel containing Nancy L. Pellett and once as the start date for the panel containing Jill Long Thompson. There is also a period where the Administration appears to actually have 4 members because Leland A. Strom took office on December 12, 2009, but Douglas L. Flory did not leave office until December 13, 2009.

<sup>77</sup> There are some conflicting dates between the years-of-service section and the narrative section.

<sup>78</sup> See *Cal. Livestock Production Credit Ass’n v. Farm Credit Admin.* 748 F. Supp. 416, 420–23 (E.D. Va. 1990); *First S. Production Credit Ass’n v. Farm Credit Admin.*, 729 F. Supp. 1559, 1567–68 (1990) (discussing the validity of orders approved by a quorum but not signed and delivered until after the quorum was lost), *rev’d* 926 F.2d 339 (4th Cir. 1991).



4. *Is there a Quorum Problem Approaching?*

One member (Jeffery Hall) remains on the Administration despite the fact that his term recently expired. However, there is no imminent quorum problem. Assuming that all commissioners stay until the ends of their terms, there will not be a quorum problem until May 2020 when Dallas Tonsager's term expires. Even then, however, members with expired terms may remain on the Administration until a successor qualifies.

5. *Has the President Advanced Nominees?*

Yes. However, the President has not nominated a replacement for Jeffery S. Hall, whose term expired October 13, 2018.

- Glen R. Smith (PN1019): Nominated 09/14/2017; Confirmed on 12/05/2017.

## VIII. FEDERAL COMMUNICATIONS COMMISSION

### A. Statutory Characteristics

1. *Commission Membership*

Five members. "The Federal Communications Commission . . . shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman." (47 U.S.C. § 154(a)).

2. *Party Balancing Requirements*

Yes. "The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission." (47 U.S.C. § 154(b)(5)).

3. *For-Cause Protections*

None.

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. "[The FCC shall be composed of five commissioners appointed by the President] one of whom the President shall designate as chairman." (47 U.S.C. § 154(a)).

*Term Length:* Unspecified.

*Removal:* Unspecified.

5. *Quorum Rules*

*Statutory Requirements:* Yes. (47 U.S.C. § 154(h)).

*Rule Requirements:* Yes. (47 C.F.R. § 0.212).

*Quorum Rule:* Defines quorum to require three members. “Three members of the Commission shall constitute a quorum thereof.” (47 U.S.C. § 154(h)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* Absent a quorum, an action committee may take certain actions on behalf of the board. If the FCC falls below quorum, the Chairman may convene a “Board of Commissioners” to act en banc for the Commission except in certain manners. (47 C.F.R. § 0.212). A Board of Commissioners cannot make final determinations in adjudicatory proceedings or engage in rulemaking, “except upon a finding by the Board that the public interest would be disserved by waiting the convening of a quorum of the Commission.”

## 6. *Term Rules*

*Length:* 5 years. (47 U.S.C. § 154(c)(1)(A)).

*Reappointment:* No limitations.

*Staggered:* The statute codified in the U.S. Code does not specify staggered terms. However, according to the ACUS Sourcebook<sup>79</sup> and Berger and Edles<sup>80</sup>, the Communications Amendments Act of 1982 requires staggered terms. Communications Amendments Act of 1982, Pub. L. 97-259, 96 Stat. 1087 § 103(a).

*Vacancy Rules:* “Any person chosen to fill a vacancy in the Commission shall be appointed for the unexpired term of the commissioner that the person succeeds.” (47 U.S.C. § 154(c)(2)).

*Continuation Until Replacement:* Permitted but with limitations. “A commissioner (A) shall be appointed for a term of 5 years; (B) except as provided in subparagraph (C), may continue to serve after the expiration of the session of Congress that begins after the expiration of the fix term of office of the commissioner.” (47 U.S.C. § 154(c)(1)(A)–(C)).

## 7. *Misc. Appointment Requirements*

*U.S. Citizen Requirement:* “Each member of the Commission shall be a citizen of the United States.” (47 U.S.C. § 154(b)(1)).

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<sup>79</sup> DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, AGENCY STRUCTURE CODEBOOK 102 n.75 (2012),

<sup>80</sup> Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1250 (2000).

*Conflict of Interest:* Members cannot have financial interests in telecommunication companies. (47 U.S.C. § 154(b)(2)(A)). “Members of the Commission shall not engage in any other business, vocation, profession, or employment while serving as members.” (47 U.S.C. § 154(b)(4)).

## B. Current Configuration<sup>81</sup>

### 1. *What is the Current Composition of the Commission?*

The Commission currently has four of five members:

- Ajit Pai (Appointed May 14, 2012; Term expires June 30, 2021).
- Michael O’Rielly (Appointed November 4, 2013; Term expires June 30, 2019).
- Brendan Carr (Appointed August 11, 2017; Term expired June 30, 2018).
- Jessica Rosenworcel (Appointed August 11, 2017; Term expires June 30, 2020).

### 2. *Does the Commission Have a Quorum?*

Yes. The Commission currently has four of five positions filled.

### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

No. Since 2000, the FCC has not had a quorum problem. However, in 2017, when Mignon Clyburn’s term expired, some Senators worried that the FCC would fall below a quorum.<sup>82</sup> The expiration of her term also triggered rumors that Chairman Pai would convene a board of commissioners under 47 C.F.R. § 0.212 to carry out business for the FCC.<sup>83</sup>

### 4. *Is there a Quorum Problem Approaching?*

Brendan Carr’s term has expired in June 2018, and the limited hold-over provisions of FCC make his continued service on the commission terminal. Moreover, Michael O’Rielly’s term will expire on June 30, 2019. President Trump has nominated Brendan Carr for reappointment, which—so long as the Senate confirms Carr—would avoid any quorum problem next year.

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<sup>81</sup> To determine information about the Board’s current configuration, I used information provided on the FCC’s website: <https://www.fcc.gov/general/commissioners-1934-present>.

<sup>82</sup> See Ted Johnson, *Senator Raises Dire Scenario for FCC: Lack of a Quorum*, VARIETY (Mar. 8, 2017), <https://variety.com/2017/biz/news/fcc-ajit-pai-donald-trump-2-1202004536/> (“‘The most important thing is that we don’t allow the FCC to fall below a functioning quorum,’ Thune said at an oversight hearing on Wednesday. That’s why he urged the Senate to act quickly when President Trump nominates two others to fill vacancies—something that he has yet to do.”).

<sup>83</sup> Margaret Harding McGill & Nancy Scola, *FCC Quorum Politics*, POLITICO (May 30, 2017), <https://www.politico.com/tipsheets/morning-tech/2017/05/30/fcc-quorum-politics-220565>

5. *Has the President Advanced Nominees?*

Yes.

- Geoffrey Adam Starks (PN2050): Nominated 06/04/2018; Placed on Senate Calendar 06/27/2018.
- Brendan Carr (PN1362): Nominated 01/08/2018; Placed on Senate Calendar 01/18/2018.
- Brendan Carr (PN732): Nominated 06/29/2017; Returned to the President on 01/03/2018.
- Brendan Carr (PN731): Nominated 06/29/2017; Confirmed on 08/03/2017.
- Jessica Rosenworcel (PN600): Nominated 06/15/2017; Confirmed on 08/03/2017.
- Aji Pai (PN89): Nominated 03/07/2017; Confirmed on 10/02/2017.
- Jessica Rosenworcel (PN5): Nominated 01/04/2017; Withdrawn on 02/28/2017.
- Jessica Rosenworcel (PN512): Nominated 05/21/2005; Returned to the President on 01/03/2017.

**IX. FEDERAL DEPOSIT INSURANCE CORPORATION**

A. Statutory Characteristics

1. *Commission Membership*

5 members: the Comptroller of the Currency; the Director of the Consumer Financial Protection Bureau; and 3 Presidential appointees. “The management of the Corporation shall be vested in a Board of Directors consisting of 5 members (A) 1 of whom shall be the Comptroller of the Currency; (B) 1 of whom shall be the Director of the Consumer Financial Protection Bureau; and (C) 3 of whom shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are citizens of the United States, 1 of whom shall have State bank supervisory experience.” (12 U.S.C. § 1812(a)(1)(A)–(C)).

2. *Party Balancing Requirements*

Yes. “After February 28, 1993, not more than 3 members of the Board of Directors may be members of the same political party.” (12 U.S.C. § 1812(a)(2)).

3. *For-Cause Protections*

None.

4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “1 of the appointed members shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairperson of the Board of Directors for a term of 5 years.” (12 U.S.C. § 1812(b)(1)).

*Term Length:* Unspecified.

*Removal:* Unspecified.

5. *Quorum Rules*

*Statutory Requirements:* No.

*Rule Requirements:* Statute gives the FDIC authority to create bylaws. (12 U.S.C. § 1819(a)). The FDIC bylaws contain quorum requirements.<sup>84</sup>

*Quorum Rule:* A majority of members in office shall constitute a quorum. “A majority of the members of the Board of Directors in office shall constitute a quorum for the transaction of business. In the event there are only three members in office, those members shall constitute a quorum. In the event there are only two members in office, those members shall constitute a quorum. In the event there is only one member in office, that member shall constitute a quorum.”

*Progressive Quorum:* Yes.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

6. *Term Rules*

*Length:* 6 years. “Each appointed member shall be appointed for a term of 6 years.” (12 U.S.C. § 1812(c)(1)).

*Reappointment:* No limitations.

*Staggered:* No.

*Vacancy Rules:* “Any member appointed to fill a vacancy occurring before the expiration of the term for which such member’s predecessor was appointed shall be appointed only for the remainder of such term.” (12 U.S.C. § 1812(c)(2)).

*Continuation Until Replacement:* Permitted. “The Chairperson, Vice Chairperson, and each appointed member may continue to serve after the expiration of the term of office to which such member was appointed until a successor has been appointed and qualified.” (12 U.S.C. § 1812(c)(3)).

7. *Misc. Appointment Requirements*

*Expertise Requirements:* One of the political appointees must have State bank supervisory experience. “3 of whom shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are citizens

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<sup>84</sup> BYLAWS OF THE FEDERAL DEPOSIT INSURANCE COMPANY art. IV, § 6(d) (May 8, 2018), <https://www.fdic.gov/about/governance/bylaws.pdf>.

of the United States, 1 of whom shall have State bank supervisory experience.” (12 U.S.C. § 1812(a)(1)(C)).

*U.S. Citizen Requirement:* Yes. (12 U.S.C. § 1812(a)(1)(C)).

*Conflict of Interest:* No member may be an officer or director of an insured entity. (12 U.S.C. § 1812(e)(2)).

## B. Current Configuration<sup>85</sup>

### 1. *What is the Current Composition of the Commission?*

The Corporation currently has four of five slots filled. The only vacant slot is the Vice Chairman position:

- Mick Mulvaney (Acting Director of CFPB)
- Joseph M. Otting (Comptroller of the Currency)
- Martin J. Gruenberg (Confirmed November 15, 2012<sup>86</sup>; Term expires ???)
- Jelena McWilliams (Confirmed May 24, 2018; Term expires ???)

### 2. *Does the Commission Have a Quorum?*

Yes.

### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the FDIC’s past commissioners and their dates in office to answer this question.

### 4. *Is there a Quorum Problem Approaching?*

No. The bylaws are written in such a way that it there should always be a quorum so long as there is at least one member.

### 5. *Has the President Advanced Nominees?*

President Trump has nominated two individuals and the Senate has confirmed one of those nominees. President Trump withdrew the other nominee. President Trump has not nominated a new nominee to fill the Commission’s currently vacancy.

- Jelena McWilliams (PN1516): Nominated 01/22/2018; Confirmed on 05/24/2018.
- Jelena McWilliams (PN1351 and PN 1350): Nominated 01/08/2018; Confirmed on 05/24/2018.

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<sup>85</sup> To determine information about the Board’s current configuration, I used information provided on the FDIC’s website: <https://www.fdic.gov/about/contact/directory/#BOARD>.

<sup>86</sup> I could only find confirmation dates. I could not find dates of when the commissioners were sworn in.

- Jelena McWilliams (PN1306 and 1305): Nominated 12/01/2017; Returned to the President on 01/03/2018.
- James Clinger (PN672 and PN671): Nominated 06/19/2018; Withdrawn on 07/19/2017.
- Jay Neal Lerner (PN65): Nominated 01/13/2015; Confirmed on 12/10/2016.

## X. FEDERAL ELECTION COMMISSION

### A. Statutory Characteristics<sup>87</sup>

#### 1. *Commission Membership*

8 members: (1) Secretary of the Senate (nonvoting); (2) Clerk of the House of Representatives (nonvoting); 6 appointed members. “The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate.” (52 U.S.C. § 30106(a)(1)).

#### 2. *Party Balancing Requirements*

Yes. “No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.” (52 U.S.C. § 30106(a)(1)).

#### 3. *For-Cause Protections*

None.

#### 4. *Chair Appointment and Removal Rules*

*Appointment:* Chairperson elected by the other members. “The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year.”

*Term Length:* One year. “The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed.” (52 U.S.C. § 30106(a)(5)).

*Removal:* Unspecified.

*Party Requirements:* “The chairman and the vice chairman shall not be affiliated with the same political party.” (52 U.S.C. § 30106(a)(5)).

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<sup>87</sup> Note: The statutory citation has changed since the *ACUS Sourcebook* was last published. The old citation is 2 U.S.C. § 437c. The new citation is 52 U.S.C. § 30106.

## 5. *Quorum Rules*

*Statutory Requirements:* Yes. (52 U.S.C. § 30106(c)).

*Rule Requirements:* No.

*Quorum Rule:* All decisions must be made by a majority vote of the members of the Commission, but the majority of substantive policy decisions—to initiate civil actions in the name of the Commission, to render advisory opinions, to make, amend, or remove rules, and to conduct investigations and hearings—must be made by the affirmative vote of four members. Accordingly, the FEC quorum is typically discussed as requiring four members.<sup>88</sup> “All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title or with chapter 95 or chapter 96 of Title 26.” (52 U.S.C. § 30106(c)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

## 6. *Term Rules*

*Length:* A single term of 6 years. “Members of the Commission shall serve for a single term of 6 years. . . .” (52 U.S.C. § 30106(a)(2)(A)).

*Reappointment:* No limitations.

*Staggered:* Yes. “Members of the Commission shall serve for a single term of 6 years, except that of the members first appointed (i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977; (ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and (iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.” (52 U.S.C. § 30106(2)(A)).

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<sup>88</sup> R. SAM GARRETT, CONG. RESEARCH SERV., FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 1 (Apr. 12, 2018), <https://fas.org/sgp/crs/misc/R45160.pdf>.



*Vacancy Rules:* “An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.” (52 U.S.C. § 30106(a)(2)(C)).

*Continuation Until Replacement:* Commissioners may continue to serve until a successor is appointed. “A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.” (52 U.S.C. § 30106(a)(2)(B)).

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members. . . .” (52 U.S.C. § 30106(c)(3)).

*Conflicts of Interest:* Appointed members cannot be elected officials or employees in the executive, legislative, or judicial branch of the Federal Government. Employees cannot engage in any other business or employment while sitting as a member on the commission. “Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.” (52 U.S.C. § 30106(c)(3)).

### B. Current Configuration<sup>89</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commission currently has four of six voting member slots filled:<sup>90</sup>

- Caroline C. Hunter (Confirmed<sup>91</sup> June 24, 2008; Term expired April 30, 2013).
- Ellen L. Weintraub (Confirmed March 18, 2003; Term expired April 30, 2009).

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<sup>89</sup> To determine information about the Board’s current configuration, I used information provided on the FEC’s website: <https://www.fec.gov/about/leadership-and-structure/commissioners/>.

<sup>90</sup> Dates of confirmation and term expirations found in the CRS report. R. SAM GARRETT, CONG. RESEARCH SERV., FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 2 (Apr. 12, 2018), <https://fas.org/sgp/crs/misc/R45160.pdf>.

<sup>91</sup> I could only find confirmation dates. I could not find dates of when the commissioners were sworn in.

- Matthew S. Petersen (Confirmed June 24, 2008; Term expired April 30, 2011).
- Steven T. Walther (Confirmed June 24, 2008; Term expired April 30, 2009).

2. *Does the Commission Have a Quorum?*

Yes. The Commission currently has a quorum.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the FEC's past commissioners and their dates in office to answer this question. The FEC's page has biographies of former commissioners, but these biographies do not list exact dates in office.

In 2008, the FEC lost its quorum and amended its rules to permit the execution of some duties.<sup>92</sup> The two remaining commissioners continued to meet publicly to discuss advisory opinions but could not vote on these opinions. The fact that the lack of a quorum occurred in the midst of an election caused significant concerns.<sup>93</sup> The Democratic National Committee brought a lawsuit against the FEC for declaratory relief arising from concerns violations of election laws by Senator John McCain, but the Court held that the lack of quorum did not eliminate jurisdictional limitations on judicial review of campaign violations.<sup>94</sup> In another case, a district court held that the plaintiff was still required to exhaust administrative remedies with the FEC before filing an action.<sup>95</sup>

4. *Is there a Quorum Problem Approaching?*

The FEC currently has a bare-minimum quorum and all four members have been in hold-over status for at least five years. In April 2018, the Congressional Research Service produced a report on the FEC's policymaking quorum describing concerns about the potential future loss of policymaking quorum.<sup>96</sup> On April 19, 2018 Chair Caroline Hunter announced her intent to ask the Office of General Counsel to

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<sup>92</sup> R. SAM GARRETT, CONG. RESEARCH SERV., FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 7 (Apr. 12, 2018), <https://fas.org/sgp/crs/misc/R45160.pdf>.

<sup>93</sup> Martin Kady II, *FEC Fight Leaves Candidates Hanging*, POLITICO (Apr. 23, 2008), <https://www.politico.com/story/2008/04/fec-fight-leaves-candidates-hanging-009807>.

<sup>94</sup> Democratic National Comm. v. Fed. Election Comm'n, 552 F. Supp. 2d 20 (2008).

<sup>95</sup> Gravel v. Am. Leadership Project, 249 F.R.D. 264 (2008).

<sup>96</sup> R. SAM GARRETT, CONG. RESEARCH SERV., FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF (Apr. 12, 2018), <https://fas.org/sgp/crs/misc/R45160.pdf>.

prepare a memorandum about what matters the FEC may consider without a quorum.<sup>97</sup>

5. *Has the President Advanced Nominees?*

President Trump has advanced a single nominee to the FEC. However, no other nominations have been made since 2013. The Senate has done nothing to advance this nominee.

- James E. Trainor (PN1425): Nominated 01/08/2018; Received in the Senate on 01/08/2018.
- James E. Trainor (PN1024): Nominated 09/14/2017; Returned to the President on 01/03/2018.

## **XI. FEDERAL LABOR RELATIONS AUTHORITY**

### **A. Statutory Characteristics**

1. *Commission Membership*

3 members appointed by the President by and with the advice and consent of the Senate. “The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party.” (5 U.S.C. § 7104(a)). “Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” (5 U.S.C. § 7104(b)).

2. *Party Balancing Requirements*

Yes. “The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party.” (5 U.S.C. § 7014(a)).

3. *For-Cause Protections*

Yes. “[Members] may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” (5 U.S.C. § 7104(b)).

4. *Chair Appointment and Removal Rules*

*Appointment:* “The President shall designate one member to serve as Chairman of the Authority.” (5 U.S.C. § 7104(b)).

*Term Length:* Unspecified.

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<sup>97</sup> Memorandum from Chair Caroline C. Hunter, Federal Election Committee (Apr. 19, 2018), [https://www.fec.gov/resources/cms-content/documents/mtgdoc\\_18-16-a.pdf](https://www.fec.gov/resources/cms-content/documents/mtgdoc_18-16-a.pdf).

*Removal:* President may remove for cause. “[Members] may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” (5 U.S.C. § 7104(b)).

5. *Quorum Rules*

*Statutory Requirements:* No.

*Rule Requirements:* No.

*Quorum Rule:* Marshall Breger and Gary Edles state, “Two members constitute a quorum for purposes of taking FLRA action.”<sup>98</sup> Their observation appears consistent with various FLRA policy memos that have been released when the commission has lacked a quorum.<sup>99</sup>

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

6. *Term Rules*

*Length:* 5 years. “A member of the Authority shall be appointed for a term of 5 years.” (5 U.S.C. § 7104(c)).

*Reappointment:* No limitations.

*Staggered:* The statute codified in the U.S. Code does not specify staggered terms. However, according to the ACUS Sourcebook<sup>100</sup>, the Civil Service Miscellaneous

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<sup>98</sup> Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1261 (2000).

<sup>99</sup> FEDERAL LABOR RELATIONS AUTHORITY, CASE PROCESSING WHILE THE AUTHORITY COMPONENT HAS ONE MEMBER 1 (2013) (“The Authority’s current status affects only one aspect of the Authority’s functioning—issuing final decisions. With one Member, the Authority lacks a quorum.”); U.S. GAO, NO. 128711, FEDERAL CIVILIAN PERSONNEL: EFFECTS OF UNCONFIRMED MEMBERS AT THE FEDERAL LABOR RELATIONS AUTHORITY 4 (1985), <https://www.gao.gov/assets/210/208063.pdf> (“Therefore, since the two members of the [FLRA] currently serve legally and the law allows the agency to operate with only two members, the lacks of a third member of the Authority does not affect the legal ability of the [FLRA] to perform its statutory responsibility. . . . In the absence of additional statutory authority, the [FLRA] would not be able to issue decisions with only one legal member.” (citing *FTC v. Flotill Prods.*, 389 U.S. 179, 183 (1967))).

<sup>100</sup> DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, AGENCY STRUCTURE CODEBOOK 115 n.80 (2012),

Amendments Act of 1983 resulted in staggered terms. Civil Service Miscellaneous Amendments Act of 1983, Pub. L. 98-224, 98 Stat. 47 § 3(b).

*Vacancy Rules*: “An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced.” (5 U.S.C. § 7104(c)).

*Continuation Until Replacement*: Permitted, but with limitations. “The term of any member shall not expire before the earlier of (1) the date on which the member's successor takes office, or (2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.” (5 U.S.C. § 7104(c)(1)–(2)).

#### 7. *Misc. Appointment Requirements*

*Conflict of Interest*: “No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.” (5 U.S.C. § 7104(a)).

### B. Current Configuration<sup>101</sup>

#### 1. *What is the Current Composition of the Commission?*

- Colleen Duffy Kiko (Appointed December 11, 2017; Term expires July 29, 2022)
- Ernest DuBester (Appointed December 11, 2017; Term expires July 1, 2019).
- James T. Abbott (Appointed ~November 16, 2017; Term expires July 1, 2020).

#### 2. *Does the Commission Have a Quorum?*

Yes. The Commission currently has all three of its positions filled.

#### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the FLRA's past commissioners and their dates in office to answer this question.

In FY2014, the FLRA lacked a quorum, resulting in a backlog of cases.<sup>102</sup>

In a 2008 case, the U.S. District Court for the Eastern District of Virginia denied jurisdiction in a case involving a First Amendment dispute between a former federal

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<sup>101</sup> To determine information about the Board's current configuration, I used information provided on the CSB's website: <https://www.csb.gov/about-the-csb/board-members>.

<sup>102</sup> U.S. FEDERAL LABOR RELATIONS AUTHORITY, PERFORMANCE AND ACCOUNTABILITY REPORT 14 (2015), [https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/PAR/FY15%20FLRA%20PAR\\_11.16.15.pdf](https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/PAR/FY15%20FLRA%20PAR_11.16.15.pdf).

employee and the government because, even though the FLRA lacked a quorum, because the FLRA had jurisdiction over the dispute.<sup>103</sup>

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. Assuming all member stay until their terms expire, the earliest a quorum problem would result is July 1, 2020 when James T. Abbott's term expires. However, members can continue to serve some amount of time while awaiting appointment of a successor.

5. *Has the President Advanced Nominees?*

President Trump has nominated three nominees and the Senate has confirmed all three nominees. The Senate did not hear President Obama's two 2015 nominees.

- Ernest W. Dubester (PN1076): Nominated 10/03/2017; Confirmed on 11/16/2017.
- Colleen Kiko (PN922): Nominated 09/05/2016; Confirmed on 11/16/2017.
- James Thomas Abbott (PN921): Nominated 09/05/2017; Confirmed on 11/16/2017.
- Patrick Pizzella (PN950): Nominated 11/19/2015; Returned to the President on 01/03/2017.
- Carol Waller Pope (PN364): Nominated 04/14/2015; Returned to the President on 01/03/2017.

## **XII. FEDERAL MARITIME COMMISSION**

### **A. Statutory Characteristics**

1. *Commission Membership*

5 Commissioners appointed by the President by and with the advice and consent of the Senate. "The Commission is composed of 5 Commissioners, appointed by the President by and with the advice and consent of the Senate." (46 U.S.C. § 301(b)(1)).

2. *Party Balancing Requirements*

Yes. "Not more than 3 Commissioners may be appointed from the same political party." (46 U.S.C. § 301(b)(1)).

3. *For-Cause Protections*

Yes. "A President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office." (46 U.S.C. § 301(b)(5)).

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. "The President shall designate one of the Commissioners as Chairman." (46 U.S.C. § 301(c)(1)).

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<sup>103</sup> Marshall v. Seekins, No. 3:08-CV-471, 2008 WL 4463626, \*7-\*8 (Sept. 30, 2018).

*Term Length:* Unspecified.

*Removal:* President may remove for cause. “A President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office.” (46 U.S.C. § 301(b)(5)).

5. *Quorum Rules*

*Statutory Requirements:* Yes. (46 U.S.C. § 302).

*Rule Requirements:* Yes. (46 C.F.R. § 501.2).

*Quorum Rule:* The statute establishes voting requirements. The regulations requires the presence of two members at the meeting. The statute requires a majority of commissioners serving on the Commission, but the regulations contemplate a minimum of two members to conduct business. “A vacancy or vacancies in the membership of the Federal Maritime Commission do not impair the power of the Commission to execute its functions. The affirmative vote of a majority of the Commissioners serving on the Commission is required to dispose of any matter before the Commission.” (46 U.S.C. § 302)). The Commissions’ regulations state, “For purposes of holding a formal meeting for the transaction of the business of the Commission, the actual presence of two Commissioners shall be sufficient. Proxy votes of absent members shall be permitted.” (46 C.F.R. § 501.2). However, Chairman Michael Khouri of the FMC has suggested that the “FMC could effectively operate with a single commissioner, if necessary, since there are no quorum constraints within its charter,” which suggests that the FMC—or at least its chair—does not view the two-member meeting requirement as a preventative for the FMC to take action.”<sup>104</sup>

It is worth noting that the Commission’s regulations formerly required a three-member quorum. “A vacancy in the Commission, so long as there shall be three Commissioners in office, shall not impair the power of the Commission to execute its functions. Any three Commissioners in office constitute a quorum for the transaction of the business of the Commission, and the affirmative votes of any three Commissioners shall be sufficient for the disposition of any matter which may come before the Commission.” (45 C.F.R. § 501.3 (1996)). I am not certain when this provision was amended, but that information may be helpful for determining why the rule was amended.

*Progressive Quorum:* No. I coded no despite Chairman Michael Khouri’s contrary suggestion.

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<sup>104</sup> Chris Gillis, *FMC Affirms Adequacy of Trump’s FY 2019 Budget Request*, AMERICAN SHIPPER (Mar. 15, 2018), <https://www.americanshipper.com/main/news/fmc-affirms-adequacy-of-trumps-fy-2019-budget-requ-70826.aspx>.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

#### 6. *Term Rules*

*Length:* 5 years. “The term of each Commissioner is 5 years. . . .” (46 U.S.C. § 302(b)(3)).

*Reappointment:* Two-term limit. “Except as provided in paragraph (3), no individual may serve more than 2 terms.” (46 U.S.C. § 302(b)(3)).

*Staggered:* No. The statute formerly required staggered terms. Codification of Title 46, Pub. L. 109-304, 120 Stat. 1485 § 301 (Oct. 6, 2006). It was amended in 2014 to remove that requirement. Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. 113-281, 128 Stat. 3022 § 403(a)

*Vacancy Rules:* “An individual appointed to fill a vacancy is appointed only for the unexpired term of the individual being succeeded. An individual appointed to fill a vacancy may serve 2 terms in addition to the remainder of the term for which the predecessor of that individual was appointed.” (46 U.S.C. § 302(b)(3)).

*Continuation Until Replacement:* Permitted, but with limitations. “When the term of a Commissioner ends, the Commissioner may continue to serve until a successor is appointed and qualified, but for a period not to exceed one year.” (46 U.S.C. § 301(b)(2)).

#### 7. *Misc. Appointment Requirements*

*Conflicts of Interest:* “(A) Limitation on relationships with regulated entities.--A Commissioner may not have a pecuniary interest in, hold an official relation to, or own stocks or bonds of any entity the Commission regulates under chapter 401 of this title. (B) Limitation on other activities.--A Commissioner may not engage in another business, vocation, or employment.” (46 U.S.C. § 301(b)(4)).

### B. Current Configuration<sup>105</sup>

#### 1. *What is the Current Composition of the Commission?*

- Michael A. Kouri (Appointed most recently in June 2016; Term expires)
- Rebecca F. Dye (Appointed most recently in June 2016; Term expires June 30, 2020).

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<sup>105</sup> To determine information about the Board’s current configuration, I used information provided on the FMC’s website: [https://www.fmc.gov/bureaus\\_offices/commissioners.aspx](https://www.fmc.gov/bureaus_offices/commissioners.aspx).



2. *Does the Commission Have a Quorum?*

Yes. Because the Commission’s quorum requirements only require the affirmative vote of “a majority of the Commissioners serving on the Commission” and the presence of two members, the Commission should always have a quorum so long as it has two members. (46 U.S.C. § 302).

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the FMC’s past commissioners and their dates in office to answer this question. The FMC’s page has biographies of former commissioners, but these biographies do not list exact dates in office.

4. *Is there a Quorum Problem Approaching?*

There does not appear to be a quorum problem approaching. However, the Commission has three vacancies.

5. *Has the President Advanced Nominees?*

President Trump has not nominated anyone to the Federal Maritime Commission. The last person nominated to the Commission was Michael A. Khouri in 2016 (PN1532).

### **XIII. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

#### **A. Statutory Characteristics**

1. *Commission Membership*

5 members appointed by the President by and with the advice and consent of the Senate. “The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter.” (30 U.S.C. § 823).

2. *Party Balancing Requirements*

None.

3. *For-Cause Protections*

Yes. “Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” (30 U.S.C. § 823(b)(1)).

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson from among the members of the Commission. “The President shall designate one of the members of the Commission to serve as Chairman.” (30 U.S.C. § 823(a)).

*Term Length:* Unspecified.

*Removal:* President may remove for cause. “Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” (30 U.S.C. § 823(b)(1)).

## 5. *Quorum Rules*

*Statutory Requirements:* No.

*Rule Requirements:* No.

*Quorum Rule:* Three members appears to constitute a quorum. I cannot find codified authority for this rule. However, the FMSHRC’s website currently states:

As of August 30, 2018, the terms of Commissioners William Althen and Robert F. Cohen, Jr., expire. As a result, the Commission will lack a quorum of members and therefore will be without authority to take substantive actions in any of the cases pending before it until at least one additional Commissioner is both nominated by the President and confirmed by the Senate.

However, in accordance with the statute, the remaining two Commissioners are authorized to affirmatively vote to grant review of any petition for discretionary review filed with the Commission. They are also authorized by the statute to sua sponte vote to grant review of any Administrative Law Judge decision regardless of whether a petition for discretionary review has been filed.

Until the Commission again has a quorum of members, all newly filed motions to reopen default cases will be acted upon by the Chief Administrative Law Judge, who may assign the default cases to Commission Judges as he sees fit.<sup>106</sup>

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

## 6. *Term Rules*

*Length:* 6 years. “The terms of the members of the Commission shall be six years . . . .” (30 U.S.C. § 823(b)(1)).

*Reappointment:* No limitations.

*Staggered:* “[M]embers of the Commission first taking office after November 9, 1977, shall serve, as designated by the President at the time of appointment, one for

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<sup>106</sup> *General Notice*, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, <https://www.fmsihrc.gov/> (last visited Oct. 30, 2018).

a term of two years, two for a term of four years and two for a term of six years. . . .” (30 U.S.C. § 823(b)(1)(A)).

*Vacancy Rules:* 6 “[A] vacancy caused by the death, resignation, or removal of any member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.” (30 U.S.C. § 823(b)(1)(B)).

Continuation Until Replacement: None.

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* President must appoint “qualified” individuals. “The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter.” (30 U.S.C. § 823(a)).

### B. Current Configuration<sup>107</sup>

#### 1. *What is the Current Composition of the Commission?*

- Mary Lu Jordan
- Michael G. Young

#### 2. *Does the Commission Have a Quorum?*

The Commission currently lacks a quorum because it only has two members. The terms of Commissioners William Althen and Robert F. Cohen, Jr., expired on August 30, 2018.<sup>108</sup>

#### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the FMSHRC’s past commissioners and their dates in office to answer this question.

#### 4. *Is there a Quorum Problem Approaching?*

The FMSHRC currently has a quorum problem. On October 16, 2018, President Trump announced his intent to nominate two individuals to the Commission.<sup>109</sup>

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<sup>107</sup> To determine information about the Board’s current configuration, I used information provided on the FMSHRC’s website <https://www.fmshrc.gov/about/commissioners>.

<sup>108</sup> *General Notice*, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, <https://www.fmshrc.gov/> (last visited Oct. 30, 2018).

<sup>109</sup> *The President Announces Intent to Nominate Commissioners*, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION (Oct. 16, 2018), <https://www.fmshrc.gov/about/news/president-announces-intent-nominate-commissioners>.

5. *Has the President Advanced Nominees?*

President Trump has advanced one nominee and announced his intent to nominate two more individuals. The Senate did not consider President Obama's 2016 nominee.

- Marco M. Rajkovich Jr. (PN1389): Nominated 01/08/2018; Placed on Senate Calendar on 03/14/2018.
- Patrick M. Nakamura (PN1919): Nominated 11/29/2016; Returned to the President on 01/03/2017.

## XIV. FEDERAL TRADE COMMISSION

### A. Statutory Characteristics

1. *Commission Membership*

5 members appointed by the President by and with the advice and consent of the Senate. "A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate." (15 U.S.C. § 41).

2. *Party Balancing Requirements*

Yes. "Not more than three of the Commissioners shall be members of the same political party." (15 U.S.C. § 41).

3. *For-Cause Protections*

Yes. "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." (15 U.S.C. § 41).

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. "The President shall choose a chairman from the Commission's membership." (15 U.S.C. § 41).

*Term Length:* Unspecified.

*Removal:* President may remove for cause. "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." (15 U.S.C. § 41).

5. *Quorum Rules*

*Statutory Requirements:* No.

*Rule Requirements:* Yes.

*Quorum Rule:* Defines quorum to require a majority of members in office. "A majority of the members of the Commission in office and not recused from

participating in any matter . . . constitutes a quorum for the transaction of business in that matter. (16 C.F.R. § 4.14). In *FTC v. Flotill Products, Inc.*, the Supreme Court held that a majority of members—three members—constitutes a quorum.<sup>110</sup> The FTC has held that this current rule overrides the ruling in *Flotill Products* and, therefore, two commissioners may act as a quorum.<sup>111</sup>

*Progressive Quorum:* Quorum rule only requires majority of members in office. “A majority of the members of the Commission in office and not recused from participating in any matter . . . constitutes a quorum for the transaction of business in that matter. (16 C.F.R. § 4.14).

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* Yes. In February 2018, the FTC published a rule that allows it to “delegate[] its functions, subject to certain limitations, when no quorum is available for the transaction of business.” (16 C.F.R. § 0.7).<sup>112</sup>

## 6. Term Length

*Length: 7 Years.* “The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. . . .” (15 U.S.C. § 41).

*Reappointment:* No limitations.

*Staggered:* Yes. “The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26,

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<sup>110</sup> 389 U.S. 179, 183 (1967).

<sup>111</sup> *In the Matter of 1-800 Contacts, Inc.*, No. 9372, 2018 WL 1028985 (F.T.C.), at \*21 (Feb. 9, 2018) (“1-800’s three-member ‘quorum’ argument is meritless. *See* RAB 46. ‘The Federal Trade Commission Act does not specify the number of Commissioners who may constitute a quorum,’ and therefore the Commission can establish a quorum by regulation. *FTC v. Flotill Prod.*, 389 U.S. 179, 181, 189-90 (1967). When *Flotill* was decided, the FTC rule expressly required three commissioners for a quorum. *Id.* at 181-82 (citing 16 C.F.R. § 1.7 (1966)). The Commission’s current rule - 16 C.F.R. § 4.14(b) - provides that a ‘majority’ of the commissioners in office is sufficient to transact business. Further, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), is irrelevant: the Taft-Hartley Act established, by statute, a quorum of three NLRB members. *Id.* at 676.”)

<sup>112</sup> *Delegation of Limited Authority*, 85 FED. REG. 7109 (Feb. 20, 2018), [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2018/02/delegation\\_of\\_ltd\\_authority\\_frn\\_2-20-18.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2018/02/delegation_of_ltd_authority_frn_2-20-18.pdf).

1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. . . .” (15 U.S.C. § 41).

*Vacancy Rules:* “Any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed.” (15 U.S.C. § 41).

*Continuation Until Replacement:* Permitted. “That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified.” (15 U.S.C. § 41).

#### 7. *Misc. Appointment Requirements*

*Conflict of Interest:* “No Commissioner shall engage in any other business, vocation, or employment.” (15 U.S.C. § 41).

### B. Current Configuration<sup>113</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commission currently has five of five slots filled:

- Joseph J. Simons (Appointed May 1, 2018; Term expires September 25, 2024).
- Noah Joshua Phillips (Appointed May 2, 2018; Term expires September 25, 2023).
- Rohit Chopra (Appointed May 2, 2018; Term expires September 25, 2019).
- Rebecca Kelly Slaughter (Appointed May 2, 2018; Term expires September 25, 2022).
- Christine S. Wilson (Appointed September 26, 2018; Term expires September 25, 2025).

#### 2. *Does the Commission Have a Quorum?*

Yes. The Commission currently has all of its slots filled.

#### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

Current interpretation of FTC rules ensure that the FTC will always have a quorum. However, if *Flotill* still applied, the FTC would have lost quorum between February 10, 2017 to April 27, 2018.

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<sup>113</sup> To determine information about the Board’s current configuration, I used information provided on the FTC’s website: [https://www.ftc.gov/system/files/attachments/commissioners/commissioner\\_chart08312018.pdf](https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart08312018.pdf).

In February 2018, the FTC amended its rules to allow it to delegate authority for limited purposes in case the agency found itself without a quorum.<sup>114</sup>

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem approaching. All five members were appointed in 2018.

5. *Has the President Advanced Nominees?*

President Trump has nominated five individuals and the Senate has confirmed all five individuals. The Senate did not consider President Obama's 2015 nominee.

- Rebecca Kelly Slaughter (PN1765): Nominated 04/09/2018; Confirmed on 04/26/2018.
- Christine S. Wilson (PN1535 and PN1534): Nominated 01/25/2018; Confirmed on 04/26/2018.
- Joseph Simons (PN1533): Nominated 01/25/2018; Confirmed on 04/26/2018.
- Noah Joshua Phillips (PN1532): Nominated 01/25/2018; Confirmed on 04/26/2018.
- Rohit Chopra (PN1531): Nominated 01/25/2018; Confirmed on 04/26/2018.
- Edith Ramirez (PN1008): Nominated 12/14/2015; Returned to the President on 01/03/2017.

## **XV. MERIT SYSTEMS PROTECTION BOARD**

### **A. Statutory Characteristics**

1. *Commission Membership*

3 members appointed by the President by and with the advice and consent of the Senate. "The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party." (5 U.S.C. § 1201).

2. *Party Balancing Requirements*

Yes. "[N]ot more than 2 [members] may be adherents of the same political party." (5 U.S.C. § 1201).

3. *For-Cause Protections*

Yes. "Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." (5 U.S.C. § 1202).

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<sup>114</sup> *FTC Amends Its Rules of Practice to Allow Delegation of Limited Authority When the Commission Lacks a Quorum*, FEDERAL TRADE COMMISSION (Feb. 9, 2018), <https://www.ftc.gov/news-events/press-releases/2018/02/ftc-amends-its-rules-practice-allow-delegation-limited-authority>.

4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board.” (5 U.S.C. § 1203(a)).

*Term Length:* Unspecified.

*Removal:* “Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” (5 U.S.C. § 1202).

5. *Quorum Rules*

*Statutory Requirements:* No.

*Rule Requirements:* Yes. (5 C.F.R. § 1200.3).

*Quorum Rule:* Establishes voting requirements. “The three Board members make decisions in all cases by majority vote except in circumstances described in paragraphs (b) and (c) of this section or as otherwise provided by law.” (5 C.F.R. § 1200.3(a)). “When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.” (5 C.F.R. § 1200.3(b)). The Board has also released guidance about its decisionmaking when it lacks a quorum.<sup>115</sup> The Federal Circuit has held that this regulation allows two-member panels to issue decisions when the members agree on the result.<sup>116</sup>

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* May refer the case to an ALJ for decision. “When due to a vacancy, recusal or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.” (5 C.F.R. § 1200.3(c)). “This section applies only when at least two Board members are in office.” (5 C.F.R. § 1200.3(e)).

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<sup>115</sup> U.S. MERIT SYSTEMS PROTECTION BOARD, FREQUENTLY ASKED QUESTIONS ABOUT THE LACK OF BOARD QUORUM (Jan. 25, 2017), <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1376654&version=1382029&application=ACROBAT>.

<sup>116</sup> Calhoun v. Dep’t of Arym, 845 F.3d 1176, 1179 (2017).



## 6. *Term Length*

*Length:* 7 years. “The term of office of each member of the Merit Systems Protection Board is 7 years.” (5 U.S.C. § 1202(a)).

*Reappointment:* “Any member appointed for a 7-year term may not be reappointed to any following term . . . .” (5 U.S.C. § 1202(c)).

Staggered: None.

*Vacancy Rules:* “A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term.” (5 U.S.C. § 1202(b)).

*Continuation Until Replacement:* Commissioners may continue to serve until the earlier of one-year after expiration of their term or a successor is appointed. “Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.” (5 U.S.C. § 1202(c)). “Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.” (5 U.S.C. § 1202(b)).

## 7. *Misc. Appointment Requirements*

*Expertise Requirements:* President must appoint “qualified” individuals. “The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board.” (5 U.S.C. § 1201).

*Conflict of Interests:* “No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.” (5 U.S.C. § 1201).

## B. Current Configuration<sup>117</sup>

### 1. *What is the Current Composition of the Commission?*

- Mark A. Robbins (May 2012; Term Expires March 1, 2018).

### 2. *Does the Commission Have a Quorum?*

The Commission does not have a quorum because it only has one of the required two members.

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<sup>117</sup> To determine information about the Board’s current configuration, I used information provided on the CSB’s website: <https://www.csb.gov/about-the-csb/board-members>.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the MSPB's past commissioners and their dates in office to answer this question. The MSPB website has a chart showing when members served but does not have the member's exact dates of service.<sup>118</sup>

4. *Is there a Quorum Problem Approaching?*

The Board has lacked a quorum since January 7, 2017.<sup>119</sup> If the Senate does not confirm President Trump's nominees, the MSPB will have no members.

As a result of the lack of quorum, the MSPB has changed certain policies about how it handles appeals.<sup>120</sup>

5. *Has the President Advanced Nominees?*

Yes. President Trump has nominated three individuals. However, the Senate Homeland Security and Governmental Affairs Committee is not planning to advance the three nominees.<sup>121</sup> The Senate did not consider President Obama's 2015 nominee.

- Julia Atkins Clark (PN2173): Nominated 06/20/2018; Hearings held on 07/19/2018.
- Andrew F. Maunz (PN1717): Nominated 03/12/2018; Hearings held on 07/19/2017.
- Dennis Dean Kirk (PN1716 and PN1715): Nominated 03/12/2018; Hearings held on (07/19/2018).
- Mark Philip Cohen (PN634): Nominated 07/08/2015; Returned to the President on 01/03/2017.

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<sup>118</sup> *Board Members' Service January 1979 – Present*, U.S. MERIT SYSTEMS PROTECTION BOARD (Dec. 31, 2017), <https://www.mspb.gov/About/BoardTermsTimeChart%20Dec2017.pdf>.

<sup>119</sup> *Recent Board Members*, U.S. MERIT SYSTEMS PROTECTION BOARD, <https://www.mspb.gov/About/recentmembers.htm> (last visited Oct. 30, 2018) (showing that Susan Tsui Grundmann left service on January 7, 2017 and Anne M. Wagner left service on February 28, 2015).

<sup>120</sup> *MSPB Shows Signs of Strain Due to Lack of Quorum*, FEDWEEK (Oct. 30, 2018), <https://www.fedweek.com/fedweek/mspb-shows-signs-of-strain-due-to-lack-of-quorum/> (The agency said that ordinarily only the three-member board can grant an employee's request to withdraw an appeal once the record on the appeal has been closed. However, it said that policy needs to change "in light of the unprecedented, lengthy period of time that the board has been without a quorum and therefore unable to rule" on such requests.).

<sup>121</sup> Nicole Ogrysko, *For the First Time Ever, MSPB Could Face a Future with No Board Members*, FEDERAL NEWS NETWORK (Oct. 17, 2018), <https://federalnewsnetwork.com/workforce-rights/governance/2018/10/for-the-first-time-ever-mspb-could-face-a-future-with-no-board-members/>.

## XVI. NATIONAL CREDIT UNION ADMINISTRATION

### A. Statutory Characteristics

#### 1. *Commission Membership*

3 members appointed by the President by and with the advice and consent of the Senate. (“The Board shall consist of three members, who are broadly representative of the public interest, appointed by the President, by and with the advice and consent of the Senate.” (12 U.S.C. § 1752a(b)(1)).

#### 2. *Party Balancing Requirements*

Yes. “Not more than two members of the Board shall be members of the same political party.” (12 U.S.C. § 1752a(b)(1)).

#### 3. *For-Cause Protections*

None.

#### 4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “In appointing the members of the Board, the President shall designate the Chairman.” (12 U.S.C. § 1752a(b)).

*Term Length:* Unspecified.

*Removal:* Unspecified.

#### 5. *Quorum Rules*

*Statutory Requirements:* Yes. (12 U.S.C. § 1752a(d)).

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum as a majority of the Board. “A majority of the Board shall constitute a quorum.” (12 U.S.C. § 1752a(d)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

#### 6. *Term Rules*

*Length:* 6 years. “The term of office of each member of the Board shall be six years.” (12 U.S.C. § 1752a(c)).

*Reappointment:* Board members cannot be appointed to succeed themselves. “Board members shall not be appointed to succeed themselves except the initial

members appointed for less than a six-year term may be reappointed for a full six-year term and future members appointed to fill unexpired terms may be reappointed for a full six-year term.” (12 U.S.C. § 1752a(c)).

*Staggered:* Yes. “The term of office of each member of the Board shall be six years, except that the terms of the two members, other than the Chairman, initially appointed shall expire one upon the expiration of two years after the date of appointment, and the other upon the expiration of four years after the date of appointment.” (12 U.S.C. § 1752a(c)).

*Vacancy Rules:* The statute seems to anticipate that appointments to unexpired terms will serve for the unexpired portion of the term. “[F]uture members appointed to fill unexpired terms may be reappointed for a full six-year term.” (12 U.S.C. § 1752a(c)).

*Continuation Until Replacement:* Members may continue to serve until a successor has been appointed. “Any Board member may continue to serve as such after the expiration of said member’s term until a successor has qualified.” (12 U.S.C. § 1752a(c)).

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “In considering appointments to the Board under paragraph (1), the President shall give consideration to individuals who, by virtue of their education, training, or experience relating to a broad range of financial services, financial services regulation, or financial policy, are especially qualified to serve on the Board.” (12 U.S.C. § 1752a(b)(2)(A)).

*Conflict of Interest:* “Not more than one member of the Board may be appointed to the Board from among individuals who, at the time of the appointment, are, or have recently been, involved with any insured credit union as a committee member, director, officer, employee, or other institution-affiliated party.” (12 U.S.C. § 1752a(b)(2)(B)).

### B. Current Configuration<sup>122</sup>

#### 1. *What is the Current Composition of the Commission?*

The Administration currently has 2 of 3 slots filled:

- J. Mark McWatters (Appointed August 26, 2014; Term expired August 2, 2019).
- Rick Metsger (Appointed August 23, 2013; Term expired August 2, 2017).

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<sup>122</sup> To determine information about the Board’s current configuration, I used information provided on the CSB’s website: <https://www.csb.gov/about-the-csb/board-members>.

2. *Does the Commission Have a Quorum?*

Yes. Regardless of one's interpretation of the statute, the Administration currently has a quorum.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the NCUA's past commissioners and their dates in office to answer this question.

4. *Is there a Quorum Problem Approaching?*

The Administration could soon suffer from a quorum problem if Rick Metsger retires. His term expired in August 2, 2017, and his retirement would leave J. Mark McWatters as the Administration's sole member. However, this assumes that the statutory quorum requires a majority of possible members and not a majority of currently sitting members.

5. *Has the President Advanced Nominees?*

President Trump has nominated Rodney Hood to fill the NCUA's current vacancy. The Senate did not act on President Obama's 2016 nominee.

- Rodney Hood (PN2169): Nominated 06/20/2018; Received in the Senate on 06/20/2018.
- John A. Herrera (PN1626): Nominated 07/13/2016; Returned to the President on 01/03/2017.

## **XVII. NATIONAL LABOR RELATIONS BOARD**

### **A. Statutory Characteristics**

1. *Commission Membership*

5 members appointed by the President by and with the advice and consent of the Senate. "The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947, is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate." (29 U.S.C. § 153(a)).

2. *Party Balancing Requirements*

No. However, the *ACUS Sourcebook* suggests that "by tradition no more than three members are from the same party."<sup>123</sup>

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<sup>123</sup> DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, AGENCY STRUCTURE CODEBOOK 167 (2012), <https://www.vanderbilt.edu/csdi/ACUSB.pdf> (citing Henry B. Houge, Maureen Bearden & Terrence L. Lisbeth, Cong. Research Serv., RL30959, Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations (2008)).

3. *For-Cause Protections*

Yes. “Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” (29 U.S.C. § 153(a)).

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “The President shall designate one member to serve as Chairman of the Board.” (29 U.S.C. § 153(a)).

*Term Length:* Unspecified.

*Removal:* President may remove for cause. “Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” (29 U.S.C. § 153(a)).

5. *Quorum Rules*

*Statutory Requirements:* Yes. (29 U.S.C. § 153(b)).

*Rule Requirements:* Yes. (29 C.F.R. § 102.178–182). The Board has a whole subsection for how the agency should operate without a quorum.

*Quorum Rule:* Defines quorum to require three members. “The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.” (29 U.S.C. § 153(b)).

The Supreme Court has reviewed the interplay between the delegation provision and the quorum provision in *New Process Steel, L.P., v. NLRB*.<sup>124</sup> In that case, the Court held that the NLRB must maintain a membership of three in order for the delegation to remain valid, thereby preventing the Board from delegating its power to the two remaining members on the Board.<sup>125</sup>

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* Yes. “The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency

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<sup>124</sup> 560 U.S. 674 (2010).

<sup>125</sup> *Id.* at 679–83.

operations should continue to the greatest extent permitted by law.” (29 C.F.R. § 102.178).

#### 6. *Term Length*

*Length:* 5 years. “Their successors, and the successors of the other members, shall be appointed for terms of five years. . . .” (29 U.S.C. § 153(a)).

*Reappointment:* Statute explicitly permits reappointment. “Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.” (29 U.S.C. § 154).

*Staggered:* Yes. “Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years.” (20 U.S.C. § 153(a)).

*Vacancy Rules:* “[A]ny individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed.” (29 U.S.C. § 153(a)).

Continuation Until Replacement: None.

#### 7. *Term-Limit Rules*

None.

#### 8. *Misc. Appointment Requirements*

*Conflicts of Interest:* “Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.” (29 U.S.C. § 154(a)).

### B. Current Configuration<sup>126</sup>

#### 1. *What is the Current Composition of the Commission?*

The Board currently has four of five members:

- John F. Ring (Appointed April 16, 2018; Term expires December 16, 2022).
- William J. Emanuel (Appointed August 10, 2017; Term expires August 27, 2021).
- Marvin E. Kaplan (Appointed August 10, 2017; Term expires August 27, 2020).
- Lauren McFerran (Appointed December 17, 2014; Term expires December 16, 2019).

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<sup>126</sup> To determine information about the Board’s current configuration, I used information provided on the NLRB’s website: <https://www.nlr.gov/who-we-are/board/members-nlr-1935>.

2. *Does the Commission Have a Quorum?*

Yes.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Yes. Since 2000, the Board has lacked a quorum on the following occasions:

- November 23, 2002 to December 16, 2002 (1 Member)
- August 28, 2005 to August 30, 2005 (2 Members)
- January 1, 2008 to March 26, 2010 (2 Members)
- January 1, 2012 to January 8, 2012 (2 Members)
- August 2, 2013 to August 4, 2013 (2 Members)

The NLRB has probably had one of the most significant quorum problems in recent history. The NLRB's enabling act authorizes it to delegate the full power of the Board to a subgroup of three members, who may act with a quorum of two members. 29 U.S.C. § 153(b). In December 2007, the NLRB had four members, with two members intending to retire. On December 20, 2007, the NLRB's four members delegated all authority to a group of three members, which included the two members who would remain on the Board and one member who planned to retire.<sup>127</sup> In the minutes for its meeting, the Board cited 29 U.S.C. § 153(b) and an Office of Legal Counsel memorandum as the source of its power to confer the Board's authority to the subgroup.<sup>128</sup> Indeed, in 2003, the Office of Legal Counsel opined that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained."<sup>129</sup> The two members retired. The Board lacked its statutory three-person quorum from January 1, 2008 to March 26, 2010, but the two remaining members continued to exercise the Board's authority as members of the subgroup.

In *New Process Steel, L.P. v. NLRB*, the Supreme Court held that the subgroup of two members could not exercise the full authority of the Board once the subgroup's membership fell below three members.<sup>130</sup> Writing for the Court, Justice Stevens stated, "It is undisputed that the first sentence of [§ 153(b)] authorized the Board to delegate its powers to the three-member group effective on December 28, 2007, and the last sentence authorized two members of that group to act as a quorum of the group during the next three days if, for example, the third member had to recuse

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<sup>127</sup> *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676–77 (2010).

<sup>128</sup> *Id.*

<sup>129</sup> M. Edward Whelan, III, *NLRB Quorum Requirements* (Mar. 4, 2003), <https://www.justice.gov/file/18931/download>.

<sup>130</sup> *Id.* at 679.



himself from a particular matter.”<sup>131</sup> He concluded that the only logical reading of the statute required the subgroup to maintain a membership of three members while it exercised the Board’s authority.<sup>132</sup> Most notably, Justice Stevens noted that the NLRB’s reading of the statute would render the statute’s quorum requirements insignificant:

The contrary reading, on the other hand, allows two members to act as the Board *ad infinitum*, which dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention. That reading also makes the three-member requirement in the delegation clause of vanishing significance, because it allows a *de facto* delegation to a two-member group, as happened in this case. Under the Government’s approach, it would satisfy the statute for the Board to include a third member in the group for only one minute before her term expires; the approach gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board’s full power be vested in no fewer than three members. Hence, while the Government’s reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of § 3(b)’s provisions functionally void.

Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language. Congress instead imposed the requirement that the Board delegate authority to no fewer than three members, and that it have three participating members to constitute a quorum. Those provisions are at best an unlikely way of conveying congressional approval of a two-member Board. Indeed, had Congress wanted to provide for two members alone to act as the Board, it could have maintained the NLRA’s original two-member Board quorum provision, see 29 U.S.C. § 153(b) (1946 ed.), or provided for a delegation of the Board’s authority to groups of two. The Rube Goldberg-style delegation mechanism employed by the Board in 2007—delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group—is surely a bizarre way for the Board to achieve the authority to decide cases with only two members. To conclude that Congress intended to authorize such a procedure to contravene the three-member Board quorum, we would need some evidence of that intent.<sup>133</sup>

The NLRB delegation story is an interesting example of how commissions resist losing quorum. The four remaining members used existing structural features—the

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 680.

<sup>133</sup> *Id.* at 681–82.

statutory authorization to delegate the Board’s authority to a group of three members—to evade the quorum requirements.

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. Assuming that all members stay until the ends of their terms, there will not be a quorum problem until August 27, 2020, when Marvin E. Kaplan’s term expires.

5. *Has the President Advanced Nominees?*

President Trump has nominated and the Senate has confirmed three of President Trump’s nominees. The Senate did not take action on President Obama’s 2016 nominee.

- Mark Gaston Pearce (PN2475): Nominated 08/28/2018; Received by Senate on 08/28/2018.
- John F. King (PN1443): Nominated 01/18/2018; Confirmed on 04/11/2018.
- William J. Emanuel (PN725): Nominated 06/29/2017; Confirmed on 09/25/2017.
- Marvin Kaplan (PN681): Nominated 06/20/2017; Confirmed on 08/02/2017.
- Kent Yoshiho Hirozawa (PN1397): Nominated 04/28/2016; Returned to the President on 01/03/2017

## **XVIII. NATIONAL MEDIATION BOARD**

### **A. Statutory Characteristics**

1. *Commission Membership*

3 members appointed by the President by and with the advice and consent of the Senate. “There is established, as an independent agency in the executive branch of the Government, a board to be known as the ‘National Mediation Board’, to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party.” (45 U.S.C. § 154).

2. *Party Balancing Requirements*

Yes. “[N]ot more than two [members] shall be of the same political party.” (45 U.S.C. § 154).<sup>134</sup>

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<sup>134</sup> The *ACUS Sourcebook* suggests that some scholars think that the NMB does not require party balancing. DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, AGENCY STRUCTURE CODEBOOK 167 n.92 (2012), <https://www.vanderbilt.edu/csdi/ACUSB.pdf>.

3. *For-Cause Protections*

Yes. “A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.” (45 U.S.C. § 154).

4. *Chair Appointment and Removal Rules*

*Appointment:* Chairperson elected by the other members. “The Mediation Board shall annually designate a member to act as chairman.” (45 U.S.C. § 154).

*Term Length:* One year. “The Mediation Board shall annually designate a member to act as chairman.” (45 U.S.C. § 154).

*Removal:* President may remove for cause. “A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.” (45 U.S.C. § 154).

5. *Quorum Rules*

*Statutory Requirements:* Yes. (45 U.S.C. § 154).

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum to require two members. “Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board.” (45 U.S.C. § 154).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

6. *Term Length*

*Length:* 3 years. “The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed. . . .” (45 U.S.C. § 154).

*Reappointment:* No limitations.

*Staggered:* None.

*Vacancy Rules:* “[A]ny member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.” (45 U.S.C. § 154).

*Continuation Until Replacement:* Permitted “Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.” (45 U.S.C. § 154).

7. *Misc. Appointment Requirements*

*Conflict of Interests:* “No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.” (45 U.S.C. § 154).

B. Current Configuration<sup>135</sup>

1. *What is the Current Composition of the Commission?*

The Board currently has three of three positions filled.

- Kyle Fortson (Appointed November 13, 2017; Term expires July 1, 2019).
- Gerald W. Fauth, III (Appointed November 2, 2017; Term expires July 1, 2020).
- Linda A. Puchala (Confirmed May 21, 2009; Term expires July 1, 2018).

2. *Does the Commission Have a Quorum?*

Yes. The Commission currently has all three positions filled.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the NMB’s past commissioners and their dates in office to answer this question.

4. *Is there a Quorum Problem Approaching?*

The Board will not experience a quorum problem unless two members leave the Board. Assuming all members stay until their terms expire, the earliest this could happen is July 1, 2019. However, members are allowed to stay until a successor is appointed.

5. *Has the President Advanced Nominees?*

President Trump has advanced and the Senate has confirmed two nominees. The Senate did not act on President Obama’s 2015 nominees. President Trump has not nominated an individual to take Linda A. Puchala’s position.

- Linda A. Puchala (PN1042): Nominated 09/28/2017; Confirmed on 11/02/2017.
- Gerald W. Fauth (PN726): Nominated 06/29/2017; Confirmed on 11/02/2017.
- Harry R. Hoglander (PN949): Nominated 11/19/2017; Returned to the President on 01/03/2017.

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<sup>135</sup> To determine information about the Board’s current configuration, I used information provided on the NMB’s website: <https://www.csb.gov/about-the-csb/board-members>.

- Linda A. Puchala (PN850): Nominated 09/16/2015; Returned to the President on 01/03/2017.

## **XIX. NATIONAL TRANSPORTATION SAFETY BOARD**

### A. Statutory Characteristics

#### 1. *Commission Membership*

5 members appointed by the President by and with the advice and consent of the Senate. “The Board is composed of 5 members appointed by the President, by and with the advice and consent of the Senate.” (49 U.S.C. § 1111(b)).

#### 2. *Party Balancing Requirements*

Yes. “Not more than 3 members may be appointed from the same political party.” (49 U.S.C. § 1111(b)).

#### 3. *For-Cause Protections*

Yes. “The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.” (49 U.S.C. § 1111(c)).

#### 4. *Chair Appointment and Removal Rules*

*Appointment:* Appointed by President by and with the advice and consent of the Senate. “The President shall designate, by and with the advice and consent of the Senate, a Chairman of the Board.” (49 U.S.C. § 1111(d)).

*Term Length:* Unspecified.

*Removal:* “The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.” (49 U.S.C. § 1111(c)).

#### 5. *Quorum Rules*

*Statutory Requirements:* Yes. (49 U.S.C. § 1111(f)).

*Rule Requirements:* Yes. (49 C.F.R. § 845.4(b); 49 C.F.R. § 845.21).

*Quorum Rule:* Defines quorum to require three members. “Three members of the Board are a quorum in carrying out duties and powers of the Board.” (49 U.S.C. § 1111(f)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* Chairman may initiate investigations. “If a quorum of the Board is not immediately available in the event of a catastrophic

accident, the determination to hold an investigative hearing may be made by the Chairman of the Board.” (49 C.F.R. § 845.4(b)). “A quorum of Board Members is not required to attend a forum, symposium, or conference. All three types of proceedings described in paragraph (a) of this section may have a relationship to previous or ongoing investigative activities; however, their purpose is not to obtain evidence for a specific investigation.” (49 C.F.R. § 845.21(b)).

6. *Term Length*

5 years. “The term of office of each member is 5 years. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, is appointed for the remainder of that term.” (49 U.S.C. § 1111(c)).

7. *Term-Limit Rules*

*Length:* 5 years. “The term of office of each member is 5 years” (49 U.S.C. § 1111(c)).

*Reappointment:* No limitations.

*Staggered:* No.

*Vacancy Rules:* “An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, is appointed for the remainder of that term.” (49 U.S.C. § 1111(c)).

*Continuation Until Replacement:* Permitted. “When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified.” (49 U.S.C. § 1111).

8. *Misc. Appointment Requirements*

*Expertise Requirements:* “At least 3 members shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation.” (49 U.S.C. § 1111(b)).

B. Current Configuration<sup>136</sup>

1. *What is the Current Composition of the Commission?*

The Board currently has all five of its five positions filled:

- Robert L. Sumwalt (Appointed August 10, 2017; Term expires December 31, 2021).

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<sup>136</sup> To determine information about the Board’s current configuration, I used information provided on the CSB’s website: <https://www.csb.gov/about-the-csb/board-members>.

- Bruce Landsberg (Appointed August 7, 2018; Term expires December 31, 2022).
- Earl F. Weener (Appointed June 30, 2010; Term expires December 31, 2015).
- T. Bella Dinh Zarr (Appointed March 2015; Term expires December 31, 2018).
- Jennifer Homendy (Appointed August 20, 2018; Term expires December 31, 2019).

2. *Does the Commission Have a Quorum?*

Yes. All five of the Board's positions are filled.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the NTSB's past commissioners and their dates in office to answer this question.

4. *Is there a Quorum Problem Approaching?*

There is unlikely to be a quorum problem in the future. Although Jennifer Homendy's term expires December 31, 2019, NTSB members may continue to serve awaiting appointment and she may continue to serve. Both Earl F. Weener and T. Bella Dinh Zarr continue to serve despite the fact that their terms have expired. At the same time, President Trump has not nominated anyone to replace these individuals. If these three individuals choose to retire soon, then there will be a quorum problem.

5. *Has the President Advanced Nominees?*

Yes, but the President has not nominated replacements for the two individuals' whose terms have expired (Earl F. Weener and T. Bell Dinh Zarr).

- Jennifer L. Homendy (PN1820): Nominated 04/12/2018; Confirmed on 07/24/2018.
- Bruce Landsberg (PN1032): Nominated 09/28/2017; Confirmed on 07/24/2018.
- Robert L. Sumwalt III (PN404): Nominated 05/10/2017; Confirmed on 12/31/2021.
- Beverly Angela Scott (PN743): Nominated 07/30/2015; Withdrawn on 10/05/2015.

## **XX. NUCLEAR REGULATORY COMMISSION**

### **A. Statutory Characteristics**

1. *Commission Membership*

5 members appointed by and with the advice and consent of the Senate. "There is established an independent regulatory commission to be known as the Nuclear Regulatory Commission which shall be composed of five members, each of whom

shall be a citizen of the United States.” (42 U.S.C. § 5841(a)(1)). “Members of the Commission shall be appointed by the President, by and with the advice and consent of the Senate.” (42 U.S.C. § 5841(b)(1)).

2. *Party Balancing Requirements*

Yes. “Appointments of members pursuant to this subsection shall be made in such a manner that not more than three members of the Commission shall be members of the same political party.” (42 U.S.C. § 5841(b)(2)).

3. *For-Cause Protections*

Yes. “Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” (42 U.S.C. § 5841(e)).

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “The President shall designate one member of the Commission as Chairman thereof to serve as such during the pleasure of the President.” (42 U.S.C. § 5841(a)(1)).

*Term Length:* Unspecified.

*Removal:* President may remove the chairperson at will. “The President shall designate one member of the Commission as Chairman thereof to serve as such during the pleasure of the President.” (42 U.S.C. § 5841(a)(1)).

5. *Quorum Rules*

*Statutory Requirements:* Yes. (42 U.S.C. § 5841(a)(1)).

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum to require at least three members. “[A] quorum for the transaction of business shall consist of at least three members present.” (42 U.S.C. § 5841(a)(1)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

6. *Term Length*

*Length:* 5 years. “Each member shall serve for a term of five years, each such term to commence on July 1, . . .” (42 U.S.C. § 5841(c)).

*Reappointment:* No limitations.



*Staggered:* Yes. “[O]f the five members first appointed to the Commission, one shall serve for one year, one for two years, one for three years, one for four years, and one for five years, to be designated by the President at the time of appointment.” (42 U.S.C. § 5841(c)).

*Vacancy Rules:* “[A]ny member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term.” (42 U.S.C. § 5841(c)).

*Continuation Until Replacement:* None.

#### 7. *Misc. Appointment Requirements*

*U.S. Citizen Requirement:* Yes. (42 U.S.C. § 5841(a)(1)).

*Conflict of Interests:* “No member of the Commission shall engage in any business, vocation, or employment other than that of serving as a member of the Commission.” (42 U.S.C. § 5841(e)).

### B. Current Configuration<sup>137</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commission currently has five of five positions filled:

- Kristine L. Svinicki (Appointed March 28, 2008; Term Expires June 30, 2022).
- Jeff Baran (Appointed October 14, 2014; Term expires June 30, 2023).
- Stephen G. Burns (Appointed November 05, 2014; Term expires June 30, 2019).
- Annie Caputo (Appointed May 29, 2018; Term expires June 30, 2021).
- David A. Wright (Appointed May 30, 2018; Term expires June 30, 2020).

#### 2. *Does the Commission Have a Quorum?*

Yes. All five of the Board’s positions are filled.

#### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

No. Since 2000, the Commission has not had a quorum problem.

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<sup>137</sup> To determine information about the Board’s current configuration, I used information provided on the NRC’s website: [https://www.nrc.gov/about-nrc/organization/commission/former-commissioners/former-commissioners.html#N\\_24](https://www.nrc.gov/about-nrc/organization/commission/former-commissioners/former-commissioners.html#N_24).

There appears to be a data entry error with respect to the end date for Edward McGaffigan, Jr. The end date listed in June 30, 2010. In the column next to it (“remarks”), September 2, 2007 is listed. September 2, 2007 appears to be McGaffigan’s proper end date because he died on that date.

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. Assuming that all members stay until the ends of their terms, there will not be a quorum problem until June 30, 2021, when Annie Caputo's term expires.

5. *Has the President Advanced Nominees?*

Yes.

- Jeffery Martin Baran (PN900): Nominated 09/05/2017; Confirmed on 05/24/2018.
- David Wright (PN562): Nominated 06/06/2017; Confirmed on 05/24/2018.
- Kristine L. Svinicki (PN561): Nominated 06/06/2017; Confirmed on 06/26/2017.
- Annie Caputo (PN560): Nominated 06/06/2017; Confirmed on 05/24/2018.
- Jessie Hill Roberson (PN669): Nominated 07/16/2015; Returned to the President on 01/03/2017.

## **XXI. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

### A. Statutory Characteristics

1. *Commission Membership*

3 members appointed by the President by and with the advice and consent of the Senate. "The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate . . ." (29 U.S.C. § 661(a)).

2. *Party Balancing Requirements*

None.

3. *For-Cause Protections*

Yes. "A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." (29 U.S.C. § 661(b)).

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates one member to serve as chairperson. "The President shall designate one of the members of the Commission to serve as Chairman." (29 U.S.C. § 661(a)).

*Term Length:* Unspecified.

*Removal:* "A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." (29 U.S.C. § 661(b)).

5. *Quorum Rules*

*Statutory Requirements:* Yes. (29 U.S.C. § 661(f))

*Rule Requirements:* No.

*Quorum Rule:* Defines quorum to require two members. “For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.” (29 U.S.C. § 661(f)).

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

#### 6. *Term Length*

*Length:* 6 years. “The terms of members of the Commission shall be six years . . .” (29 U.S.C. § 661(b)).

*Reappointment:* No limitations.

*Staggered:* Yes. “[T]he members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years.” (29 USC § 661(b)(1)).

*Vacancy Rules:* “[A] vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.” (29 USC § 661(b)(2)).

*Continuation Until Replacement:* None.

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “[President shall appoint] from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter.” (29 U.S.C. § 661(a)).

### B. Current Configuration<sup>138</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commissioner currently has three of three positions filled:

- Heather L. MacDougall (Appointed August 16, 2017; Term expires April 27, 2023).

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<sup>138</sup> To determine information about the Board’s current configuration, I used information provided on the OSHRC’s website: <https://www.oshrc.gov/about/agency-chairmen-and-commissioners/>.

- Cynthia L. Attwood (Appointed August 6, 2013; Term expires April 27, 2019).
- James J. Sullivan, Jr. (Appointed August 28, 2017; Term expires April 27, 2021).

2. *Does the Commission Have a Quorum?*

Yes. All three of the Commission's positions are filled.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Yes. Since 2000, the Commission has lacked a quorum on the following occasions:

- April 28, 2017 to August 15, 2017 (1 member).
- April 28, 2013 to August 5, 2013 (1 member).
- August 28, 2009 to May 12, 2009 (1 member).
- December 21, 2001 to September 1, 2002 (1 member).
- December 15, 2000 to January 15, 2001 (1 member).

It appears that quorum problems were caused during the Bush Administration, in part, by the administration's failure to proactively nominate commissioners.<sup>139</sup>

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. Assuming that all members stay until the ends of their terms, there will not be a quorum problem until April 27, 2021, when Annie Caputo's term expires. However, OSHRC regularly suffers from vacancies, and it would not surprise me if the President failed to nominate commissioners until the onset of a quorum problem.

5. *Has the President Advanced Nominees?*

The Trump Administration has filled all the Commission's positions recently, but the administration waited until there was a quorum problem to nominate replacements. It appears that Presidential neglect has caused quorum failures in the past.

- Heather L. MacDougall (PN521): Nominated 05/25/2017; Confirmed on 08/03/2017.
- James J. Sullivan, Jr. (PN463): Nominated 05/16/2017; Confirmed on August 3, 2017.

## XXII. POSTAL REGULATORY COMMISSION

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<sup>139</sup> EHS Today Staff, *Review Commission Loses Its Quorum*, EHSTODAY (Jan. 17, 2002), [https://www.ehstoday.com/news/ehs\\_imp\\_35105](https://www.ehstoday.com/news/ehs_imp_35105).

## A. Statutory Characteristics

### 1. *Commission Membership*

5 members appointed by the President by and with the advice and consent of the Senate. “The Postal Regulatory Commission is composed of 5 Commissioners, appointed by the President, by and with the advice and consent of the Senate.” (39 U.S.C. § 502(a)).

### 2. *Party Balancing Requirements*

Yes. “Not more than 3 of the Commissioners may be adherents of the same political party.” (39 U.S.C. § 502(a)).

### 3. *For-Cause Protections*

Yes. “The Commissioners . . . may be removed by the President only for cause.” (39 U.S.C. § 502(a)).

### 4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “One of the Commissioners shall be designated as Chairman by, and shall serve in the position of Chairman at the pleasure of, the President.” (39 U.S.C. § 502(d)).

*Term Length:* Unspecified.

*Removal:* President may remove the chairperson at will. “One of the Commissioners shall be designated as Chairman by, and shall serve in the position of Chairman at the pleasure of, the President.” (39 U.S.C. § 502(d)).

### 5. *Quorum Rules*

*Statutory Requirements:* No.

*Rule Requirements:* No.

*Quorum Rule:* None. I cannot find any evidence of a quorum requirement for PRC. This seems strange given that most agencies adhere to *some* sort of quorum even if it is not codified.

*Progressive Quorum:* No.

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

### 6. *Term Length*

*Length:* 6 years. The Commissioners shall serve for terms of 6 years.” (39 U.S.C. § 502(f)).

*Reappointment:* No limitations.

*Staggered:* None.

*Vacancy Rules:* None.

*Continuation Until Replacement:* Permitted but limited. “A Commissioner may continue to serve after the expiration of his term until his successor has qualified, except that a Commissioner may not so continue to serve for more than 1 year after the date upon which his term otherwise would expire under subsection (f).” (39 U.S.C. § 502(c)).

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements:* “The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause. Each individual appointed to the Commission shall have the qualifications and expertise necessary to carry out the enhanced responsibilities accorded Commissioners under the Postal Accountability and Enhancement Act.” (39 U.S.C. § 502(a)).

*Conflict of Interests:* “No Commissioner shall be financially interested in any enterprise in the private sector of the economy engaged in the delivery of mail matter.” (39 U.S.C. § 502(b)).

### B. Current Configuration<sup>140</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commission currently has four of five positions filled:

- Robert G. Taub (Appointed October 2011; Term expires October 14, 2022).
- Tony Hammond (Appointed December 11, 2013; Term expires October 14, 2018)
- Mark Acton (Appointed August 2006; Term expires October 14, 2022).
- Nanci E. Langley (Appointed December 2014; Term expires November 22, 2018)

#### 2. *Does the Commission Have a Quorum?*

Need information on the PRC’s quorum requirements to answer this question. However, if the quorum is simple majority, the PRC has a quorum.

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<sup>140</sup> To determine information about the Board’s current configuration, I used information provided on the PRC’s website: <https://www.prc.gov/leadership>.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the PRC's past commissioners and their dates in office to answer this question.

4. *Is there a Quorum Problem Approaching?*

Need information on the PRC's quorum requirements to answer this question. However, if the quorum is simple majority, the PRC may soon have a quorum problem absent confirmation of another member. Two members' (Tony Hammond and Nanci E. Langley) terms expires in Fall 2018. These members will be eligible to remain on the commission for one year after the expiration date.

5. *Has the President Advanced Nominees?*

President Trump has nominated one individual to serve on the PRC. However, Tony Hammond's term has just expired and President Trump has not yet nominated a replacement. The Senate does not appear to be moving quickly to confirm President's Trump sole nominee.

- Michael Kubayanda (PN2113): Nominated 06/11/2018; Confirmed on 10/03/2018.

## **XXIII. SECURITIES AND EXCHANGE COMMISSION**

### **A. Statutory Characteristics**

1. *Commission Membership*

5 Commissioners appointed by the President by and with the advice and consent of the Senate. "There is hereby established a Securities and Exchange Commission (hereinafter referred to as the "Commission") to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate." (15 U.S.C. § 78d(a)).

2. *Party Balancing Requirements*

Yes. "Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable." (15 U.S.C. § 78d(a)).

3. *For-Cause Protections*

Yes. None in the statute. However, federal courts require for-cause removal for SEC commissioners.<sup>141</sup>

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<sup>141</sup> See *SEC v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 681–82 (10th Cir. 1988) (suggesting that SEC commissioners are subject to for-cause restrictions). In *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, a majority of the Supreme Court assumed that SEC Commissioners were subject to for cause protections. 561 U.S. 477, 487 (2010). Justice Breyer questioned the majority's assumption that SEC commissioners are subject to for-cause protections. *Id.* at 545–46 (2010) (Breyer, J., dissenting) ("One last question: How can the Court simply *assume* without

#### 4. *Chair Appointment and Removal Rules*

*Appointment:* The statute does not specify who selects the Chairperson. However, courts have recognized that the President selects the chairperson, and the chairperson serves at pleasure of the President.<sup>142</sup>

*Term Length:* Unspecified.

*Removal:* The statute how the Chairperson is removed. However, courts have recognized that the President selects the chairperson, and the chairperson serves at pleasure of the President.<sup>143</sup> It would be nice to find some sort of legal authority—beyond mere constitutional requirements—about the SEC appointments process.

#### 5. *Quorum Rules*

*Statutory Requirements:* None.

*Rule Requirements:* Yes. (17 C.F.R. § 200.41).

*Quorum Rule:* Defines quorum to require three members. “A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to § 200.60 or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter.” (17 C.F.R. § 200.41).

*Progressive Quorum:* Yes. “A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to § 200.60 or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter.” (17 C.F.R. § 200.41).

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deciding that the SEC Commissioners themselves are removable only ‘for cause’? . . . It is certainly not obvious that the SEC Commissioners enjoy ‘for cause’ protection.”).

<sup>142</sup> See *SEC v. Blinder, Robinson & Co, Inc.*, 855 F.2d 677, 681 (10th Cir. 1988) (“[A]s the President has the power to choose the chairman of the SEC from its commissioners to serve an indefinite term, it follows that the chairman serves at the pleasure of the President.”).

<sup>143</sup> See *SEC v. Blinder, Robinson & Co, Inc.*, 855 F.2d 677, 681 (10th Cir. 1988) (“[A]s the President has the power to choose the chairman of the SEC from its commissioners to serve an indefinite term, it follows that the chairman serves at the pleasure of the President.”).



When the SEC adopted this quorum rule in 1995, it acknowledged that it wanted to preserve flexibility for the agency should vacancies become a problem.<sup>144</sup> The Commission stated,

The Commission also believes that it would be appropriate to preserve the flexibility necessary to take effective action in the event, however unlikely, that there would be a period with only one commissioner in office. To provide adequate flexibility in this unlikely situation, the Commission is providing that one commissioner would constitute a quorum if no other commissioners are in office. The Commission does not believe it is necessary, at this time, to provide that one commissioner may constitute a quorum when disqualifications result in only one commissioner being available to deal with a particular matter.<sup>145</sup>

In *Falcon Trading Group, Ltd. v. SEC*, the D.C. Circuit held that SEC had authority to promulgate this rule:

If not otherwise constrained by statute, an agency sufficiently empowered by its enabling legislation may create its own quorum rule. See *LaPeyre v. FTC*, 366 F.2d 117, 122 (5th Cir.1966) (FTC's quorum rule “is within the Commission's power to make and is wholly valid”); cf. *Earnest v. Moseley*, 426 F.2d 466, 469 (10th Cir.1970) (8–member Federal Parole Board had authority to delegate board revocation decisions to 3–member panel because “[t]he creation of the Board and Congress' vesting in it a very broad discretion carries with it an inherent authority to establish such procedures as will best effectuate Congress' purpose in establishing the Board and the parole system”). In the case of the SEC, Congress has specifically bestowed on the Commission “power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter.” 15 U.S.C. § 78w(a)(1). This broad grant must be read to include authority to determine how many members constitute a quorum of the Commission, as we have suggested in the past. See *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 802 (D.C.Cir.1965) (citing SEC's own ruling for proposition that at that time “[t]hree members of the five-member Commission constitute[d] a quorum”). Because that authority is not countermanded elsewhere by Congress, as for example in an explicit

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<sup>144</sup> SEC, *Establishment of Commission Quorum Requirement*, 60 Fed. Reg. 17201 (Apr. 5, 1995); see also N. Peter Rasmussen, *How Many SEC Commissioners Are Needed for a Quorum?—It Depends*, BLOOMBERG LAW (Dec. 6, 2016), <https://www.bna.com/sec-commissioners-needed-b73014448152>.

<sup>145</sup> *Id.*

statutory quorum provision, we conclude that the SEC's quorum rule and the opinion and order issued pursuant to it are lawful.<sup>146</sup>

*Unanimous Voting Absent a Quorum:* No.

*Limited Action Absent a Quorum:* No.

#### 6. *Term Rules*

*Length: 5 Years.* ““Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified. . . .” (15 U.S.C. § 78d(a)).

*Reappointment:* No limitations

*Staggered:* Yes. “the terms of office of the commissioners first taking office after June 6, 1934, shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years, after June 6, 1934.” (15 U.S.C. § 78d(a)).

*Vacancy Rules:* “[A]ny commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term . . . .” (15 U.S.C. § 78d(a)).

*Continuation Until Replacement:* Permitted, but with limitations. “Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office . . . .” (15 U.S.C. § 78d(a)).

#### 7. *Misc. Appointment Requirements*

*Conflict of Interests:* “No commissioner shall engage in any other business, vocation, or employment than that of serving as commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this chapter.” (15 U.S.C. § 78d(a)).

### B. Current Configuration<sup>147</sup>

#### 1. *What is the Current Composition of the Commission?*

The Commission currently has five of five positions filled. However, one member (Kara M. Stein) remains on the commission despite an expired term.

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<sup>146</sup> 102 F.3d 579, 582 (D.C. Cir. 1996).

<sup>147</sup> To determine information about the Board’s current configuration, I used information provided on the CSB’s website: <https://www.csb.gov/about-the-csb/board-members>.

- Jay Clayton (May 4, 2017; Term Expires June 5, 2021).
- Kara M. Stein (August 9, 2013; Term Expires June 5, 2017).
- Robert J. Jackson, Jr. (January 11, 2018; Term Expires June 5, 2019).
- Hester M. Peirce (January 11, 2018; Term expires June 5, 2020).
- Elad L. Roisman (September 11, 2018; Term expires June 5, 2023).

2. *Does the Commission Have a Quorum?*

Yes. All of the Commissions' positions are filled.

3. *Has the Commission Had a Quorum Problem in the Near Past?*

No. As a result of the SEC's rules, the SEC has not had a quorum problem between 2000 and 2018.

4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. It seems that the SEC could never suffer from a quorum problem under its current regulations. The regulations provide that "if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office." (17 C.F.R. § 200.41). This seems to suggest that so long as the Commission has at least one member, it has a quorum.

5. *Has the President Advanced Nominees?*

Yes.

- Elad L. Roisman (PN2047): Nominated 06/04/2018; Confirmed on 09/05/2018.
- Robert J. Jackson (PN894): Nominated 09/05/2017; Confirmed on 12/21/2017.
- Hester Maria Peirce (PN783): Nominated 07/19/2017; Confirmed on 12/21/2017.
- Jay Clayton (PN47): Nominated 01/20/2017; Confirmed on 05/02/2017.
- Hester Maria Peirce (PN940): Nominated 11/16/2018; Returned to the President on 01/03/2017.
- Hester Maria Peirce (PN913): Nominated 10/21/2015; Returned to the President on 01/03/2017.
- Lisa M. Fairfax. (PN912): Nominated 10/21/2015; Returned to the President on 01/03/2017.

## **XXIV. UNITED STATES INTERNATIONAL TRADE COMMISSION**

### **A. Statutory Characteristics**

#### **1. Commission Membership**

6 commissioners appointed by the President by and with the advice and consent of the Senate. "The United States International Trade Commission (referred to in this subtitle as the "Commission") shall be composed of six commissioners who shall

be appointed by the President, by and with the advice and consent of the Senate.” (19 U.S.C. § 1330).

2. *Party Balancing Requirements*

Yes. “Not more than three of the commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.” (19 U.S.C. § 1330(a)).

3. *For-Cause Protections*

None.

4. *Chair Appointment and Removal Rules*

*Appointment:* President designates a chairperson. “The chairman and the vice chairman of the Commission shall be designated by the President from among the members of the Commission not ineligible, under paragraph (3), for designation. The President shall notify the Congress of his designations under this paragraph.” (19 U.S.C. § 1330(c)(1))

*Term Length:* Two years. “Each term of office thereafter shall begin on the day after the closing date of the immediately preceding term of office and end at the close of the 2-year period beginning on such day.” (19 U.S.C. § 1330(c)(2)(B)).

*Removal:* Unspecified.

*Party Requirements:* Yes. “(A) The President may not designate as the chairman of the Commission for any term any commissioner who is a member of the political party of which the chairman of the Commission for the immediately preceding term is a member, or who has less than 1 year of continuous service as a commissioner as of the date such designation is being made. (B) The President may not designate as the vice chairman of the Commission for any term any commissioner who is a member of the political party of which the chairman for that term is a member.” (19 U.S.C. § 1330(c)(3)).

5. *Quorum Rules*

*Statutory Requirements:* Yes. (19 U.S.C. § 1330(c)(6)).

*Rule Requirements:* Yes. (19 C.F.R. § 201.4(a)).

*Quorum Rule:* Defines quorum to require a majority of commissioners in office. “A majority of the commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies.” (19 U.S.C. § 1330(c)(6)). “A majority of the members of the Commission constitutes a quorum. The Commission may meet and exercise its powers at any place, and may, by one or more of its members, or by such agents as it may designate, prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country.”

(19 C.F.R. § 201.4(a)). The Court of International Trade discussed the ITC's quorum requirements in *Nippon Steel Corp. v. United States*.<sup>148</sup>

*Progressive Quorum*: Yes. "A majority of the commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies." (19 U.S.C. § 1330(c)(6)).

*Unanimous Voting Absent a Quorum*: No.

*Limited Action Absent a Quorum*: No.

#### 6. *Term Rules*

*Length*: 9 years. "The term of office of each commissioner appointed after such date shall expire 9 years from the date of the expiration of the term for which his predecessor was appointed" (19 U.S.C. § 1330(b)(1)).

*Reappointment*: Limited. "A person who has served as a commissioner for more than 5 years (excluding service as a commissioner before January 3, 1975) shall not be eligible for reappointment as a commissioner." (19 U.S.C. § 1330(a)).

*Staggered*: Yes. "The terms of office of the commissioners holding office on January 3, 1975, which (but for this sentence) would expire on June 16, 1975, June 16, 1976, June 16, 1977, June 16, 1978, June 16, 1979, and June 16, 1980, shall expire on December 16, 1976, June 16, 1978, December 16, 1979, June 16, 1981, December 16, 1982, and June 16, 1984, respectively." (19 U.S.C. § 1330(b)).

*Vacancy Rules*: "[A]ny commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term . . ." (19 U.S.C. § 1330(b)(1)).

*Continuation Until Replacement*: "[A]ny commissioner may continue to serve as a commissioner after an expiration of his term of office until his successor is appointed and qualified." (19 U.S.C. § 1330(b)(2)).

#### 7. *Misc. Appointment Requirements*

*Expertise Requirements*: No person shall be eligible for appointment as a commissioner unless he is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite for developing expert knowledge of international trade problems and efficiency in administering the duties and functions of the Commission." (19 U.S.C. § 1330).

*U.S. Citizen Requirement*: Yes. (19 U.S.C. § 1330).

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<sup>148</sup>*Nippon Steel Corp. v. United States*, 30 C.I.T. 1229, 1234 (2006); *see also* *Tak Fat Trading Co. v. United States*, 26 C.I.T. 46, 48–49 (2002).

*Conflict of Interests:* “No commissioner shall actively engage in any business, vocation, or employment other than that of serving as a commissioner.” (19 U.S.C. § 1330(c)(4)).

## B. Current Configuration<sup>149</sup>

### 1. *What is the Current Composition of the Commission?*

The Commission currently has five of six positions filled.

- David S. Johanson (Appointed December 8, 2011; Term expires December 16, 2018).
- Irving A. Williamson (Appointed February 7, 2008; Term expires June 2014).
- Meredith M. Broadbent (Appointed September 10, 2012; Term expires June 16, 2017).
- Rhonda K. Schmidlein (Appointed April 28, 2014; Term expires December 16, 2012).
- Jason E. Kearns (Appointed April 2, 2018; Term expires December 16, 2024).

### 2. *Does the Commission Have a Quorum?*

Yes.

### 3. *Has the Commission Had a Quorum Problem in the Near Past?*

Need information on the ITC’s past commissioners and their dates in office to answer this question.

### 4. *Is there a Quorum Problem Approaching?*

There is no imminent quorum problem. It seems that the ITC could never suffer from a quorum problem under its statute because the statute provides that a quorum constitutes a “majority of the members *in office*.” 19 U.S.C. § 1330(c)(6). However, it is worth noting that three members are currently serving beyond their expired terms.

### 5. *Has the President Advanced Nominees?*

The President has nominated individuals, but the Senate has not been proactive in confirming nominees.

- Amy Karpel (PN1654): Nominated 02/27/2018; Hearings held on 06/12/2018.
- Randolph J. Stayin (PN1059): Nominated 10/02/2017; Hearings held on 06/12/2018.
- Dennis M. Devaney (PN1058): Nominated 10/02/2017; Received in the Senate on 10/02/2017;

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<sup>149</sup> To determine information about the Board’s current configuration, I used information provided on the CSB’s website: <https://www.csb.gov/about-the-csb/board-members>.

- Jason Kearns (PN720): Nominated 06/29/2017; Confirmed on 03/01/2018.
- Jason E. Kearns (PN21): Nominated 01/17/2017; Withdrawn on 02/28/2017.