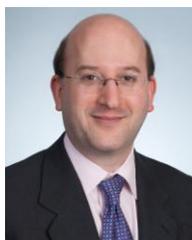


Potential Appointees Must Prepare For Vetting Minefield



Rob Kelner

Law360, New York (November 13, 2012, 12:23 PM ET) -- Even before the networks called the election, potential presidential appointees began angling for positions in a second-term Obama administration. With the election now decided, hundreds more will join the hunt for plum jobs. In the weeks and months ahead, many senior administration officials — from Cabinet secretaries on down — will return to the private sector, opening up spots in the upper echelons of American government.

Unless they have been through it before, those seeking to fill positions are likely to be stunned by the intense, time-consuming and highly intrusive vetting process they will have to undergo. Many will find it necessary to do something they had never even considered when applying for previous jobs: get a lawyer.

“Vetting law” may be obscure, seasonal and D.C.-centric, but, for those going through the appointment process, hiring a lawyer who has previously steered clients through the thicket can be essential. Appointees will have to devote enormous amounts of time to collecting information, completing complex forms, filling out detailed questionnaires, and enduring long interviews. The Senate, the White House Counsel’s Office, the FBI, the IRS, the Office of Government Ethics and individual agency ethics officials can all be involved. Especially thorny areas of inquiry, particularly for high net worth individuals and business leaders, include the following:

- **Tax issues.** Obama White House vetting teams are now intently focused on identifying tax problems in the prospective appointee’s past. Tax obligations subject to scrutiny include federal, state and local income taxes, household employee taxes (nannies, housekeepers, etc.) and gift taxes. Prospective nominees need to be prepared to have their tax filings fly-specked for deficiencies and, if some are found, to pay any back taxes owed and have a ready explanation for the prior nonpayment.
- **Financial holdings and business activities.** During the vetting process, prospective nominees must file draft financial disclosure forms with the pertinent federal agency and the White House Ethics Counsel. Think of these forms as tax returns on steroids. In many cases, the underlying assets of investment vehicles — including trusts and hedge funds invested in — must be disclosed. Other assets, liabilities and sources of income must be itemized. Prospective appointees coming from the investment and private equity world can expect especially rigorous scrutiny, given the controversies surrounding private equity during the presidential election.

- Legal proceedings. Background checks routinely involve searches of public records, including law enforcement databases and court dockets. Criminal investigations or prior convictions can be deal-breakers. Civil proceedings, particularly those that are relevant to the duties of the potential appointee, are subject to careful review.
- Publications and organizational affiliations. Prospective appointees must also divulge on lengthy questionnaires all published writings, significant speeches or panel presentations, and organizational positions and affiliations. Any potentially controversial writings or affiliations needs to be dealt with up front.

Regardless of the potential trouble-spots, candor is essential. Potential nominees who fail to disclose material information risk more than losing out on their dream job. It can be a federal crime to make false statements during the presidential appointee vetting process.

In addition to the above headaches, some new laws and rules will add wrinkles to this year's vetting process. For one thing, the Presidential Appointment Efficiency and Streamlining Act of 2011 removed the requirement for Senate confirmation for those appointed to 163 positions. While this takes the Senate out of the equation for some positions, these appointees will still face the rigorous White House vetting process. In addition, the recently passed Stop Trading On Congressional Knowledge Act (STOCK Act) has a number of provisions that matter to prospective appointees. Information about home mortgages for certain appointees, for example, must now be disclosed.

Finally, it is not just the office-seeker that should be concerned about the appointment process. It is not uncommon for a prospective appointee's current or former employer to be thrown into the fire. The deferred compensation plan provided to the prospective appointee, for example, may come under scrutiny. Moreover, if the appointee worked on controversial projects or deals while at the company, the employer may find itself at the center of a media firestorm. Think Bain Capital. Employers need to anticipate and proactively address problematic issues that may arise during the vetting of a company executive.

For most people, being considered for a high-level government appointment begins as a flattering ego boost. But for many, the vetting process quickly brings them back down to earth. It is not unusual for prospective appointees to consider backing out of the process once they realize how intrusive it will be. By then, it can sometimes be too late to limit the reputational damage. Careful preparation, including a pre-vetting review by counsel, is the best insurance against a vetting debacle.

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