

A Primer for Navigating the Presidential Appointee Vetting Process

November 10, 2016

Election and Political Law

With the election over, the process of selecting and vetting individuals to fill the next administration's key appointed positions is quickly shifting into high gear. For those who are called to serve in such positions, the decision to enter the process may be one of the most important and life-changing decisions they will make. Accordingly, it is critical for anyone considering an appointed position to understand the presidential appointment vetting process from the start.

The rewards of public service as a high-level presidential appointee include the opportunity to serve one's country, pursue important policy goals, and help shape events. In order to serve as a presidential appointee, however, candidates must first successfully navigate two complex political processes: nomination by the President and (for those positions that require it) confirmation by the United States Senate. Both processes entail extensive vetting of professional credentials and a host of personal background check issues.

While each administration's vetting procedures differ somewhat from the past, the core process is a well-worn path, and we are likely to see a number of similarities to prior practices, even if the Trump administration makes significant changes overall.

This advisory provides a high-level overview of the presidential appointee vetting process, as it has existed to date, including changes that have appeared in the recent past. In addition, we address the top five vetting priorities that potential appointees should consider **before** entering the rigorous process. We always recommend that clients who are potential appointees reflect carefully on how the vetting process will impact them and their families prior to beginning the process.

Vetting Process Overview

The vetting process is typically led by the White House Counsel's Office and the Office of Presidential Personnel, with involvement by the FBI, the IRS, and agency ethics offices. Initial steps include collecting from the potential nominee: tax records, prior writings, responses to detailed questionnaires covering a wide range of topics, and financial disclosure forms. The White House also will conduct a search of public records, social media posts, and other materials posted on the Internet. The depth of the review may depend on the seniority of the proposed position. After the White House nominates an individual, if the position is subject to Senate confirmation, the relevant Senate committee then requests additional information and conducts its own thorough review.

The Obama administration introduced an additional complexity into the presidential appointment process. The Obama White House publicly announced the President's "intention to nominate"

certain candidates for high-level positions after an expedited vetting process but prior to the completion of the full background check and other vetting prerequisites to a formal nomination by the President. The clearance bar for this expedited “mini-vet” was lower than the requirements for final nomination. Accordingly, advance notice of the intended appointment ran the risk of exposing candidates to embarrassing publicity during the course of the vetting process.

Between now and Inauguration Day, we will see how the Trump transition team handles early nomination decisions. Because of the pressure to fill key positions as quickly as possible, we may soon start seeing names of those candidates the administration “intends to nominate” after President-elect Trump is sworn in. Regardless of the transition team’s specific procedures before the inauguration, or the new White House’s process after it, candidates who obtain legal advice regarding the labyrinthine vetting and confirmation process are better-positioned to maintain control over the fate of their appointment.

Top Five Vetting Priorities

Individuals who are interested in a presidential appointment are well-advised to focus attention on the following top five major vetting issues during the early stages of their candidacy.

1. Tax Issues

Taxes are often the central vetting issue for many nominees. This focus likely will not diminish much, despite the tax controversies that arose during the recent campaign. Candidates should anticipate careful scrutiny by the transition team, the eventual White House, and certainly the Senate of a wide range of tax obligations, including federal, state, and local income taxes, household employee taxes (nannies, housekeepers, and landscapers), and gift taxes. Candidates should be prepared to pay any back taxes owed to federal, state, or local governments, and to explain their reasons for nonpayment. Senate committees responsible for scrutinizing and holding hearings on presidential nominations may require that nominees certify their compliance with all tax law requirements for up to 10 years.

2. Ethics and Financial Disclosure Requirements

The Ethics in Government Act requires certain public servants to file a financial disclosure report on an annual basis. This report, which nominees must file in draft form with the pertinent federal agency and the White House Ethics Counsel during the vetting process, is scrutinized by vetters to discern and resolve any conflicts of interest posed by potential public service. As a general rule, presidential appointees must divest themselves of any financial holdings and other interests that may conflict with their duties as a presidential appointee. (This rule is not legally binding on the President and Vice President, however). For nominees with substantial personal wealth or business interests, this may present significant challenges and require careful analysis. Recent guidance has loosened the treatment of hedge fund or other pooled investment fund holdings, but much depends on the specific facts of the investment products themselves.

3. Litigation, Investigations, and Other Legal Proceedings

Background investigations routinely include public records checks in law enforcement databases, as well as such court docket databases as PACER. The pendency of a criminal investigation or a past criminal conviction, even for a misdemeanor offense, could render a nomination untenable. Candidates often have knowledge of the pendency of an investigation for

which they are a target or subject, but that is not always the case. While criminal investigations or convictions have graver consequences for a nomination than civil litigation, the significance of civil proceedings should not be underestimated. As a general rule, litigation or similar proceedings that are relevant to the duties of the potential appointee receive heightened scrutiny. For example, financial litigation or penalties are especially important if the nominee is slotted for a Treasury Department or other financial industry regulatory position. Employment discrimination or civil rights litigation is especially relevant to a civil rights enforcement position. Military draft issues and security breaches are especially problematic if the candidate is being considered by the White House or Senate for a defense-related position.

By contrast, domestic and personal conduct proceedings are relevant to all nominees. Judgments or allegations regarding delinquent child support or alimony payments, domestic violence or drug abuse, financial improprieties, and sexual or racial harassment will raise substantial, if not insurmountable, obstacles to many nominations, irrespective of the nature of the position. As with all requests for information from government officials during the appointment process, candor in dealing with potentially embarrassing personal conflicts is essential. Lying to the FBI, Congress, or other government officials involved in the vetting process is a criminal offense punishable by fine or imprisonment.

4. Publications and Organizational Affiliations

Candidates are required to identify all published writings, significant speeches or panel presentations, and organizational positions and affiliations on extensive written questionnaires. It is critical that a nominee disclose any potentially controversial writings or affiliations early on in the vetting process. Political watchdog organizations closely monitor writings and affiliations in order to obtain evidence of public policy positions and personal beliefs; a candidate's "paper trail" on controversial issues is likely to garner attention. However, careful management of a nominee's controversial public positions—including preemptive outreach to special interest groups, the solicitation of bipartisan endorsements, and strategic public relations efforts—may avert or minimize unwanted attention. Active and informed political management is essential to prevent any groundswell of opposition from gaining momentum.

5. Medical, Family, and Personal Issues

Candidates for public office may be expected to undergo a medical examination in order to ensure that they will be able to withstand the physical rigors of service. Specialized follow-up may be necessary where a candidate's medical history includes serious or chronic health conditions. Investigators who conduct personal background checks routinely seek information from neighbors, family members, and professional contacts regarding any evidence of drug or alcohol abuse, or other medical conditions that might impede a candidate's ability to serve or might compromise the interests of the United States. Mental health counseling for bereavement, marital issues, or other life circumstances is no longer subjected to extensive scrutiny. A spouse or partner's medical history may be relevant to certain positions, such as ambassadorial posts. Absent a special circumstance, however, the mental and physical health of a candidate's children or other family members is generally outside the scope of the vetting inquiry.

Covington's Election and Political Law Practice Group includes a multi-disciplinary and bipartisan group of lawyers specializing in vetting and confirmation counseling, and numerous firm lawyers have served as veters or been through the confirmation process themselves.

For further information concerning our vetting practice, please contact any of the following firm lawyers:

<u>Robert Kelner</u>	+1 202 662 5503	<u>rkelner@cov.com</u>
<u>Bob Lenhard</u>	+1 202 662 5940	<u>rlnhard@cov.com</u>
<u>Sarah Wilson</u>	+1 202 662 5397	<u>swilson@cov.com</u>
<u>Zack Parks</u>	+1 202 662 5208	<u>zparks@cov.com</u>
<u>Derek Lawlor</u>	+1 202 662 5091	<u>dlawlor@cov.com</u>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.