

# A Guide To The Executive Branch Official Nomination Process

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Although the Trump administration has completed the vetting and confirmation of a cabinet and White House staff, thousands of senior positions remain unfilled throughout the executive branch. More than ever, people selected for those posts find themselves under close scrutiny. Particularly for those named to positions requiring Senate confirmation, that scrutiny begins well before they are confirmed or even officially nominated. The process from initial selection for a position to swearing-in is considerable, and even before a person is formally nominated by the White House, a great deal of work and time is required.



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This article describes the key steps in the path to nomination for federal officials and provides tips on how to navigate them. If you are a potential nominee to a Senate-confirmed position, your nomination will normally not move forward until your background check, ethics review, and other aspects are complete. You must disclose an array of personal information, including about your finances, your legal history and your family. You should also expect much of that information to become public. You may also be required to sell significant assets and resign from positions with companies and organizations.



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The path to nomination is set by the appointing administration but is still very self-directed. After you are named for a position, the burden is on you to complete the required paperwork and ensure the process moves along. These tasks are not for the faint of heart and cannot be handled on the fly — they require a great deal of work. If your nomination stalls because you are taking a long time to finish your submissions, it could put your prospects at risk if the administration is anxious to fill the position. And if you submit materials to the government that are inaccurate or incomplete, you may expose yourself to legal risk.

Because of the unfamiliarity of this process and the pitfalls that can befall the unwary, many potential nominees benefit from professional guidance in navigating the process. The better prepared you are, the better your transition into government will proceed.

## **Self-Vetting**

Before the nomination process begins, you should consider the challenges and risks of allowing your name to be put forth. Just because someone in an administration — with limited information — may believe you are a worthy pick does not mean your nomination will be smooth sailing. A self-assessment, possibly with an independent professional acting as a confidential sounding board, will allow you to consider whether pursuing the position is likely to lead to a desirable outcome.

For example, certain potential nominees have pulled out of consideration because their personal financial holdings were too difficult to disentangle from conflicts of interest. If a large portion of your net worth is tied to a business that would be under your regulatory or policymaking purview as a government official, the odds are very high that you will be expected to divest those interests upon assuming the duties of your office. If you will be unable to dispose of those assets in a reasonable time frame, or doing so would require you to take a larger financial hit than you are able to withstand (even with tax-favored treatment), that may be a sign that you should take your name out of the running. You should decide sooner rather than later how much of an economic sacrifice you are willing to make to enter government service.

This self-assessment, of course, goes beyond purely financial matters. Nominations can get tripped up on tax issues, past legal troubles, membership in exclusionary clubs or controversial organizations, provocative speeches and writings, or the perennial “nanny problem.”

To be sure, not every issue of this nature is necessarily fatal to a nomination. Depending on the facts, a potential complication might be remediable, or too minor to be of interest. You should consider the facts, get confidential advice if necessary, and weigh objectively whether you and your family are able and willing to withstand scrutiny from Congress and the press.

The last thing you should do is to withhold bad facts from your various nomination submissions and hope that no one ever learns of them. Between administration vetters, FBI background investigators, ethics officials, eager-beaver majority- and minority-side Senate staffers, political interest groups, and a press corps that will peer into every crack in a nominee’s armor, you should assume that anything interesting about you will be discovered. If you are found to have deliberately omitted important information, that will not only jeopardize your nomination and your reputation but also risk legal liability.

These issues are best considered at the very outset of the process, not months in. It is almost always preferable to quietly take yourself out of the running early on than see your nomination hopes blow up in the *Washington Post*. You don’t want the first result of a Google search of your name to be that you were a failed nominee.

Once you determine you are comfortable moving forward with the nomination process, here are the key steps.

### **Financial Disclosure**

Every person entering into a senior political appointee position in the executive branch is required to submit a so-called 278e form that provides a variety of information about his or her finances employment, liabilities and positions. This disclosure is very comprehensive and will eventually become publicly available. A copy of the form is available [here](#). In addition to the initial entry report, officials are also required to submit annual updates and periodic reports on particular transactions.

If you are filling out a 278e form, you must — with limited exceptions such as your personal residence — list every asset you, your spouse or your dependent children own that is worth more than \$1,000. Remember those savings bonds your Aunt Tillie gave you for your high school graduation? The tiny 401(k) from your first job out of school that you never rolled over? Your vacuum-sealed, mint condition edition of X-Men #1? If they meet the value threshold, they all go on your 278e. With the exception of your personal salary, you do not have to report the exact dollar value of your assets or the income they have produced; rather, for each asset you report a range, such as between \$1,001 and \$5,000 or between \$50,001 and \$100,000.

The rules for filling out a 278e form are highly comprehensive and not entirely obvious. Here are some of the issues that often trip people up:

- Investment holdings — particularly things like real estate funds and private equity investments — often have complex structures. If you own an interest in an investment fund or holding vehicle, you must list not only the top-line holding entity, but also the underlying assets of that entity. This requirement applies unless the investment fund is a publicly traded mutual fund or otherwise “publicly available” to investors.
- This requirement also applies for the holdings in your 401(k), IRA or other retirement plan. You cannot simply list your “IRA” and provide the value of the whole thing — rather, you are expected to list each underlying investment in the account.
- If you hold an interest in a privately held company, you will be expected to report the line of business the company is in. Simply listing that you own a million-dollar stake in XYZ LLC, without any supporting information about what the company does, will not suffice.
- You must list and provide the value of certain life insurance policies (whole life, universal or variable) but not others (term policies). You must also provide the underlying assets of variable policies.
- Putting your assets into a trust normally does not shield them from disclosure. If you are the grantor of a revocable trust, or the beneficiary of a nondiscretionary irrevocable trust, you are deemed the “owner” of the trust assets for financial disclosure purposes.
- You must also list all positions you hold with companies and organizations. This includes not just employment positions, but also any other entity in which you hold a fiduciary role, whether paid or unpaid. This requirement covers any companies or organizations in which you are a director, including small nonprofits. It also includes trustee positions — even if the trust is merely a familial instrument and even if the trust contains few or no assets.
- You must describe your employment agreements and arrangements, including your pension or other retirement plan, stock options and restricted stock, carried interest, deferred compensation, and partnership benefits.

- You must list all sources of income that paid more than \$5,000 for your professional services in a calendar year. This is not simply limited to your employer. If you are a lawyer in private practice or other professional service provider, you must list every client or customer who paid at least \$5,000 for your personal services. You may withhold the names of clients if a professional rule prohibits the disclosure of your client's identity, but simply because a client will be annoyed at being listed does not mean you can leave them off the form.
- You must also report your liabilities exceeding \$10,000, including credit card debt, student loans, investment-related obligations such as capital commitments, and — for officials requiring Senate confirmation — home mortgage debt.

For people named to positions requiring Senate confirmation, submitting your initial draft of your 278e is never the end of the process. Agency ethics counsel and the Office of Government Ethics review and provide feedback on the form. This is inevitable; like your demanding AP English teacher, no matter how perfect your first draft, OGE will come back with an array of edits and follow-up questions. Depending on the state and complexity of the form, there are often two or more rounds of questions before OGE will be ready to finalize it.

### **Divestitures and Resignations**

Once OGE and agency ethics officials have a clear picture of your various assets and positions, they will identify the potential for conflicts of interest that may arise from these interests. Then they figure out what, in their view, you will have to do about these conflicts when you enter government.

This determination may well include the divestiture of some of your assets. Divestiture will be necessary if the government concludes that your retention of an asset while holding your new position is likely to create a financial conflict of interest under the federal financial conflicts statute. This analysis is complex and highly dependent on the duties of the position you will be entering. In many cases a particular asset is sufficiently unlikely to impede the official's ability to do his job that the official may simply agree to recuse from particular matters affecting this financial interest. Generally speaking, the broader an official's policymaking role, the more likely he or she will be asked to divest assets that might be affected by his or her areas of responsibility. The scope of a nominee's required divestitures is negotiable, but only up to a point — the head of the U.S. Food and Drug Administration will probably not be allowed to own significant stock in a pharmaceutical company, for instance, and senior military officials will largely need to stay away from defense contractors.

Nominees often ask whether, instead of selling assets that the government has identified as creating a conflict, they can put the assets into a "blind trust." Doing so will not by itself solve a conflict problem from an ethics standpoint. Rather, only after the trustee has sold the asset in question, and informed the nominee that the sale has happened, will the conflict be deemed to have been resolved. One way or another you, or your designated trustee, will have to dispose of the asset.

An open-market asset sale is not the only way to divest an asset. Assets can be donated to charity. Or, because only the assets of dependent children are generally imputed to an official for conflicts purposes, some people entering government transfer assets to their adult children. This strategy can solve a conflict problem and, with appropriate professional guidance, can be part of a nominee's estate plan.

In addition to disposal of assets, the government will expect you to resign from positions you hold. This requirement extends not only to paid employment, but also board directorships and trusteeships. The current administration has largely been requiring every Senate-confirmed appointee to resign from all fiduciary positions with the exception of family trusts.

If you will be leaving a private employer when you enter government, OGE and your agency ethics counsel will seek information regarding the terms of your separation, including any payments you will receive on your way out the door and any continuing benefits you will be entitled to receive from your former employer even after you join the government. These are important to OGE's analysis of such issues as whether you will be in compliance with a criminal statute that prohibits the private supplementation of a federal employee's income, whether your continuing connection with the employer creates a financial conflict of interest, and whether you will receive a so-called "extraordinary payment" from your former employer that creates heightened recusal requirements under federal ethics regulations.

### **Ethics Letter**

Your divestitures, resignations, and other matters will be embodied in a so-called "ethics agreement" or "ethics letter" that you sign. Though signed by the nominee, the letter is drafted by agency ethics officials and OGE and is normally addressed to the top ethics official at the agency you are entering. Your ethics letter, like your 278e form, will become publicly available.

Your ethics letter will spell out exactly which assets you have agreed to divest, and the time frame for doing so (normally 90 days after Senate confirmation, though longer timeframes can be negotiable for illiquid assets). It will also lay out your plan to resign from any positions you hold and specify the terms of your separation from your current employer, including the conditions and timing of any payments you will receive on your way out the door.

An ethics letter also contains certain standardized language that is the same for all nominees. This includes language confirming that you will comply with your obligations under federal conflicts laws and regulations, that you will receive an ethics briefing after confirmation, that you will not allow an investment professional to buy and sell securities on your behalf without your advanced approval, and (as required by the current administration) that you will be bound by the "Ethics Pledge" embodied in the president's executive order imposing various requirements on top of existing laws and regulations.

Once your ethics letter and financial disclosure forms have been finalized, OGE will "preclear" you. Only after preclearance will the White House normally forward your name to the Senate for formal nomination.

## The Silver Lining

There is an important upside to the asset divestitures that many people entering government must make. If you are required to sell an asset to avoid a conflict of interest, you can likely get favorable tax treatment for that sale in the form of a “certificate of divestiture.” Issued by OGE, a certificate of divestiture allows you to defer the capital gains taxes that would normally be owed upon selling the assets.

After selling an asset covered by a certificate of divestiture, you must within 60 days roll over the proceeds into so-called “permitted property” — generally speaking, diversified mutual funds or U.S. treasuries. The capital gains deferral lasts until you sell the permitted property, even if that sale does not occur until long after you leave government service.

A few key points about certificates of divestiture:

- You can only get tax deferral for assets you sell after you are issued a certificate of divestiture. Retroactive certificates of divestiture will not be issued. Do not jump the gun and sell assets until you receive a certificate of divestiture covering those assets.
- The tax benefits of certificates of divestiture apply only to capital gains taxes. Other types of income you might get from disposing of an asset (such as ordinary income taxation for exercise of certain employee stock options) are subject to normal taxation.
- A certificate of divestiture allows you to defer taxes on your capital gains, not to avoid them permanently. The deferral works similarly to a like-kind real estate exchange under Internal Revenue Code section 1031. For example, if you buy a stock at \$10, sell it pursuant to an ethics agreement at \$30, and roll the proceeds over into a mutual fund that you later sell at \$50, you will be taxed on a gain of \$40 when you sell the mutual fund.
- Property sold at a loss is not affected one way or the other by being included on a certificate of divestiture. Thus, in a sense, it is a heads-you-win, tails-you-don't-lose situation: you can defer taxation on gains, but may immediately reflect capital losses in your next tax return to offset other income.

## Background Check

People entering so-called “national security” positions must fill out a so-called SF-86 security clearance form and undergo a comprehensive background check, usually conducted by the FBI. The form can be found [here](#). This requirement applies not only to people entering agencies with obvious national security implications, such as the CIA and U.S. Department of Defense. It also extends to anyone else whose work might touch on national security issues, defined broadly — including U.S. attorneys, diplomats, trade or commerce officials, inspectors general, and many others.

The SF-86 form is 127 pages long (that number is not a typo) and requires you to submit an immense range of information about yourself going back at least 10 years, including:

- Extensive personal information about every close relative, extending to in-laws and step-siblings.
- Your full employment history, including address and contact information for your former employers and supervisors and the reason why you left each job, and an explanation of any gaps in your employment record.
- Any police record other than minor traffic infractions, even if the record was expunged or sealed.
- Every address where you have lived, including the name and contact information of a neighbor from that address.
- Every foreign citizen with whom you or your spouse have had a close personal relationship.
- Every foreign trip you have taken, any foreign company or individual that you have provided advice or support to, and any contact you have had with a foreign government or its representatives.
- Any counseling you have undergone for emotional or mental health conditions (though the form is careful to note that receiving counseling is not in itself a reason for denying security clearance).
- Any illegal drug use or abuse of prescription drugs or alcohol.
- Failures to pay required federal, state or local taxes.
- Any civil legal actions in which you were a party.

You will need to set aside a good deal of time to fill out your SF-86. Realistically, prepare to lose a weekend while working on it. The online form is unforgiving: The system will not allow you to electronically submit the SF-86, or even print out a pdf of a draft, unless you have typed something in every single field.

That being said, few people have perfect memory or perfect records. If you do not have a phone number for the old boss you haven't talked to in five years, or can only estimate the dates of your 2011 trip to Tahiti, that will probably not prevent your security clearance.

After you submit the SF-86, the FBI will contact you about setting up an interview. The interview will last several hours, and the investigator will walk you through the entire form, asking questions and requesting clarifications. Although you should be prepared, you should not walk into the interview with an excessively defensive attitude. You will come across better if you treat it as a friendly professional conversation about your life rather than an interrogation or a cross-examination.

Your personal interview is only part of the background check. You also will provide the names of three people who know you well, but who are not relatives or people who are listed on other parts of the form. The FBI will interview them about you. The investigators are also likely to follow up in other respects, for example by contacting former employers or schools, or researching any legal actions you were involved in.

The background check is more of a black box than other parts of the prenomination process. Unlike the back-and-forth communications with OGE and agency counsel that is characteristic of the financial disclosure and ethics review, the FBI will not normally give you any visibility into what it is doing in the course of your background check or when the check will be complete. The only two things you will be told about the investigation, if you ask, are either: (1) it is in progress, or (2) it is done.

### **Personal Data Statement**

The White House counsel's office normally asks people named to Senate-confirmed positions to fill out a personal data statement." Although not quite as all-consuming as the financial disclosure or background check forms, the personal data statement asks for an array of information, much of it aimed at assessing whether you will bring personal or political baggage that could stand in the way of an easy confirmation. Each administration uses its own form, but the forms generally seek the following types of information:

- The most controversial matters you have worked on.
- All lobbying you or your spouse have performed.
- All work you or your spouse have done for foreign entities.
- Whether you have ever been a member of a club or organization that practiced restrictive membership.
- Any failure to pay taxes, or any tax collection proceedings against you.
- Any claims of sexual harassment or other workplace misconduct.
- The names of any domestic workers you have hired, whether they were eligible to work in the United States, and whether all required taxes were paid for the work.

There is also a catchall question about whether there is any other information about you or your family that could cause embarrassment, or could be used to blackmail or coerce you. Importantly, a nominee's personal data statement is almost never made available to the public.

## Senate Committee Questionnaire

Nominees requiring Senate confirmation are also expected to fill out a questionnaire from the committee that will be considering their nomination. Different committees have different questionnaires, and vary as to whether they make some or all of a nominee's responses public. In addition to questions about many of the same things covered in the other paperwork we have discussed, such as the nominee's past employment, potential conflicts of interest, and involvement in legal actions, the questionnaires often request the following types of information:

- The nominee's financial assets. Unlike the 278e, instead of providing the value of assets within a broad range, you may be required to give an exact dollar value of each asset.
- A list of all publications you have authored and all speeches you have given.
- All political campaign contributions made by you or your spouse.
- Questions about why you are qualified for the position.

Senate staffers scrutinize a nominee's answers closely and they may form the basis for live questions during the nomination hearing. Ultimately these responses may well be used to justify a senator's vote for or against a nomination.

## Conclusion

The process we have described is laborious, and requires patience and stamina. It also often benefits from experienced advice. For people with the desire, ambition and opportunity to enter into senior government service, it is usually well worth the effort. We describe the process not to scare anyone away from public service, but so that you do so with your eyes open.

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