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nature of the matter the employee will work on; and (4) conclude that the disqualifying financial interest is not so substantial as to be deemed likely to affect the employee's integrity. OGE lists other factors to consider before granting a waiver in the case study linked below.

Authority
Cusick, R.I. U.S. Office of Government Ethics - DO-07-006: Waivers under 18 U.S.C. §§ 208(b)(1) and (b)(3). (February 23, 2007). Retrieved from https://www.oge.gov/web/oge.nsf/Legal%20Advisories/328CE4B5A300EAEB85257E96005FBDE5/$FILE/do-07-006.pdf?open

4.2.2 Bush II Administration

Precedent
Henry Paulson retained his interest in a Goldman Sachs defined benefit pension plan, which met the definition of a disqualifying financial interest under 18 U.S.C. § 208. During the 2008 financial crisis, Paulson received a section 208(b)(1) waiver, which allowed him to communicate with Goldman Sachs.

Authority
The Paulson Ethics Waiver | Bear Market Investments. (August 11, 2009). Retrieved from http://web.archive.org/web/20090822134624/https://www.bearmarketinvestments.com/the-paulson-ethics-waiver

4.2.3 Obama Administration

Precedent
Cheryl Mills, former counselor and chief of staff, Department of State, received a waiver in order to serve as the government's representative on the Board of the Interim Haiti Recovery Commission (IHRC). Mills began her position at the State Department in 2009 and requested the waiver in 2011 after the IHRC was set-up. The waiver was approved on the grounds that Mills had no financial interest in the activities of the IHRC and that the goals of the IHRC and the State Department did not conflict and, in fact, were somewhat coextensive.

Authority
Cheryl Mills 208(b)(1) Waiver, pages 12-13.

4.2.4 Current Practice

Precedent
Various rules and standards of varying formality have been developed in connection with section 208(b)(1) waiver requests, primarily relating to the size of the conflicted financial interest as to which the waiver is requested relative to the filer's total net worth. Thus, in general, if the conflicted interest is a small fraction of the filer's wealth, a waiver request could be granted by

the agency and supported by OGE. Several variables impact this analysis. For example, the denominator of the fraction is generally limited to the filer's investable net worth, excluding residential real estate and other non-investment type assets. Establishing support for the denominator, especially where the filer's investments include illiquid investment funds, is necessary. In the case of an investment fund, since the waiver is granted with respect to the interest in the fund itself, rather than with respect to the individual portfolio holdings of the fund, analysis may be required as to the relative value of both the interest in the fund, and the proportionate interest in the underlying portfolio holdings that have created potential conflicts of interest.

Authority
Cusick, R.I. U.S. Office of Government Ethics - DO-07-006: Waivers under 18 U.S.C. §§ 208(b)(1) and (b)(3). (February 23, 2007). Retrieved from https://www.oge.gov/web/oge.nsf/Legal%20Advisories/328CE4B5A300EAEB85257E96005FBDE5/$FILE/do-07-006.pdf?open

4.3 Section 208(b)(3) Waiver

4.3.1 Clinton Administration

Precedent
A waiver under section 208(b)(3) is available for Special Government Employees serving on advisory committees established under the Federal Advisory Committee Act. On Dec.18, 1996, OGE published a final rule giving guidance on section 208(b)(3) waivers. Agencies and not OGE decide whether to grant a waiver. The link below to a 2007 OGE document explains the suggested factors considered.

Authority
Cusick, R.I. U.S. Office of Government Ethics - DO-07-006: Waivers under 18 U.S.C. §§ 208(b)(1) and (b)(3). (February 23, 2007). Retrieved from https://www2.oge.gov/web/oge.nsf/0/328CE4B5A300EAEB85257E96005FBDE5/$FILE/do-07-006.pdf

4.3.2 Current Practice

Precedent
Waivers for certain special government employees are authorized under 18 U.S.C. § 208(b)(3). Under OGE regulations, waivers issued under section 208(b)(3) must be issued "prior to the individual taking any action in the matter or matters" for which the waiver is sought. 5 C.F.R. § 2640.302(a)(6). The "agency official first must review the special government employee's financial disclosure form before determining that a waiver is appropriate in light of the information disclosed by the employee."

Fox, D. W. U.S. Office of Government Ethics - DO-10-005: Guidance on Waivers under 18 U.S.C. § 208(b), Authorizations under Agency Supplemental Regulations. (April 22, 2010). Retrieved from https://www.oge.gov/Web/OGE.nsf/All+Advisories/F0D8053747931EAD85257E96005FBB7A/$FILE/438cb0a3fe89437e877ef22c26c6fada4.pdf?open

Case Study

In 2009, the Food and Drug Administration granted a waiver to Dr. Richard Mann, a transplant nephrologist, to serve as a temporary voting member to the Cardiovascular and Renal Drugs Advisory Committee in the matter of a new drug application for a drug to be used in kidney transplants. His employer, Robert Wood Johnson Medical School, had received a research contract for a competing drug. The committee needed the "input of physicians who [had been] responsible for the day-to-day management of kidney transplant patients." Because of Mann's extensive experience conducting kidney transplants, the need for his input outweighed the concerns over a potential for a conflict of interest. Out of the 16 transplant nephrologists who were invited, Mann was the only one who could attend the meeting.

Authority

Peterson, J. E. 18 U.S.C. 208(b)(3) Waiver to Allow Participation in a Food and Drug Administration Advisory Committee. (November 4, 2009). Retrieved from https://wayback.archiveit.org/7993/20170405212552/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/CardiovascularandRenalDrugsAdvisoryCommittee/UCM191574.pdf

4.4 Divestitures

4.4.1 Bush I Administration

Precedent

In order to comply with 18 U.S.C. § 208, nominees may have to divest certain financial holdings that pose a conflict of interest. Since 1989, section 1043 of the Internal Revenue Code allows the director of OGE to issue a certificate of divestiture, which allows the employee to sell the financial interest and reinvest the proceeds into "permitted property" (as narrowly defined). If these requirements are met, any tax on capital gains owed on the sale of the conflicting property is deferred until the replacement permitted property is sold. There is no required holding period for the property sold or of the replacement property, and there is no length of government service requirement for the filer.

Authority
26 U.S.C. § 1043 - Internal Revenue Code. (2009). Retrieved from https://www.gpo.gov/fdsys/pkg/USCODE-2009-title26/html/USCODE-2009-title26-subtitleA-chap1-subchapO-partIII-sec1043.htm
Herzig, Tillerson, Section 1043 and the Myth of the One-Year Rule, Forbes, May 16, 2018
https://www.forbes.com/sites/davidherzig/2018/03/16/tillerson-section-1043-and-the-myth-of-the-one-year-rule/#42b360c48aaf

4.4.2 Current Practice

Precedent
Divestitures have become the default remedy for many potential conflicts of interest, eclipsing the use of recusals and waivers in many situations in which such alternative remedies might have been viable but were viewed as less effective or less politically palatable. This continues to be the case.

V. EXECUTIVE COMPENSATION ARRANGEMENTS

5.1 General Issues Relating to Executive Compensation Arrangements

Executive compensation arrangements constitute one of the most complicated areas for government ethics compliance. These arrangements pose disclosure, conflict of interest, and remedial challenges. Executive compensation arrangements, as individualized contractual arrangements between employers and executives, take a range of forms. OGE has focused on such arrangements in a number of ways, including through the reorganization of the public disclosure form (now 278e) into separate Parts (primarily Parts 2 and 3) that address employment related arrangements and financial interests. The treatment of executive compensation arrangements in ethics agreements is subject to a considerable degree of flexibility. Significant amounts of time are dedicated to resolving potential conflicts related to executive compensation arrangements. Little standardization of treatment has developed. No administration has utilized a single template to handle all executive compensation arrangements in a consistent manner.

Disclosure and related technical issues are addressed in Public Financial Disclosure: A Reviewer's Reference (Second Edition) section 6 (Nov. 2004). OGE's new electronic 278e highlights executive compensation issues, moving disclosure of such arrangements to the front of the on-line reporting system, and separating these issues from "other" financial interests (in part 6).

Some elements of executive compensation arrangements in private industry exacerbate the complexity and lack of standardization for purposes of government ethics, including the absence of clear definitions, frequent

lack of clarity, and even misunderstandings on the part of the filers as to the relevant features of their own executive compensation arrangements. Filers themselves often confuse different categories and features of executive compensation arrangements, e.g., stock options, restricted stock units and phantom stock, even if they understand the economics of their arrangements.

Direct discussions with human resources and other components of the employer are often necessary in order to address disclosure and conflict issues adequately and to maintain consistency with Securities and Exchange Commission filings. However, such contacts raise confidentiality concerns, exacerbating some of the practical problems of dealing with such arrangements in the vetting process. For example, certain executive compensation arrangements may raise potential 208 issues that could be resolved by amendments to such arrangements, but such changes require compensation committee or board action, or raise issues under ERISA rules and tax rules, especially IRC § 409A.

Recently, OGE has raised concerns relating to the ban on outside earned income in connection with any activities that are connected to the filer and that occur following appointment. This is an evolving area.

5.2 Bonus Payments

5.2.1 Obama Administration

Precedent

To an extent not evident in vetting during prior administrations, the Obama administration focused extensively on bonus payments paid to filers by their employers, especially bonus payments made for the portion of the current calendar year prior to the start of government service and any other bonus payments made in connection with termination of employment. This focus was in part tied to the financial crisis in late 2008, and the emphasis in the press concerning large bonuses paid to executives in private industry.

All bonus payments are necessarily made prior to the beginning of government service, in order to avoid supplementation issues under 18 U.S.C. § 209. Under Crandon v. United States, 494 U.S. 152 (1990), as long as the payments are received prior to the beginning of government service, a safe harbor precluded the application of section 209. Thus, regardless of whether the bonus evidences an intent to make up for reduced compensation while in government, as long as the payment is received under the terms of the Crandon decision, no section 209 issue can arise. (Issues under the extraordinary payment restructures in 5 CFR § 2634.203 were separate and less significant because of the Obama pledge.) Acceptance of this safe harbor preclusion of section 209 by ethics officials with respect to all payments to individuals entering government

service has been uneven, notwithstanding the clear instruction of the Supreme Court on this issue.

In a number of vetting cases in the Obama administration, questions were raised concerning how the employer determined the amount of the bonus, and whether the determination was based upon objective factors (viewed as a positive). These questions may reflect limited familiarity with how such bonuses are determined in the private sector, especially for senior executives. Sometimes, an explanation that bonus determinations are not purely discretionary could satisfy these concerns.

5.2.2 Current Practice

In the Trump administration, OGE continues to scrutinize bonus payments and to require explanations concerning the method by which such bonuses were computed.

5.3 Deferred Compensation Arrangements

5.3.1 General Issues

Deferred compensation arrangements, sometimes also referred to as nonqualified retirement plans, involve the agreement by the employee to forgo receipt of current salary in exchange for an unsecured and unfunded promises by the employer to pay an amount in the future that reflects the foregone salary plus some return or yield. The total amount, including yield, is tracked in a deferred compensation account. The employee does not have any security interest in the account, which remains subject to the claims of general creditors of the employer, and therefore the amount is at risk of the solvency of the employer.

A contractual obligation of the employer to pay the deferred compensation account to the employee or former employee represents a financial interest by the employee in the employer for purposes of section 208.

Deferred compensation arrangements take a number of forms. Some deferred compensation arrangements involve establishment of a contractual obligation by the employer to pay the employee the amount of the compensation that has been deferred, plus some fixed yield, and therefore raise only the ability or willingness issue described below. Other deferred compensation arrangements replicate investment accounts, because the deferred compensation account is invested in securities, or a basket of securities, selected by the employee, much like a qualified defined contribution plan. The amount paid out in the future is increased by the investment return of those selected securities. These arrangements, in which the yield tracks selected securities, do not involve actual investments in the securities; the yield is simply adjusted by an amount calculated based upon the investment performance of the securities.

5.3.2 Clinton Administration

Precedent

A financial interest represented by deferred compensation account in favor of a filer gives rise to potential conflicts of interest under section 208 as a financial interest with respect to the obligor (the employer or former employer). Such a potential conflict of interest could be mitigated by purchasing a surety bond or other insurance product from a third-party insurance company. The surety bond covered the risk that the employer could not or would not pay the deferred compensation obligation in the future. Such a mechanism in effect ensured the solvency of the employer and therefore eliminated the conflict of interest with respect to the employer (at least if the deferred compensation arrangement paid a fixed yield on the account balance).

5.3.3 Bush II Administration

Precedent

During the George W. Bush administration, the cost of surety bond premiums, as used in the Clinton administration, increased, and their availability decreased (only a few insurers, including Lloyds and Chubb were willing to issue such policies). Therefore, the ability to mitigate conflicts of interest represented by deferred compensation arrangements was threatened.

Faced with this concern, the treatment of deferred compensation arrangements for purposes of potential conflicts of interest was revised during the Bush II administration. Under the revised policy, no surety bond or other insurance was required to annul the obligation represented by the deferred compensation arrangement. Instead, the potential section 208 conflict was deemed to be limited to the ability of the filer to impact the employer's ability or willingness to pay the amount due under the deferred compensation arrangement. In other words, the filer was only recused from particular matters that could affect the solvency of the employer. Based on this limited scope, the filer's ethics agreement included a commitment that the filer would recuse herself from any particular matters that could affect the ability or willingness to pay of the employer. Since such particular matters are relatively rare (although not unheard of, especially in connection with the financial collapse in 2008), the ability or willingness approach adopted in such provision of the ethics agreement has become the norm.

However, this approach does not address the situation in which the yield on the deferred compensation account balance is not fixed. For example, many such account balances generate a yield that is based upon, or tracks the value of the employer stock, or upon a basket of securities determined under the arrangement. Under such circumstances, the potential 208 conflict raised by the deferred compensation arrangement will be deemed

to be the potential 208 conflict raised by the tracked asset or assets (e.g., if the deferred compensation arrangement tracks the filer's employer's stock, then the filer will be deemed to have potential 208 conflict with his or her former employer by virtue of the deferred compensation arrangement).

Authority
DAEOgram 99x6 (Apr. 14, 1999) (concerning only qualified pension plans, not deferred compensation arrangements). Retrieved from https://www.oge.gov/web/oge.nsf/All%20Advisories/72A887D63D64192185257E96005FBCFB/$FILE/bf65b709bbb841598a91b1f52db4c9be3.pdf?open

5.3.4 Current Practice

Precedent
A straight deferred compensation arrangement, involving an obligation to pay an amount equal to deferred salary plus a fixed yield can be addressed through the ability or willingness recusal mechanism developed in the George W. Bush administration. Deferred compensation arrangements that included a tracking mechanism that permitted the deferred compensation account to be adjusted based upon the investment results of selected securities or a basket of securities in which the deferred compensation balance was "invested" gives rise to potential section 208 conflicts (see above).

5.4 Special Categories of Executive Equity Compensation Interests

As noted, executive compensation arrangements take a wide array of forms, ranging from special bonus payments to interests that resemble stock. Each of these forms raises separate issues in the vetting process.

5.4.1 Current Practice

Precedents

A. Stock options.
Compensatory stock options for section 208 purposes represent financial interests in the issuer of the options, identical to the financial interest represented by outright ownership of shares. Compensatory stock options are often issued with vesting restrictions, which provide that the filer as holder of the stock option will forfeit the option under certain circumstances, generally including termination of employment before vesting dates (sometimes conditioned upon termination without good cause, or other contractual complexities).

Compensatory stock options issued by public companies are almost always issued at fair market value, that is, the exercise price that must be paid in order to receive the underlying stock is generally equal to the fair market value of the stock at the time the options were issued., Therefore the

spread representing net fair market value to the holder is initially zero. In addition, fair market value of the underlying stock may decline below the exercise price, in which case the options are underwater and therefore the options themselves may have little or no current value. However, this nominal value for compensatory stock options does not reduce the attention paid to such options in the vetting process.

OGE's Public Financial Disclosure Guide reference details the way in which compensatory stock options should be reported, generally on Parts 2 and 3 of the current 278e. In the Obama administration, additional details concerning compensatory stock options were often required as part of 278 disclosure. Detailed exhibits were sometimes attached to the 278 to describe compensatory stock options. These attachments included details concerning the number of options, the forfeiture conditions (that is, the dates on which the forfeiture conditions would be satisfied or would lapse), the strike price and whether the stock options were underwater. This detail was believed to be necessary by OGE and ethics officials in order to provide sufficient information to the public concerning compensatory options, and reflected a suspicion that such options might have little current fair market value. (which ordinarily would be reflected on Part 2) but could represent substantial optionality value in the future, for example for issuing companies in the technology sector.

The complexity of and concerns regarding various compensation option arrangements contributed to an expanded amount of disclosure concerning options (as well as other executive compensation arrangements) and led during the Obama administration to extraordinary attention to the details of disclosure concerning such arrangements on the various parts of the 278. During the Obama administration, such disclosure often required negotiation among various stakeholders in order to satisfy all constituencies that the arrangements had been adequately disclosed, and there was no standardized approach developed for such disclosure. Filers often omitted supplying text for such disclosure, deferring to OGE and ethics officials as to their preferred format on initial drafts of public financial disclosure reports.

B. Restricted stock

Unlike compensatory options, stock issued in connection with services represents outright ownership of shares and does not require payment of an exercise price to receive the shares. Forfeiture conditions cause compensatory stock to be restricted stock, and those vesting restrictions would be included in the details disclosed in the 278, including in an attachment to the 278 (see above). Ordinarily, compensatory stock is issued without payment, or at a steep discount. Any discount is taxable as compensation income, as soon as the forfeiture conditions end, or lapse. Such lapse can occur as a result of accelerated vesting. Some executive compensation plans involving grants of restricted stock permit acceleration of vesting upon taking a position in a university, a nongovernmental

organization, or the government. If restricted stock is subject to accelerated vesting, acceleration must occur prior to government service, in order to avoid concerns under section 209.

C. Restricted stock units

Restricted stock units, or RSUs, represent a right, in the hands of an employee, to receive a certain number of employer shares upon certain events, and are generally granted for no consideration to be paid by the employee. RSUs constitute a contractual right, not a direct interest in the employer shares themselves. In practice, the value represented by RSUs is converted into cash based on the fair market value of the shares represented by the units at some designated vesting or other maturity date, although occasionally employees convert RSUs into shares and hold the compensatory shares.

A financial interest in employer equity represented by RSUs is often confused with stock options.

D. Phantom stock

As in the case of RSUs, phantom stock, or phantom stock rights, represent at best an indirect interest in employer shares. Phantom shares are converted into cash upon certain events, based upon the appreciation in the index shares, and unlike RSUs are never convertible into actual shares. For purposes of section 208, phantom stock is a financial interest identical to employer stock.

Phantom stock or phantom stock rights are often confused with stock options and RSUs.

E. Carried interests

Carried interests, also sometimes referred to as promoted interests, are a creature of partnership tax law, where the technical term is profits interests. Profits interests represent an interest in a partnership (including a limited liability company treated as a partnership for U.S. tax purposes) other than a capital interest (which is a partnership interest that reflects an interest in capital, often in the form of a capital account; a profits interest has a zero capital account). Carried interests permit holders to receive allocations of capital gain in connection with services to the partnership, in effect as a substitute for compensation for services (which would be taxed at the maximum rate applicable to ordinary income). Profits interests are generally issued to the managers of such funds and are the subject of several IRS administration guidelines and safe harbors. Carried interests are common in real estate partnerships and are practically universal in investment partnerships, including private equity and, to a limited degree, hedge fund arrangements. As the holder or owner of a carried interest, a filer is treated as a full owner of an equity interest in a partnership, including

in the profits and losses of the partnership, and not simply as right to get cash compensation.

Carried interests carry with them both a political and a conflict of interest dimension. Politically, carried interests have been the subject of tax reform efforts. The reform proposals would charge holders income taxed as ordinary income rates. These reform efforts have been ongoing for many years and have been blocked during the Obama administration.

From a conflict point of view, the holder of a carried interest is a partner for all relevant purposes, and therefore the holder of the carried interest has a conflict with respect to each of the portfolio companies or other investments held in the fund.

On its website, OGE has referred to carried interests as a contract right, and stated that, for purposes of financial disclosure, a carried interest is an arrangement that stipulates the right to future payments based on the performance of an investment fund or business. OGE has also suggested informally that carried interests held in connection with any services provided to a partnership might raise outside earned income issues under Executive Order 12674 (as modified by Executive Order 12731), and implemented in 5 CFR § 2635.804.

Analysis of carried interests during the vetting of appointees during the Obama administration confronted the increasing complexity of carried interest arrangements. For example, multitier private equity funds might issue a single carried interest that would represent an indirect interest in the profits of numerous lower-tier partnerships and therefore in each of the portfolio companies of those partnerships. Although in substance a performance bonus related to the performance of the investment funds, carried interests transformed such bonus arrangements into an analysis similar to the analysis required with respect to EIF-type investments.

F. Qualified plans

Filers have often failed to consider assets held in 401(k) or other ERISA qualified plans or in section 529 plans established for purposes of paying for children's tuition. Each of these qualified plans, to the extent that it holds interests in underlying securities, is treated as holding financial interest on behalf of filers and all holdings must be disclosed. Qualified plans raise a number of disclosure issues that are exacerbated by the fact that filers fail to focus on these plans, because they do not generate K-1's or 1099s to report their income for tax purposes, and therefore can be overlooked if financial information is being compiled using tax returns.

Section 529 plans pose unique issues, because of the asset mix of such plans. Generally, each state plan provides for a limited menu of investment options. As the maturity of the plan evolves closer to the date on which the

funds will be used for college expenses, the mix of investment options tends towards fixed income and away from equity investments (in order to reduce the risk profile of the investments), and therefore section 529 plan investments will change, and the conflict profile may also change.

5.5 Treatment of Payments That Raise "Emolument" Issues

Under Article I, Section 9, Clause 8 of the Constitution (the "Emoluments Clause") certain federal employees are prevented from receiving payments from foreign governments. For these purposes, foreign governments can include investment funds owned by such governments (including sovereign wealth funds), and therefore to the extent certain federal employees receive payments the source of which is a sovereign wealth fund, the payments can be subject to the Emoluments Clause. The definition of an emolument is uncertain (and has been the subject of considerable litigation) – while it appears to clearly encompass gifts from covered parties, it is less clear whether and under what circumstances it applies to compensatory arrangements and arm's-length transactions.

Application of the Emoluments Clause to categories of appointees, e.g., part-time employees who retain an interest in law partnerships, is subject to considerable uncertainty, in part because of changes in advice received from the Office of Legal Counsel in the Department of Justice during different administrations.

5.5.1 Current Practice

The scope of the Emoluments Clause is currently the subject of several lawsuits, including in the Second Circuit, Fourth Circuit and the D.C. Circuit. The Defense Department has been proactive in applying the Emoluments Clause to compensation received by reserve military officers, where such compensation is sourced in sovereign wealth funds and other similar entities. Similarly, attorneys serving as special government employees or SGE's on certain advisory boards may be subject to Emoluments Clause treatment with respect to legal fees received through their law firms from such sources.

Authority

Yoder, E. "Federal Employees Warned to Watch Out for Emoluments," The Washington Post. (April 2, 2013). Retrieved from https://www.washingtonpost.com/news/federal-eye/wp/2013/04/02/federal-employees-warned-to-watch-out-for-emoluments/

OLC Opinion, "Application of the Emoluments Clause to a Member of the FBI Director's Advisory Board" (Jan. 15, 2007). Retrieved from https://www.oge.gov/web/oge.nsf/Legal%20Interpretation/6FB719825F20112885257EF2004DFF4D/$FILE/fbi_advisory_board_opinion_061507_0.pdf?open

OLC Opinion, "Applicability of the Emoluments Clause to Nongovernmental Members of ACUS" (Jun. 3, 2010). Retrieved from https://www.justice.gov/file/18411/download

VI. FORM 86 SUPPLEMENT

The Supplement to Standard Form 86 is technically associated with the National Security Questionnaire (Standard Form 86, or SF-86), but is only tangentially related to that form or to security clearances generally. The 86 supplement has been generated, modified and reformatted by White House officials in several administrations, and different versions have been issued by different administrations, including the Trump administration. To some degree, the 86 supplement helps provide vetting officials with information about topics that, in the past, have led to scandals or other concerns. The questions in the form should be read in the context of past scandals. As a prophylactic screening mechanism, the 86 supplement provides somewhat fragmented information, and the requested information overlaps with other disclosure forms, therefore requiring extra care to make sure such information is consistently reported across forms. Moreover, the questions in the 86 supplement are, in some cases, not well-drafted. This requires answers to be carefully conditioned and qualified to assure accuracy. The 86 supplement used in the Obama administration kept many of the same questions used in the Bush administration (other than changing the layout of the Word document). The supplement used in the Trump administration is considerably different. Both editions are outlined in detail below.

6.1 Obama Administration

6.1.1 Positions and Former Positions

Precedent

The 86 supplement (Question 1S. [for supplement] Part a) asks for detailed information about positions and former positions with organizations and companies, and therefore overlaps with the disclosure required in other documents, including in the 278, Schedule C, Part I. Therefore, this question should be completed at the same time, with the same information.

6.1.2 Positions with Potential Conflicts

Precedent

Question 1S. Part b) in the 86 supplement asks (among other things) if the filer now holds any positions that will create a conflict in a future executive branch position. Because all presidential appointees must terminate their outside positions before government service begins, position conflicts will be resolved prior to federal service. As with a number of the responses, the filer might be able to use standardized language for the response to this question. For example, a response that states: "I do not believe that any of my current positions will present a conflict or an appearance of conflict, and

any such potential conflicts will be resolved in connection with my ethics agreement" may be appropriate.

6.1.3 Violation of Laws

Precedent

The violation-of-laws question (Question 3S) is an example of drafting problems in the 86 supplement. For purposes of responding to this question, it should be noted that the literal language of the question means that any criminal investigation targeting any business with which the filer has been associated would be responsive. For filers who have been employed by large companies, there will often be some violation of law in the history of the company (for example, an OSHA violation). If the filer knows of such a violation, of course, it should be disclosed. If not, an answer with standard language along the following lines has been accepted: "I have not been convicted of a violation of law. However, in the course of my career, businesses with which I have been associated may have been convicted of such violations. I am not, however, aware of any such specific violation."

6.1.4 Investigations

Precedent

As with the immediately prior question, Question 4S is worded broadly, and could encompass any investigation (an undefined term) of any business or organization with which the filer has been associated, presumably because such investigation might cause embarrassment by association. If the filer has direct knowledge of any such investigation that might be publicly or otherwise known, of course, it should be specifically disclosed. However, in order to address the possibility of an investigation that is tangentially related to the filer, a standardized response to this question along the following lines has been accepted: "In the course of my career, I have been associated with a large number of companies or organizations, and some of these companies may have been subject to an investigation for possible violation of law. However, I have not been personally subject to any such investigation [and I do not know of any such investigation of any of the businesses with which I have been directly associated]."

6.1.5 Litigation

Precedent

A thorough search of public litigation databases should be conducted in connection with Question 5S.

6.1.6 Political Committees and Issues

Precedent

The breadth of Question 7S. Part a) has been expanded to include the following clause: "or have been identified in a public way with a particular

organization, candidate or issue." Although the origin of this question is unclear, it may encompass a wide range of political issues.

Case Study

The Senate voted 47-52 to reject President Obama's nomination of Debo Adegbile to head the Justice Department's Civil Rights Division. During his time as litigation director of the NAACP Legal Defense Fund, Adegbile was involved in fling an amicus brief for controversial figure Mumia Abu-Jamal. Abu-Jamal had been convicted of murdering a Philadelphia police officer in 1981.

Authority

Weisman, J., & Shear, M. D. Democrats in Senate Reject Pick by Obama. "The New York Times." (March 5, 2015). Retrieved from https://www.nytimes.com/2014/03/06/us/politics/senate-rejects-obama-nominee-linked-to-abu-jamal-case.html?_r=0

6.1.7 Lobbyist Activities

Precedent

Question 7S. Part b) seeks information not only with respect to LDA-type registration by the filer, but also whether the filer has acted as a lobbyist, asking the filer to indicate whether he has been carrying on lobbying-type activities, which could raise risks to the filer, if the filer has not registered.

6.1.8 Discriminatory Clubs

Precedent

Following the controversy over Griffin Bell's nomination as attorney general during the Carter administration, the 86 supplement included a question about a nominee's membership (or past membership) in a social club that discriminates on racial, religious, or other grounds. Bell had been a member of at least one such club and faced heavy questioning about it during his Senate confirmation.

Authority

Lyons, Patrick J. Griffin Bell, Ex-Attorney General, Dies at 90. "The New York Times" (January 5, 2009). Retrieved from https://www.nytimes.com/2009/01/06/washington/06bell.html?_r=0

Case Study

Webster Hubbell's nomination during the Clinton administration for associate attorney general, the number three position in the Department of Justice, sparked controversy because of his membership in a previously whites-only country club.

Authority

Hackett, M. "Clinton Nominee in the Rough Over Golf Club." Chicago Tribune (May 13, 1993). Retrieved from

https://www.chicagotribune.com/news/ct-xpm-1993-05-13-9305130234-story.html

Precedent

Policies against membership in discriminatory social clubs were enforced through Question 8S of the Obama administration 86 supplement. Question 8S in its current form asks whether the filer has ever belonged to a social club that ever discriminated. Question 8S covers discriminatory policies that existed before filer was a member of the social club and even if filer was never aware of such past policies.

It appears that the principal focus concerning discriminatory organizations is on golf and social clubs, not other types of social and other organizations. For example, it does not appear that membership in college fraternities or sororities, which all had policies of discriminating on grounds of gender, might be disqualifying. Also unclear is whether membership in certain national fraternities and sororities, many of which had policies of racial discrimination before the 1960s, would be disqualifying.

6.1.9 Immigration Issues

The scope of Question 9S. Part a) concerning immigration (in contrast to the broad scope of other questions in the 86 Supp), is to individuals who are "currently living with you."

Precedent

For the most part, during the George W. Bush administration, immigration status of household workers was not considered to be a disqualifying issue in the vetting process, although a number of exceptions are noted.

Case Study

Authority

Linda Chavez was nominated to be secretary of the Department of Labor in 2001 by incoming president George W. Bush. She withdrew after political attention surrounding an illegal immigrant from Guatemala who had lived with Chavez in the early 1990s had become a distraction to the administration. Fournier, R., Chavez Withdraws As Labor Nominee, "The Washington Post" (January 9, 2001) Retrieved from https://www.washingtonpost.com/wpsrv/aponline/20010109/aponline172303_000.htm

Precedent

Focus on hiring undocumented workers as a threshold issue for vetting increased during the course of the Obama administration, and was potentially disqualifying.

Independent Contractor Exception
The vetting standard may differ depending upon whether the household workers are employees or independent contractors.

Accountant Letters
In order to substantiate the status of a household worker as an independent contractor for both tax (see below) and immigration purposes, vetting attorneys will often request a letter from the filer's tax accountant or other professional advisor.

Authority
Committee on Finance U.S. Senate. Nominations of Dr. Lael Brainard, Mary John Miller, and Charles Collyns. (November 20, 2009). Retrieved from
https://permanent.access.gpo.gov/gpo9505/659342.pdf

6.1.10 Nanny Tax Issues

Precedent
The "nanny tax" question in the 86 supplement used in the Obama administration (Question 9S. Part b) asks about adults that the filer "employ[s]" (not "have employed"). The present tense used in this question appears to limit the inquiry to current service providers.

6.1.11 Embarrassment to the President

Precedent
The answer to Question 10S in the 86 supplement used in the Obama administration is generally "no" and any responses other than "no" likely would be discussed directly with White House counsel staff in the initial vetting process, rather than included in detail in the form.

6.2 Current Practice

The Trump administration substantially revised and reduced the scope of the 86 supplement (captioned "SF-86 Supplement"), although it retained a number of the subject areas from the prior versions. Many of the issues in prior 86 supplement forms were transferred to and included in the Trump administration's "Personal Data Statement." (The Obama administration did not utilize a personal data statement of any kind after the initial period of the administration, but instead for Senate confirmed nominees primarily relied upon Senate committee questionnaires to elicit information that had been targeted in the PDS from prior administrations.) The most important of these subject areas and some of the issues raised in connection with those question areas in the current 86 supplement are discussed below.

6.2.1 Foreign Business or Other Contacts

The wording of this question in the 86 supplement issued by the Trump administration is somewhat ambiguous but is designed to determine contacts with foreign organizations that are not otherwise disclosed in the SF 86. For example, it is unclear what is meant by a "nonprofit organization with any foreign government ownership" means, because a nonprofit organization might be controlled by a foreign government but is not likely to be "owned?"

6.2.2 Harassment Claims

Q3 asks, "Have any claims of sexual harassment, racial discrimination, or any other workplace misconduct, ever been made against you or any employee directly supervised by you?" Any allegations, even if settled and dismissed, can become the subject of a detailed background investigation.

6.2.3 Litigation

Q5 is broadly worded: "To your knowledge, have you or your spouse, or has either of your conduct been the subject of any civil or criminal case, administrative proceeding, or government investigation, other than a minor traffic infraction?" Since the question could bring in routine administrative inquiries against the business with which the filers associated (for example a company tax audit), the question may merit a qualified response such as: "In the normal course of business, companies and entities with which I have been associated have been the subject of various legal proceedings, but I have not personally been the subject of such proceedings."

6.2.4 Embarrassment to the President

Precedent

The equivalent of Question 10S of the 86 supplement of the Obama administration is question 7 in the current version used by the Trump administration. It reads in full as follows: "With as much detail as possible, please provide any other information, including information about other members of your family, which could suggest a conflict of interest, be a possible source of embarrassment, or be used to coerce or blackmail you." The appropriate answer to Question 7 is generally "no" and any responses other than "no" likely would be discussed directly with White House counsel's staff in the initial vetting process, rather than included in the form.

VII. OUTSIDE EMPLOYMENT & ACTIVITIES

7.1 Outside Earned Income

7.1.1 Bush I Administration

Precedent

The George H.W. Bush administration restricted outside earned income for various types of appointees. Restriction was proposed by a presidential committee appointed to address the political fall-out from ethical scandals involving former Reagan administration officials.

Authority

Executive Order 12674 (Apr. 12, 1989) modified by Executive Order 12731 (Oct. 17, 1990)
G. Calvin Mackenzie with Michael Hafken, Scandal Proof: Do Ethics Laws Make Government Ethical? 50 (2002).

7.1.2 Current Practice

Precedent

The definition of earned income for purposes of the outside earned income limitation is similar to the definition used for purposes of the tax on self-employment income under section 1401 et seq. of the tax code, and also parallels the difference between earned income and investment income under now repealed provisions of the tax code that provided for differential tax rates depending upon character of income. Questions were raised during the administration of George W. Bush concerning whether “line 1” income for partnership tax return purposes (i.e., line 1 on the K-1 Form issued to partners to indicate the partner’s share of business or operating income of the partnership) would be considered earned income, especially if the executive branch employee were a general partner of the partnership (even if the employee provided no services to the partnership), but these questions were not definitively answered.

It appears that line 1 income allocated to limited partners of a limited partnership, or, by extension, holders of LLC membership interests in a limited liability company, where no services are provided to the limited partnership or the LLC, should not be treated as earned income for these purposes, even though it might be earned income for purposes of self-employment tax.

7.2 Participation in Non-profit Organizations in Official Capacity

7.2.1 Current Practice

Precedent

Government employees may participate in particular matters that affect the financial interests of nonprofits in which they serve or seek to serve in their official government capacity. (This does not apply to government officials serving in nonprofits in their personal capacity). The exemption applies only to the prohibition of 18 U.S.C. § 208(a). Additionally, the employee still requires permission from a supervisor to be permitted to participate in a nonprofit in an official capacity. The employee remains subject to government ethics rules and other applicable statutes while serving in the nonprofit organization. Nonprofits for this purpose are those organizations that receive tax-exempt status under section 501 of the Internal Revenue Code. If an entity does not qualify, a section 208(b)(1) waiver is still an option.

Authority

5 C.F.R. § 2640.203(m). LA-13-05: 18 U.S.C. § 208(b)(2) Exemption for Official Participation in Nonprofit Organizations.
Shaub, W. M. U.S. Office of Government Ethics - LA-13-05: 18 U.S.C. § 208(b)(2) Exemption for Official Participation in Nonprofit Organizations. (April 9, 2013). Retrieved from https://www.oge.gov/web/oge.nsf/All%20Advisories/CE1F23774940E1E685257E96005FBEFB/$FILE/9182469fbb6f484db9fc9c2e6dc837a92.pdf?open

7.3 Stock Purchases in IPOs

7.3.1 Current Practice

Precedent

Section 12 of the STOCK Act prohibits certain government employees from purchasing securities that are subject to an IPO if "done in a manner that is not available to members of the public generally." According to the Securities and Exchange Commission, an employee who has acquired stock from a former private employer will not be considered to have purchased the stock if, during her time in the government, her shares are automatically converted to common stock when that company goes public. Additionally, in the similar case of an employee exercising a pre-existing right to convert previously held shares to common stock, the employee would not be considered to have purchased the stock. Importantly, neither agency ethics officials nor the OGE will be able to advise employees concerning the application of this section of the STOCK Act because it is a matter of securities law.

Authority
LA-14-02: Participation in Initial Public Offerings by Certain Employees Apol, D. J. U.S. Office of Government Ethics - LA-14-02: Participation in Initial Public Offerings by Certain Employees. (March 7, 2014). Retrieved from https://www.oge.gov/web/oge.nsf/All%20Advisories/B8EAA52BEB5BB52685257E96005FBF06/$FILE/29e20ef2652d455e9242bd382b0acd882.pdf?open

7.4 Future Employment Restrictions

7.4.1 Current Practice

Precedent
The Obama Ethics Pledge, E.O. 13490 Sec. 1, Paragraph 4, restricted post-government communications with employees of former agency that otherwise might be banned for one year under 18 USC § 207(c) instead for two years. The Trump Ethics Pledge, E.O. 13770, Secs. 2 and 3, which replaced the Obama Ethics Pledge, simply requires former officials to comply with § 207(c) if otherwise required, and also requires signatories to the Pledge to agree, upon leaving government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. Section 208 also provides criminal sanctions related to negotiations regarding future employment after government service.

Case Study
Capricia Marshall needed a waiver to serve on the Board of Trustees of the Blair House Restoration Fund, which has a close relationship with Marshall's former government employer, the State Department.

Authority
Visek, R. C. Limited Waiver Pursuant to Section 3 of Executive Order 13490, p. 67-69. (November 5, 2014). Retrieved from https://www2.oge.gov/web/oge.nsf/Special%20Reports/876E1CFDE699F4C285257EBC00669563/$FILE/2014%20Ethics%20Pledge%20Assessment%20Report-%20EO%2013490%20(FINAL).pdf?open

Ethics Commitments by Executive Branch Appointees (January 28, 2017) https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/

VIII. TAXES

8.1 Nanny Taxes

8.1.1 Clinton Administration

Precedent

Prior to 1994, if the taxpayer paid a nanny, babysitter, or other household worker more than $50 in a calendar quarter, the taxpayer had to withhold FICA contributions from that person's wages and remit those taxes along with share of FICA tax to the IRS using IRS Form 942. Following Zoe Baird's failed nomination for attorney general during the Clinton administration, in which it was revealed Baird hired undocumented workers and failed to pay their FICA contributions, Congress adopted the nanny tax law, raising the amount that triggered FICA payments from $50 a quarter to $1,000 a year and indexing it to inflation, and creating a new annual tax fling on Form 1040, Schedule H.

Authority

Klott, G., "Taking Care of 'Nanny Tax' is a Little Easier Block." Chicago Tribune (February 27, 1996). Retrieved from https://www.chicagotribune.com/news/ct-xpm-1996-02-27-9602270041-story.html

8.1.2 Bush II Administration

Precedent

During the administration of George W. Bush, many nominees and appointees came forward with potential nanny tax liabilities, seeking to cure such issues. For the most part, the administration adopted the position that if such tax liabilities were fully satisfied by fling amended returns and paying all back taxes, interest and penalties, prior liability for unpaid taxes for household workers (including gardeners, housekeepers, and childcare workers) would not prevent a nomination from proceeding, with the exception of nominations for positions in the Treasury Department (because of its authority over tax collection).

Case Studies

The Linda Chavez and Bernard Kerik nominations during the George W. Bush administration for Secretary of Labor and Secretary of Homeland Security respectively were withdrawn, in part, for failing to pay the post-1994 nanny tax, although in the case of Kerik, it was not clear whether the nanny tax issue was the actual reason for his withdrawal. In the case of Chavez, immigration issues were at least as important as tax issues in the withdrawal.

Authority

Lipton, E and W. K. Rashbaum. Kerik Pulls Out as Bush Nominee for Homeland Security Job. "The New York Times." (December 11, 2004). Retrieved from https://www.nytimes.com/2004/12/11/politics/kerik-pulls-out-as-bush-nominee-for-homeland-security-job.html?_r=0

8.1.3 Obama Administration

Precedent
Liability for nanny taxes and other taxes of household employees became a "threshold" question in initial due diligence. The Obama administration put significant emphasis on worker classification issues. On the independent contractor issue, support in the form of an accountant letter is often sufficient to provide support.

Case Study
Nancy Killefer withdrew her candidacy to become Chief Performance Officer (within the Office of Management and Budget) during the Obama administration in part because she failed to pay a nanny tax.

Authority
Kravitz, D. 'Nanny' Problems Ensnare Another Obama Pick. "Washington Post Investigations." (February 3, 2009). Retrieved from http://voices.washingtonpost.com/washingtonpostinvestigations/2009/02/tax_problems_ensnare_another_o.html

8.1.4 Trump Administration

Although difficult to generalize, it appears that nanny tax issues have become less critical in connection with nominees in the Trump administration, and in any event, are not a negating item for nominations. Instead, there is significant opportunity for curing past nanny tax liabilities, and for paying any tax liability, or otherwise committing to pay any back-tax liability (including interest and penalties). Tax accountant letters are also useful.

Case study
Andrew Puzder withdrew his candidacy during the Trump administration to become secretary of labor, based upon a number of vetting issues, including unpaid nanny taxes. Mick Mulvaney was confirmed during the Trump administration as the head of the Office of Management and Budget, notwithstanding unpaid nanny taxes.

Authority
"Puzder Paid Taxes on Undocumented Employee After Labor Secretary Nomination," Wall St. J., Feb. 7, 2017
https://www.wsj.com/articles/puzder-paid-taxes-on-undocumented-employee-after-labor-secretary-nomination-1486498560
"Labor Nominee Puzder Admits to Employing a Housekeeper Who Was in the U.S. Illegally," L.A.Times, Feb, 7, 2017

https://www.latimes.com/business/la-fi-puzder-nanny-20170207-story.html

8.2 Errors with Respect to Personal Income Taxes

8.2.1 Current Practice

Precedent

A focus on avoiding income tax errors or anticipating questions that might be raised concerning individual income tax returns became a principal part of the review of Obama nominations, especially in connection with nominations under the jurisdiction of the Senate Finance Committee. A full-time detailee from the Internal Revenue Service reviewed individual tax returns for the committee. Although the then ranking member, Sen. Grassley (R-Iowa), asserted that the reviews of returns of nominees was not an "audit," the reviews were the functional equivalent of a detailed IRS review of all tax issues raised in the returns. In reaction, the Obama administration hired a detailee from the Tax Division of the Justice Department with tax expertise, to review tax returns of nominees needing Senate confirmation in advance of submission to the committee. The staff of the Senate Finance Committee continued its practice of detailed reviews of tax returns of nominees (for example, the nominee for Secretary of the Treasury) during the Trump administration.

Amended returns

Normally, if inadvertent errors are identified in already-filed tax returns, a taxpayer has the legal right to correct those errors by fling an amended return (Form 1040X). However, during the Obama administration, amended tax returns were viewed with disfavor.

Case Study

Tom Daschle withdrew his nomination for Secretary of Health and Human Services during the Obama administration because of numerous tax problems, including his failure to pay income taxes on a luxury car and driver.

Authority

U.S. Senate Committee on Finance. Finance Committee Releases Memo Regarding Brainard Nomination. "The United States Senate Committee on Finance." (November 18, 2009). Retrieved from https://www.finance.senate.gov/release/finance-committee-releases-memo-regarding-brainard-nomination

Hulse, C., & Pear, R. Daschle Apologizes Over Taxes as Allies Give Support. "The New York Times." (February 2, 2009). Retrieved from https://www.nytimes.com/2009/02/03/us/politics/03daschle.html

8.3 Non-income Taxes and Tax Liens

8.3.1 Obama Administration

Case Study

During Timothy Geithner's nomination for Secretary of the Treasury during the Obama administration, the Senate Finance Committee disclosed that Geithner failed to pay over $30,000 in FICA taxes from his time with the International Monetary Fund (IMF). The IMF is a tax-exempt organization and it does not withhold taxes for Social Security and Medicare although U.S. citizens must still pay the FICA taxes.

Authority

Bernard, T. S. Geithner's Tax Mistake Was Honest, Experts Say. "The New York Times." (January 14, 2009). Retrieved from https://www.nytimes.com/2009/01/15/us/politics/15tax.html?_r=0

8.4 Foreign Bank Account Reporting

8.4.1 Current Practice

Precedent

New emphasis on foreign bank account reporting and international transparency.

8.5 Tax Penalties

8.5.1 Current Practice

Precedent

Since 2009, tax penalties have taken on special significance, especially for nominations under the jurisdiction of the Senate Finance Committee. For these purposes, tax penalties might include amounts assessed for underpayment of estimated taxes, even though underpayment of estimated taxes are in effect a delayed payment, rather than negligence or fraud and the "penalties" under the applicable sections of the Internal Revenue Code are equivalent to an interest charge.

8.6 Substantiation of Charitable Contributions

8.6.1 Obama Administration

Precedent

A nominee who receives income from an honorarium cannot avoid tax liability by assigning it to a charity and must both substantiate the contribution and pay taxes on the payment of the honorarium.

Case Study

During the Obama administration, U.S. Trade Representative nominee Ronald Kirk asked for his speaking engagement honoraria to be given to

his alma mater to fulfill a scholarship fund pledge.

Authority

Senate Finance Committee Memorandum, "Mayor Ronald Kirk Nomination," Mar. 2, 2009
https://www.finance.senate.gov/imo/media/doc/prb030209.pdf

IX. DRUG AND ALCOHOL ISSUES

9.1 General Policy Issues

Current drug use is rarely an issue in the vetting process. Prior drug use is subject to a complex analysis that varies depending upon elapsed time (how long since the last use of drugs), types of drugs (essentially, marijuana versus other drugs), frequency of use (including specific timelines), and other factors, all in context of rapid changes in societal norms and generational views of drug use.

9.2 Forms and Reporting

Detailed reporting concerning drug use is provided in SF-86, section 23 ("illegal use of drugs and drug activity") and a yes answer to any question in this section will likely elicit further questions. In addition, certain preliminary questionnaires separate from the SF-86 used as screening mechanisms have asked for information about illegal use of drugs. For all such purposes, illegality is determined by federal, not state or local, law (which have in many cases either eliminated statutes prohibiting the use of certain drugs, or have sharply reduce the penalties for such use, e.g., to a misdemeanor or an administrative fine). Illegality could include use of certain prescription drugs without proper prescriptions, and depressants and tranquilizers are listed as types of drugs or controlled substances in section 23 of SF-86.

9.3 Past Illegal Drug Use

9.3.1 Reagan Administration

Case Study

In November 1987, Judge Douglas H. Ginsburg withdrew his nomination to the Supreme Court after publicly disclosing that he used marijuana before becoming a judge, and while a professor at Harvard Law School. Subsequent FBI investigations indicated the possibility that individuals with knowledge of Ginsburg's past drug use had lied to investigators in the course of his security investigation. As a result of the Ginsburg matter, at the end of the Reagan administration, and during the administration of Pres. George W. Bush, in a change in procedure, all candidates for positions such as federal judges were to be asked directly if they had used illegal drugs.

Authority

Shenon, P., F.B.I. Study Hints Some Lied to Hide Ginsburg Drug Use. "The New York Times." (January 13, 1988). Retrieved from https://www.nytimes.com/1988/01/13/us/fbi-study-hints-some-lied-to-hide-ginsburg-drug-use.html

9.3.2 Bush I Administration

Precedent
Initially, applicants for senior positions were disqualified for any illegal drug use in the past 15 years. This restriction was later reduced to 10 years, apparently in recognition that some drug use was common among Baby Boomers.

Authority
Barr, S., & White, B. Agencies Vary in Handling Drug Issue. "Washington Post." (August 23, 1999). Retrieved from http://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/frules082399.htm

9.3.3 Clinton Administration

Precedent
The White House asked appointees to disclose all illegal drug use going back to age 18. There were no automatic disqualifications based on past drug use. Each appointee was judged on a case-by-case basis.

Authority
Barr, S., & White, B. Agencies Vary in Handling Drug Issue. "Washington Post." (August 23, 1999). Retrieved from https://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/frules082399.htm

9.3.4 Bush II Administration

Precedent
In 2006, the State Department's website published adjudicative guidelines for determining eligibility for access to classified information. Under the section titled "Guideline H: Drug Involvement," the department outlined potentially disqualifying activities. These included: drug abuse (defend as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction"), testing positive for illegal drug use, illegal drug or drug paraphernalia possession (including cultivation, processing, manufacture, purchase, sale, or distribution), diagnosis by a qualified medical professional of drug abuse/ dependence, evaluation of drug abuse/dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program, failure to successfully complete a properly prescribed drug treatment program, any illegal drug use after being granted a security clearance, expressed intent to continue

illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The department also published a list of mitigating factors. These included: infrequent use, a significant amount of time having been passed after the behavior, a demonstrated intent not to abuse drugs in the future, abuse of prescribed drugs occurring "after a severe or prolonged illness," and the completion of a prescribed drug treatment program with a favorable prognosis from the appropriate medical professional.

Authority
U.S. Department of State. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information. (February 3, 2006). Retrieved from https://www.state.gov/m/ds/clearances/60321.htm See also 32 C.FR. § 147.9 "Guideline H—Drug Involvement," (outlining similar guidelines for the Department of Defense).

9.3.5 Obama Administration

Precedent
Legalization of Marijuana. The fact that a number of states have legalized, or at least de-criminalized the recreational use of marijuana has not limited the analysis of the drug use issue in connection with vetting.

9.3.6 Trump Administration

Precedent
Legalization of marijuana in numerous states has not reduced the concerns regarding prior drug use for nominees in the Trump administration. Instructions that accompanied nomination and vetting materials sent to prospective appointees early in the Trump administration emphasized that questions concerning drug use should disregard legalization in states and should respond under federal drug laws. Background investigations regarding drug use in response to affirmative answers on Form SF 86 suggests that standards of review have not changed significantly, however, from the Obama administration, especially if prior drug use was moderate and not recent. Incorrect answers concerning prior drug use are, however, grounds for rejection of a nomination, and potentially 18 USC §1001 penalties.

9.4 Alcohol Use

9.4.1 Bush II Administration

Precedent
The 2008 version of the national security questionnaire added questions related to the effect of alcohol on an applicant's employment within the past seven or ten years, depending on the applicable reporting period for the

particular nominee or appointee.

In 2006, the State Department posted adjudicative guidelines concerning alcohol on its website. Under the section titled "Guideline G: Alcohol Consumption," the department outlined potentially disqualifying activities. These included: "alcohol-related incidents" of concern (e.g. DWI's or domestic abuse), "alcohol-related incidents at work," "habitual or binge consumption of alcohol to the point of impaired judgment," a proper medical diagnosis of alcohol abuse/dependence, a proper evaluation of alcohol abuse/dependence as part of an alcohol treatment program, relapse after said diagnosis, or "failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence."

Mitigating factors included: infrequent behavior, a significant amount of time having passed since the behavior, the presence of unusual circumstances, acknowledgment of and proper steps to treat alcohol abuse, current participation and progress in a counseling/treatment program with no history of relapse, and the successful completion of counseling/rehabilitation along with a demonstrated "clear and established pattern of modified consumption or abstinence" and a favorable prognosis from a qualified medical professional or "a licensed clinical social worker who is a staff member of a recognized alcohol treatment program."

Authority
U.S. Department of State. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information. (February 3, 2006). Retrieved from https://www.state.gov/m/ds/clearances/60321.htm See also 32 C.FR. § 147.9 "Guideline G—Alcohol Consumption." (Outlining similar guidelines for the Department of Defense).

9.5 Driving While Intoxicated (DWI)

9.5.1 General Policy Issues

In some cases, arrests for DWI are expunged if certain procedures are followed (remedial training, etc.). However, questions regarding arrests on the SF-86 still require disclosure of such arrest records, and therefore, regardless of whether DWI offenses are no longer contained in official police records, they must be fully disclosed and described in the SF-86.

X. MEDICAL ISSUES (INCLUDING MENTAL HEALTH)

10.1 Bush II Administration

Precedent
State Department Adjudicative Guidelines. The State Department's website explains in a section titled "Guideline I: Psychological Conditions" that a negative inference should not "be raised solely on the basis of seeking

mental health counseling" and lists a number of causes for concern, which, among others, may include failure "to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g. failure to take prescribed medication." Mitigating factors may include demonstrated compliance with treatment, voluntary entry into counseling or treatment with a favorable prognosis, a mental health professional's recent opinion that the individual's condition is no longer a problem, the condition having been a temporary one, and the lack of indications of a current problem.

Authority
U.S. Department of State. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information. (February 3, 2006). Retrieved from https://www.state.gov/m/ds/clearances/60321.htm See also 32 C.FR. § 147.11 "Guideline I—Emotional, mental, and personality disorders." (Outlining similar guidelines for the Department of Defense).

10.2 Current Practice

Precedent
Attention to mental health issues has been reflected in evolution of national security questionnaire. Question 21 and extensive sub-questions in the SF-86 reflects the historic view that mental health treatment might be a disqualifying condition for a security clearance. However, in order to avoid automatic disqualification for mental health treatment, the national security questionnaire has added various exemptions, which essentially disregard psychiatric and other mental health treatment in selected categories, presumably because these are deemed not to be indicative of security risks. Thus, for example, the mental health portion of the 2008 form SF-86 provides an additional exemption for any counseling or treatment "strictly related to adjustments from service in a military combat environment." The mental health section of the 2010 version of SF-86 included an exemption for anyone who sought or received treatment as a victim of sexual assault. Since the 2010 version of the SF-86 has been issued, various defense and intelligence officials have stressed the mental health exemptions available to returning servicemen and survivors of sexual assault, noting the importance of seeking treatment to the long-term health and well-being of both categories of people.

Precedent
In light of the above discussion concerning military survivors of sexual assault, the applicable provisions of SF-86 now includes the following instruction: "Victims of sexual assault who have consulted with the health care professional regarding an emotional or mental health condition during this period strictly in relation to the sexual assault are instructed to answer No."

Authority
Memorandum from Secretary of Defense Leon Panetta for Secretaries of

the Military Departments et al. (Sept. 4, 2012); Memorandum from Undersecretary of Defense James Clapper for Secretaries of the Military Departments et al. (Nov. 20, 2009); Memorandum from National Intelligence Director James Clapper for Distribution (Apr. 12, 2013).

Media Release, "Director of National Intelligence Issues New Security Clearance Guidance." Director of National Intelligence. (April 5, 2013). Retrieved from https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/828-director-of-national-intelligence-issues-new-security-clearance-guidance

XI. IMMIGRATION STATUS

11.1 General policy issues

Along with failure to pay payroll taxes for domestic service providers, forms and interviews for security clearance and personal data statements have long focused on the immigration status of such workers. See also discussion above, section 6.1.9.

In the Obama administration, questions were often raised as to whether such workers had provided the filer with "I-9" forms, indicating the legal status of the worker and providing backup documentation. Given the fact that obtaining such forms for domestic workers is highly unusual, the absence of such forms was not automatically disqualifying (in contrast to failure to pay nanny taxes, see above). In addition, it was widely accepted that, if the domestic service provider could be classified as an independent contractor, no such forms or backup documentation would be required.

In the Trump administration, greater emphasis has been placed on immigration status. In addition to questions concerning whether the employer has received and maintained I-9 forms and related documentation for employees, the personal data statement issued by the administration has emphasized this issue, requiring lists of domestic employees and independent contractors, and inquiring as to their immigration status.

Case study
Andrew Puzder. In connection with his nomination in 2016 for secretary of labor disclosed that his family hired an undocumented immigrant as a maid and initially failed to pay taxes related to her employment.

Authority
Berman, More Trouble for Andrew Puzder, The Atlantic, Feb. 7, 2017 https://www.theatlantic.com/politics/archive/2017/02/trump-labor-nominee-puzder-hired-undocumented-immigrant/515865/

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