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Presidential Transitions: Security Clearance Background Investigations

The security clearance process is designed to determine the trustworthiness of an individual prior to granting him or her access to classified national security information. Only federal entities may issue security clearances—and generally only upon a favorable determination following completion of a background investigation.

To facilitate the presidential transition and minimize gaps in national security personnel, expedited security clearance processes are available before and after each presidential election. Before the election, eligible presidential candidates may initiate clearances for prospective transition team members whose duties will require access to classified information. Post-election, an apparent successful presidential candidate may initiate expedited background investigations for proposed nominees for high-level Cabinet positions. This helps to ensure that these individuals have the appropriate clearances to perform their duties as soon as practicable.

This In Focus covers the expedited security clearance processes that are available to presidential candidates prior to inauguration, both pre- and post-election, and provides answers to frequently asked questions. For further discussion of the security clearance process, see CRS Report R43216, *Security Clearance Process: Answers to Frequently Asked Questions*.

Do All Positions Require Background Investigations?

In general, all individuals working for or on behalf of the federal government are subject to background investigations to ensure that they “are and continue to be loyal to the United States, reliable, trustworthy, and of good conduct and character” according to investigative and adjudicative standards (Executive Order 13764).

Though all positions require some form of background investigation, not all require security clearances. A *security clearance*, as noted above, is designed to determine eligibility for access to classified information. For positions that do not require access to classified information, a *background investigation* is conducted to determine the applicant’s *suitability* for federal employment. A background investigation to determine suitability may involve many of the same investigative elements as a background investigation for a security clearance. Unlike a security clearance, a suitability determination does not confer access to classified information.

Additionally, many, but not all, Senate committees have formal or informal rules that require pending political appointees to complete questionnaires and undergo some form of background investigation prior to their nomination hearings. Committee requirements are separate and distinct from security clearance requirements. Personal information obtained as part of a security clearance background investigation may be made available to committees upon request to the Administration and in accordance with applicable provisions of the Privacy Act (5 U.S.C. §552a) or other use restrictions.

Transition Team Clearances (Pre-Election)

The Intelligence Reform and Terrorism Prevention Act (IRTPA, P.L. 108-458) expedites security clearance processing for members of each eligible candidate’s transition team who will require access to classified materials. IRTPA allows each eligible candidate, as defined by the Pre-Election Presidential Transition Act of 2010, to initiate the transition team’s security clearance investigations prior to the election (50 U.S.C. §3342).

The Pre-Election Presidential Transition Act of 2010 defines an *eligible candidate* as a candidate of a “major party” for President or Vice President and any other candidate the administrator of the General Services Administration has determined to be a “principal contender” (3 U.S.C. §102 note).

To the extent practicable, the background investigations and security clearance adjudications for transition team members are to be completed by the day after the general election. This helps to ensure that the transition team members of an incoming presidential Administration have the appropriate clearances during the transition period between election and inauguration.

While IRTPA provides for expedited processing of transition team clearance investigations, it does not loosen or waive applicable investigative requirements or adjudicative standards. Further, presidential candidates are not statutorily required to initiate clearances for transition team members. Failure to do so may limit or delay transition team members’ access to classified materials.

Presidential Nominee Clearances (Post-Election)

After the presidential election, the Presidential Transition Act (PTA, 3 U.S.C. §102 note) allows “apparent successful

candidates” to initiate expedited background investigations and security clearance adjudications for their nominees for high-level Cabinet positions. This helps to ensure that these individuals have the appropriate clearances to perform their duties as soon as practicable.

Under Section 3(f) of the PTA, after the election, any apparent successful candidate should submit the names of candidates for “high level national security positions through the level of undersecretary of cabinet departments” to the Federal Bureau of Investigation (FBI) or other federal agencies with authority to conduct background investigations. Further, those names should also be submitted to the Defense Counterintelligence and Security Agency (DCSA), the agency designated by the President through executive order to conduct “effective, efficient, and secure background investigations.” The necessary background investigations for presidential appointees shall be completed as “expeditiously as possible” before the presidential inauguration.

As with the IRTPA, the PTA provides for expedited processing of clearance investigations but does not change investigative requirements or adjudicative standards. While the PTA recommends that the incoming Administration submit its high-level nominees for security clearances “as soon as possible” after the election, it does not require such nominees to obtain clearances prior to their appointments. However, failure to do so may limit or delay a nominee’s access to classified materials.

Background Investigation Process

Once an individual has received a conditional offer for a position that requires access to classified information, he or she must submit the required personnel vetting questionnaire (e.g., Standard Form 86) and supporting documentation, such as citizenship documents and employment history. This is typically done electronically.

A background investigation is conducted using the information provided by the applicant. The nature, scope, and cost of the investigation that an applicant must undergo varies based on the position. All investigations include verification of U.S. citizenship; fingerprint check; and review of applicable federal, state, and local records.

Security Clearance Decision and Appeal

Eligibility for access to classified information may be granted only “where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States” (Executive Order 12968, §3.1). Security clearance determinations are made by authorized adjudicative agency personnel using the *National Security Adjudicative Guidelines*.

An individual whose clearance has been denied or revoked has an opportunity to appeal the decision under agency-specific procedures in accordance with E.O. 12968.

Access to Classified Materials

A security clearance means that an individual is eligible for access. To gain access to specific classified materials, cleared individuals must have a demonstrated “need-to-know” and sign an appropriate nondisclosure agreement (Executive Order 12968, §1.2).

Need-to-Know

“Need-to-know” is a determination that an individual requires access to specific classified materials “in order to perform or assist in a lawful and authorized governmental function.” During a presidential transition, national security staff may require access in order to receive classified briefings or use secure facilities or information systems.

Nondisclosure Agreements

One of the primary purposes of the nondisclosure agreement (e.g., Standard Form 312) is to inform clearance holders that “unauthorized disclosure, unauthorized retention, or negligent handling of classified information ... could cause damage or irreparable injury to the United States.” The nondisclosure agreement also informs clearance holders of the potential administrative and legal consequences for failing to protect classified information in accordance with applicable laws, directives, and guidance.

Which Agencies Conduct Background Investigations?

The DCSA conducts most federal background investigations, though many other agencies—including the FBI and some within the Intelligence Community—have been delegated or have statutory authority to conduct some or all of their background investigations. Traditionally, the FBI has been primarily responsible for conducting background investigations of nominees for high-level Cabinet positions.

Can Security Clearance Requirements Be Waived?

Except as may be permitted by the President, no one may be granted access to classified information without a successful determination following an appropriate background investigation (50 U.S.C. §3161). However, in accordance with executive orders and intelligence directives, in certain cases an individual may be granted temporary or limited access prior to or without obtaining a security clearance. Often, access is granted in time-sensitive situations while the applicant’s full background investigation is completed. For example, an agency head or designated senior official may authorize temporary access to certain classified materials prior to the completion of an investigation or emergency access to respond to an imminent threat. In addition, the President may have some authority to provide access to individuals who do not have security clearances. For further discussion, see CRS Legal Sidebar WSLG1807, *Presidential Authority to Permit Access to National Security Information*.

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