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Homeland Security: Components and Management Positions in the New Department

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Summary

The Homeland Security Act of 2002 (P.L. 107-296) created a new department with some 25 full-time, civilian, presidentially appointed positions subject to Senate confirmation. The Act also creates or transfers a number of other positions. The Constitution and existing statutes provide a discernible framework for departmental appointments and pay levels, including congressional authority to create positions and specify which are subject to Senate confirmation, who may appoint, and which are available to political or career appointees. In addition to presidentially appointed positions, this framework includes noncareer Senior Executive Service (SES) and Schedule C positions. Although the Homeland Security Act adopts this framework for most of the positions in the new department, it creates some positions with appointing authority and compensation that deviate from previously existing norms.

The Act creates the positions of secretary, deputy secretary, five under secretaries, 12 assistant secretaries, and four other key positions, such as general counsel, requiring Senate confirmation. Two other presidentially appointed positions requiring Senate confirmation, Commandant of the Coast Guard and Commissioner of Customs, are transferred to the new department by the Act. The Act creates or transfers eight other positions, such as chief financial officer, that are presidentially appointed but do not require Senate confirmation. It creates a number of other positions, specifying appointing official and compensation in some cases and not in others. All provisions creating positions are identified in a table.

The Act creates the department through transfers of existing agencies and functions and the creation of new entities. All such entities and functions, their current organizational location, new location, and expected transfer date are listed in tables.

The Act also directs existing officials to provide assistance, during the transition, to the new secretary, as requested, and it specifies transitional authority related to acting officials and reconfirmation of present officeholders.

In addition to the Homeland Security Act, the report draws on the President's signing statement and Department of Homeland Security Reorganization Plan, released on November 25, 2002, which provide more specific detail about the proposed implementation of the new law.

Further information concerning the top positions in the new department is available in CRS Report RL31677, *Filling Presidentially Appointed, Senate-Confirmed Positions in the Department of Homeland Security*, by Henry B. Hogue. For more information on creation of the new department, see CRS Report 31751, *Homeland Security: Department Organization and Management — Implementation Phase*, by Harold C. Relyea. This report will be updated if there are significant changes in the managerial composition of the department.

Contents

Introduction	1
The Departmental Framework for Political Appointments	2
Compensation	3
Management Positions in the Department of Homeland Security	4
Secretary	4
Deputy Secretary	4
Under Secretaries	4
Assistant Secretaries	5
Presidentially Appointed Assistant Secretaries Subject to Senate Confirmation	5
Presidentially Appointed Assistant Secretaries Not Subject to Senate Confirmation	5
Administratively Created Assistant Secretary Positions	6
Compensation for Assistant Secretaries	6
Analysis of Assistant Secretary Provisions	6
Other Presidentialy Appointed Positions Requiring Senate Confirmation ..	7
Director of the Bureau of Citizenship and Immigration Services	8
Inspector General	8
General Counsel	8
Commandant of the Coast Guard	8
Commissioner of Customs	9
Director, Office for Domestic Preparedness	9
Under Secretary of Transportation for Security	9
Other Presidentialy Appointed Positions Not Requiring Senate Confirmation	9
Chief Financial Officer	10
Officer for Civil Rights and Civil Liberties	10
Chief Information Officer	10
Chief Human Capital Officer	11
Director of the Secret Service	11
Executive Secretary	11
Other Positions	11
Entities and Functions Transferred or Created	15
Cross-Agency Provisions	22
Transitional Provisions	23
Assistance to the Secretary	23
Appointments to Initial Vacancies	23
Termination of Positions Not Transferred	24
Discussion and Options	24
Conclusion	25

List of Tables

Table 1. Positions Created by the Homeland Security Act	10
Table 2. Entities and Functions Transferred or Abolished by the Homeland Security Act	13
Table 3. New Entities Created by the Homeland Security Act	18

Homeland Security: Components and Management Positions in the New Department

Introduction

The Homeland Security Act of 2002 created a new Department of Homeland Security, effective January 24, 2003.¹ The Act transfers a number of existing organizational units and functions and creates new units. It includes statutory provisions for staffing the top echelons of management within the new organization. The Act also called for the submission, by the President, of a reorganization plan not later than 60 days after enactment of the new law. The President released such a plan the day he signed the Act, and it provides more specific details concerning the proposed implementation of the Act.² The President also released a signing statement that provides additional information with regard to his interpretation of some of the provisions of the Act.³

The Constitution and existing statutes provide a discernable framework for departmental appointments and pay levels, which is described below. Following a discussion of this framework, this report identifies the provisions of the Act that created positions in the new department, and it provides an analysis of the provisions within this context. The report identifies units that are transferred, as well as those that are created. The provisions affecting the transfer of existing positions and the temporary filling of new positions are discussed.

The Homeland Security Act deviates in some ways from the existing appointments framework. These differences, and problems that may result, are

¹ P.L. 107-296; Nov. 25, 2002; 116 Stat. 2135. H.R. 5005, "An Act to establish the Department of Homeland Security, and for other purposes," as amended in the Senate, was passed by the Senate on Nov. 19, and it was passed by the House on Nov. 22, 2002. The bill was signed into law by President George W. Bush on Nov. 25, 2002.

² U.S. President (George W. Bush), "Department of Homeland Security Reorganization Plan," Nov. 25, 2002. The plan may be found at [http://www.whitehouse.gov/news/releases/2002/11/reorganization_plan.pdf], visited May 8, 2003. Two months later, the President transmitted a modification of that plan to Congress. U.S. President (George W. Bush), "Letter to Congressional Leaders Transmitting the Reorganization Plan Modification for the Department of Homeland Security," *Weekly Compilation of Presidential Documents*, vol. 39, Jan. 30, 2003, p. 136.

³ U.S. President (George W. Bush), "Statement on Signing the Homeland Security Act of 2002," *Weekly Compilation of Presidential Documents*, vol. 38, Nov. 25, 2002, pp. 2092-2095. Hereafter cited as Signing Statement.

identified throughout the report. Options for congressional consideration are explored.

The Departmental Framework for Political Appointments

The President and the Senate share the power to appoint the principal officers of the United States, an arrangement established by the Constitution:

... he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law ... (Article II, sec. 2, cl. 2)

The provision also empowers Congress to allow for the appointment of “inferior Officers” by the President alone, the courts, or department heads.

The officers in a department are established in the organic legislation or reorganization plan.⁴ Currently more than 1,200 presidentially appointed civilian executive or legislative branch positions require Senate confirmation (PAS positions).⁵ More than 330 of these are in the 14 previously existing executive departments. Within the departments, the first four levels — secretary, deputy secretary, under secretary, and assistant secretary — are nearly always PAS positions. Some staff officers, including the chief financial officer and the general counsel, are also routinely subject to confirmation. The persons filling those positions are generally considered to be the top policy decision makers in the federal government, having the responsibility to implement statutes.

Some executive branch positions are staffed through presidential appointments not requiring confirmation (PA positions). Those positions are rare in operational agencies; they are generally found in the White House Office and filled by persons who directly staff and advise the President. There are rare instances in which a position is placed at an executive level but is exempted by statute from a confirmation requirement.

In addition to PAS and PA positions, two types of non-presidential appointments are used to staff most other policy-making positions in the departments. The ranks of program managers are most commonly filled by career and noncareer members of the Senior Executive Service (SES). The number of noncareer SES is

⁴ For information on the appointment status of presidential appointments requiring Senate confirmation (PAS positions) within the executive departments currently, see CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107th Congress, 2001-2002*, by Henry B. Hogue.

⁵ U.S. Congress, Senate, Committee on Governmental Affairs, *Policy and Supporting Positions*, 106th Cong., 2nd sess., Committee Print, S. Prt. 106-54, Nov. 8, 2000 (Washington: GPO, 2000). Hereafter referred to as Plum Book 2000.

statutorily limited to 10% throughout the government and 25% of total SES within any given department or agency.⁶

Schedule C positions are used to fill lower-level positions that are excepted from the competitive service because of their confidential or policy-determining character. Most Schedule C positions are paid at rates on the General Schedule⁷ but are excepted from civil service requirements. For example, the personal secretary or executive assistant to a departmental secretary would serve in a Schedule C position. The Office of Personnel Management is responsible for approving these positions.

Compensation

Senior-level appointees are generally compensated according to the Executive Schedule, which has five pay levels. The correspondence between rank and level is fairly consistent across the existing departments. Level I is often referred to as Cabinet rank, and is generally accorded to departmental secretaries. Level II, usually that of deputy secretaries, is the rate corresponding to the salary for Members of Congress and for U.S. District Judges. Pay rates range from \$125,400 to \$171,900.⁸ Almost without exception, statutory positions on the Executive Schedule are positions requiring confirmation.

The compensation package for the position of Under Secretary of Transportation Security,⁹ currently head of the Transportation Security Administration (TSA), is a noteworthy exception to these compensation arrangements. This under secretary, a PAS position with a five-year term, is compensated at Executive Level II. In addition, in a departure from usual practice, the position carries with it statutory provision for an annual bonus not to exceed 30% of the annual rate of pay.¹⁰ If that bonus had been applied, the aggregate pay for the under secretary would have been \$195,000 in 2002.¹¹ There is no provision for the continuation of this position in the

⁶ 5 U.S.C. 3134.

⁷ The General Schedule is the pay and classification system for the majority of the rank and file white collar staff of the federal government. Pay rates are found through the Office of Personnel Management Website at [<http://www.opm.gov/oca/payrates/index.htm>], visited Mar. 11, 2003.

⁸ Executive Schedule positions are listed at 5 U.S.C. 5312-5316. These are salary rates in effect as of this writing. For information on pay for federal officials, see CRS Report 98-53, *Salaries of Federal Officials: A Fact Sheet*, by Sharon Gressle.

⁹ The Homeland Security Act transferred the Transportation Security Administration to the new department as a “distinct entity.” (P.L. 107-296, Secs. 403 (2), 423, and 424; 116 Stat. 2178, 2185.) James M. Loy was confirmed as Under Secretary of Transportation Security on Nov. 18, 2003, prior to the transfer on March 1, 2003. He continues to lead the organization under the title of “Administrator.” Officials in human resources office at TSA did not respond to requests for information about Loy’s current compensation and appointment status.

¹⁰ P.L. 107-71, Sec. 101(c)(1) and (2); Nov. 19, 2001; 115 Stat. 602.

¹¹ The salary for the Vice President, the Speaker of the House of Representatives, and the
(continued...)

new department, and no position with similar compensation arrangements is created under the Homeland Security Act.

Management Positions in the Department of Homeland Security

The Homeland Security Act establishes, in the new department, more than 50 identifiable new or transferred positions. The Department of Homeland Security Reorganization Plan, released by the President on November 25, 2002, signified the President's intention to nominate, appoint, and transfer individuals into many of these positions as soon as possible after January 24, 2003, the effective date of the Act.¹² This section identifies the positions created or transferred by the Act.

Secretary

The Homeland Security Act establishes the position of secretary as the head of the new department. The secretary is a PAS position, compensated at Level I of the Executive Schedule.¹³ The Act provides that the secretary has direction, authority, and control over the department. All functions of all officers, employees, and organizational units of the department are vested in the secretary. Specific functional authorities are detailed, including delegation of authority, coordination with non-federal entities, and promulgation of regulations. The Act provides that the secretary may, at the direction of the President, be part of National Security Council meetings.

Deputy Secretary

The Homeland Security Act establishes the position of deputy secretary as a PAS position, compensated at Level II of the Executive Schedule.¹⁴ The deputy secretary is the first in line of succession to act on behalf of the secretary.

Under Secretaries

The Homeland Security Act establishes five under secretary positions. The under secretaries are as follows: for Information Analysis and Infrastructure Protection; for Science and Technology; for Border and Transportation Security; for

¹¹ (...continued)

Chief Justice of the United States is projected to be \$198,600, effective January 2003.

¹² For more information on appointments to presidentially appointed, Senate-confirmed positions in the new department, see CRS Report RL31677, *Filling Presidentially Appointed, Senate-Confirmed Positions in the Department of Homeland Security*, by Henry B. Hogue.

¹³ P.L. 107-296, Sec. 102(a) and Sec. 1702.

¹⁴ P.L. 107-296, Sec. 103(a)(1) and Sec. 1702.

Emergency Preparedness and Response; and for Management.¹⁵ All the under secretary positions are PAS positions compensated at Level III of the Executive Schedule.¹⁶

Assistant Secretaries

The Department of Homeland Security appears to have three categories of assistant secretaries. Two categories have a statutory basis in the Homeland Security Act, and one category has been created administratively.

Presidentially Appointed Assistant Secretaries Subject to Senate Confirmation. The Act creates up to 12 PAS assistant secretary positions with no specified functions.¹⁷ Under such provisions, the President generally specifies the functions of each assistant secretary at the time he announces or submits a nomination. As of May 8, 2003, the President had specified the functions associated with two of the 12 positions: Assistant Secretary for Border and Transportation Security Policy and Assistant Secretary for Immigration and Customs Enforcement.

Among the 12 PAS assistant secretary positions, the Assistant Secretary for the Bureau of Immigration and Customs Enforcement has a unique statutory context. Originally, the Homeland Security Act created the position of Assistant Secretary of the Bureau of Border Security without specifying the means of appointment.¹⁸ It was not clear whether or not this position was intended to be one of the 12 above. This question appears to have been answered by the modification to the President's reorganization plan.¹⁹ As part of the reorganization of the border security functions under this modification, the position was renamed the Assistant Secretary for the Bureau of Immigration and Customs Enforcement and identified as a presidentially appointed Senate-confirmed position.

Presidentially Appointed Assistant Secretaries Not Subject to Senate Confirmation. The Act creates two additional presidentially appointed assistant secretary positions, but these do not specify a Senate confirmation requirement.²⁰ The President, in his signing statement, endorsed the view that these positions were distinct from the positions discussed above, stating that

¹⁵ P.L. 107-296, Secs. 103(a)(2), (3), (4), (5), and (7). Titles II, III, IV, V, and VII of the Act set out the authorities and responsibilities associate with these positions.

¹⁶ P.L. 107-296, Sec. 1702.

¹⁷ P.L. 107-296, Sec. 103(a)(8). Generally, where assistant secretary functions are not specified in statute, the President specifies functions with each nomination to such a position.

¹⁸ Sec. 442(a)(2).

¹⁹ See "Border Reorganization Fact Sheet," at [http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0073.xml], visited May 8, 2003.

²⁰ Sec. 201(b).

The text and structure of the Act make clear that these two presidentially appointed Assistant Secretary positions were created in addition to the 12 unspecified Assistant Secretary positions, and the executive branch shall construe the relevant provisions accordingly.²¹

The two officials, the Assistant Secretary for Information Analysis and Assistant Secretary for Infrastructure Protection, are responsible for assisting the Under Secretary for Information Analysis and Infrastructure Protection in the discharge of his or her duties.

Administratively Created Assistant Secretary Positions. In addition to the assistant secretary positions authorized by the Act, at least two non-statutory positions with the title of assistant secretary have been created, administratively, within DHS. These positions, Assistant Secretary for Public Affairs and Assistant Secretary for Legislative Affairs, have been filled through appointment by the Secretary of Homeland Security.²²

Compensation for Assistant Secretaries. In general, the Act provides that the statutory assistant secretaries are compensated at Level IV of the Executive Schedule.²³ The compensation for the administratively created assistant secretary positions is not clear. As of this writing, staff at DHS were unable to provide information on how the positions are being compensated.

One provision of the Act related to assistant secretaries and compensation is unclear. As just noted, Section 1702(a)(4) provides that DHS assistant secretaries are to be compensated at Level IV of the Executive Schedule. Section 451(a)(2)(C) provides that the Director of the Bureau of Citizenship and Immigration Services “shall be paid at the same level as” the Assistant Secretary of the Bureau of Border Security. According to Section 1702(a)(3), however, the director is to be compensated, with the under secretaries, at Level III of the Executive Schedule. In other words, although Section 451 stipulates that the pay rates of the two positions will be the same, Section 1702 provides that they will be compensated at different rates. The interpretation of these provisions is further complicated by the reorganization of border security functions and renaming of the Assistant Secretary of the Bureau of Border Security, which is discussed above. As of this writing, staff at DHS were unable to provide information on how these provisions are being implemented.

Analysis of Assistant Secretary Provisions. Homeland Security Act provisions and administrative actions during the creation of the new department have effectively created three categories of assistant secretaries: presidentially appointed

²¹ U.S. President (George W. Bush), “Statement on Signing the Homeland Security Act of 2002,” *Weekly Compilation of Presidential Documents*, vol. 38, Nov. 25, 2002, p. 2092.

²² See DHS press releases at [<http://www.dhs.gov/dhspublic/display?theme=43&content=506>] and [<http://www.dhs.gov/dhspublic/display?theme=43&content=417>], visited May 8, 2003. DHS officials have confirmed that these positions are not among the 12 statutory PAS assistant secretary positions.

²³ P.L. 107-296, Sec. 1702(a)(4).

and Senate-confirmed; presidentially appointed without Senate confirmation; and appointed by the secretary. It is not clear whether or not assistant secretaries from each of these three categories will be given the same level of policymaking authority and responsibility. As a result of the different appointment processes, however, the three types of assistant secretary may have differing stature within the department and within the government at large. In addition, those who are subject to Senate confirmation are likely to undergo greater scrutiny in the selection process and to be more accountable to Congress during their tenure. As a condition of Senate confirmation, most nominees make a commitment “to respond to requests to appear and testify before any duly constituted committee of the Senate.” Appointees who are not subject to Senate confirmation are under no such obligation.

The creation of presidentially appointed assistant secretary positions not subject to Senate confirmation is a marked departure from past practices in the other departments. PA positions²⁴ are almost all in the White House Office. It is rare for positions in the executive departments to be designated as PA positions; nearly all principal officers in these organizations are statutorily designated as PAS positions. Prior to the creation of this new department, as far as it can be determined, there was only one PA position in the executive departments.²⁵ PA positions are generally made for personnel who will be working in close proximity to the President and are privy to the confidential policy discussions conducted by leaders of agencies in the Executive Office of the President. By and large, presidential appointees to PA positions act as advisers, while those nominated to PAS positions are primarily policy decision makers who administer programs. The latter group are responsible for implementing statutes.

Other Presidential Appointed Positions Requiring Senate Confirmation

The positions identified in this section were established as PAS positions by the Homeland Security Act.

²⁴ As of Sept. 2001, the Office of Personnel Management reported 86 full-time and 111 part-time presidential appointees not requiring Senate confirmation. (See [<http://opm.gov/feddata>], with link to “Data from the CPDF,” visited May 8, 2003.)

²⁵ 42 U.S.C. 284(a) provides that “The Director of the National Cancer Institute shall be appointed by the President.” The other health institute directors are appointed by the Secretary of Health and Human Services. All the directors report to the secretary.

The Plum Book for 2000 erroneously lists four other departmental positions as being presidential appointments not requiring confirmation. Three, the Deputy Secretary of Education, the Deputy Secretary of Labor, and the Department of Transportation Administrator, Research and Special Programs Administration, are all statutory positions requiring Senate confirmation. The fourth, the Assistant Secretary of Defense for Force Management Policy, was a statutory position, but was discontinued with the creation of the Deputy Under Secretary of Defense for Personnel and Readiness under P.L. 107-107, Sec. 901.

Director of the Bureau of Citizenship and Immigration Services.²⁶

The Act creates the position of Director of the Bureau of Citizenship and Immigration Services, who is to report directly to the Deputy Secretary and is to have a minimum of 5 years of management experience. The compensation for this position is not clear. Section 1702(a)(3) provides that the office holder will be compensated at the same level as the under secretaries (Level III of the Executive Schedule). Section 451(a)(2)(C) provides, however, that the position will receive compensation at the same rate as the Assistant Secretary of Border Security. The compensation for that assistant secretary is not specifically stated, but Section 1702(a)(4) provides that all assistant secretaries will be compensated at Level IV of the Executive Schedule. Thus, Section 1702 provides that the two positions will be compensated at different rates, while Section 451 stipulates that their pay rates will be the same.

Inspector General. The Homeland Security Act provides for the creation of an inspector general (IG) position, appointed as provided in Section 3(a) of the Inspector General Act of 1978.²⁷ The referenced section of the Inspector General Act provides for the appointment by and with the advice and consent of the Senate. The Homeland Security Act places the IG at Level IV of the Executive Schedule,²⁸ on a par with other departmental IGs.²⁹ The Act also includes provisions that give the secretary greater authority, direction, and control over the IG, under certain circumstances, than is provided for in the IG statute. These provisions include steps to be taken to notify Congress under such circumstances.³⁰ The Act also specifies new law enforcement powers for IGs.³¹

General Counsel. The Homeland Security Act creates, as a PAS position, a general counsel as chief legal officer of the department, to be paid at Level IV of the Executive Schedule.³² This is consistent with the practice in each of the 14 existing departments, which have statutory departmental legal counsels, usually referred to as a general counsel. Those positions are also paid at Level IV of the Executive Schedule³³ and all require confirmation as part of the appointment process.

Commandant of the Coast Guard. The Homeland Security Act establishes the position of Commandant of the Coast Guard to “assist the Secretary in the performance of the Secretary’s functions, ... appointed as provided in section 44 of title 14, United States Code, and who shall report directly to the Secretary.” In addition, the duties of the commandant “include those required by section 2 of title

²⁶ P.L. 107-296, Sec. 103(a)(6), Sec. 451, and Sec. 1702.

²⁷ P.L. 107-296, Sec. 103(b).

²⁸ P.L. 107-296, Sec. 1702.

²⁹ 5 U.S.C. 5315.

³⁰ P.L. 107-296, Sec. 811.

³¹ P.L. 107-296, Sec. 812.

³² P.L. 107-296, Sec. 103(a)(9) and Sec. 1702.

³³ 5 U.S.C. 5315.

14, United States Code.”³⁴ The commandant has the grade of admiral while serving.³⁵

Commissioner of Customs. The Act establishes the position of Commissioner of Customs as a PAS position at the head of the United States Customs Service in the new department. The position is compensated at Level III of the Executive Schedule. The Act explicitly provides that the office holder immediately prior to the new law’s effective date may continue until the appointment of a new commissioner.³⁶ During late January 2003, the border security functions being transferred into the new department were reorganized, and the Commissioner of Customs now heads the Bureau of Customs and Border Protection in the Directorate for Border and Transportation Security.³⁷

Director, Office for Domestic Preparedness. An Office for Domestic Preparedness is created by the Homeland Security Act, and the office is headed by a presidentially-appointed, Senate-confirmed director.³⁸ The compensation for the position is not specified in the Act.

Under Secretary of Transportation for Security

The Act transferred the Transportation Security Administration (TSA) to the new department as a “distinct entity.”³⁹ When TSA was part of the Department of Transportation, the head of TSA, formerly known as the Under Secretary of Transportation for Security, was a PAS position.⁴⁰ The position was not explicitly transferred by the Act. However, James M. Loy, who was confirmed as Under Secretary of Transportation Security on Nov. 18, 2003, prior to the transfer on March 1, 2003, continues to lead the organization under the title of “Administrator.”

Other Presidentially Appointed Positions Not Requiring Senate Confirmation

The positions identified in this section are appointed by the President but do not require Senate confirmation. As noted elsewhere, it is unusual to have this type of position in an executive department; most leadership positions are either PAS positions or secretarial appointments. In addition to the positions identified here, two

³⁴ P.L. 107-296, Sec. 103(c). An additional subsection providing that the commandant report directly to the secretary may be found at Sec. 888(g).

³⁵ 14 U.S.C. 44

³⁶ P.L. 107-296, Sec. 411(b). Robert C. Bonner was confirmed as Commissioner of Customs on Sept. 19, 2001. As of April 7, 2003, in the wake of the transfer of the U.S. Customs Service to the new department on Mar. 1, 2003, he continued to hold that position.

³⁷ “Border Reorganization Fact Sheet,” at [http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0073.xml], visited May 8, 2003.

³⁸ P.L. 107-296, Sec. 430.

³⁹ P.L. 107-296, Secs. 403(2), 423, and 424; 116 Stat. 2178, 2185.

⁴⁰ 49 U.S.C. 114(b).

or three assistant secretary positions, as discussed above, are presidentially-appointed without Senate confirmation.

Chief Financial Officer. Under the provisions of the Chief Financial Officers Act of 1990,⁴¹ there are established, in each of the executive departments, chief financial officers (CFOs). The chief financial officer may be appointed by the President, with the advice and consent of the Senate, or may be designated by the President from among agency officials who have been confirmed by the Senate for another position.⁴² In a departure from this provision of law, the Homeland Security Act establishes the position of chief financial officer as a PA position in the new department.⁴³ The CFO is appointed by the President and compensated at Level IV, as are other departmental CFOs.⁴⁴ Unlike other CFOs, however, the Department of Homeland Security CFO does not require Senate confirmation. The new CFO position differs from others in another way, as well. Current law provides that CFOs report directly to the head of the agency, in this case the secretary. Notwithstanding this provision of law, however, the Homeland Security Act provides that the new CFO reports to the secretary, or to “another official of the Department, as the Secretary may direct.”⁴⁵

Officer for Civil Rights and Civil Liberties. An Officer for Civil Rights and Civil Liberties is established by the Act.⁴⁶ There are conflicting provisions in the Act regarding the appointment authority for this position. Section 103(d)(5) creates this position as a PA position, whereas Section 705 creates the position (or another position with the same title) as a secretary-appointed position. The first holder of this office was reportedly appointed by the President.⁴⁷ This officer is compensated at Level IV of the Executive Schedule.⁴⁸

Chief Information Officer. Chapter 35 of Title 44 of the U.S. Code sets out the requirements for the coordination of federal information policy. Under 44 U.S.C. 3506, each agency head is directed to designate a chief information officer. The CIOs are to be paid at Level IV of the Executive Schedule and to report directly to the agency head (secretary).⁴⁹ The Homeland Security Act creates the department’s CIO as a PA position, compensated at Level IV of the Executive Schedule.⁵⁰ The

⁴¹ P.L. 101-576, Nov. 15, 1990, Sec. 205.

⁴² 31 U.S.C. 901(a)(1).

⁴³ P.L. 107-296, Sec. 103(d)(4).

⁴⁴ P.L. 107-296, Sec. 1702.

⁴⁵ P.L. 107-296, Sec. 702.

⁴⁶ P.L. 107-296, Sec. 103(d)(5) and Sec. 705.

⁴⁷ “Officer for Civil Rights & Civil Liberties: Daniel W. Sutherland,” at [<http://www.dhs.gov/dhspublic/display?theme=11&content=621>], visited May 8, 2003.

⁴⁸ P.L. 107-296, Sec. 1702.

⁴⁹ P.L. 104-106; Feb. 10, 1996; 110 Stat. 684-686.

⁵⁰ P.L. 107-296, Sec. 103(d)(2) and Sec. 1702.

CIO is to report to the secretary or to “another official of the Department as the Secretary may direct.”⁵¹

The provisions creating this new office are unusual among provisions that establish high-level positions generally. As noted above in the discussion of assistant secretary positions, the creation of a PA position in a department is very unusual. This is as true for CIOs as other officers. In addition, changing the status of appointment for one CIO may affect the CIO Council.⁵²

Chief Human Capital Officer. The Homeland Security Act creates a Chief Human Capital Officer as a PA position in the new department.⁵³ Compensation for this position is not specified. The Act also creates similar positions in other federal departments and agencies, although the officers filling these positions are appointed by the agency head. (See “Cross-Agency Positions,” below.)

Director of the Secret Service. The Act establishes the Director of the Secret Service as a PA position in the new department.⁵⁴ Previously, the Director of the Secret Service was appointed by the Secretary of the Treasury. The six most recent directors have been career members of the Senior Executive Service chosen from on-board staff.⁵⁵ Compensation for the position is not specified.

Executive Secretary. The Homeland Security Council is created by the Homeland Security Act, and the council staff will be led by a civilian executive secretary appointed by the President without Senate confirmation.⁵⁶ The pay for this position is set by the President “at a rate not to exceed the rate of pay payable to the Executive Secretary of the National Security Council.”

Other Positions

The Homeland Security Act creates additional positions not identified in one of the above categories. These positions are included in **Table 1** below, which identifies all positions created by the Act. The positions are presented sequentially as they appear in P.L. 107-296.

⁵¹ P.L. 107-296, Sec. 703.

⁵² The Chief Information Officer Council was established by executive order. U.S. President (Clinton), “Federal Information Technology,” Executive Order 13011, *Federal Register*, vol. 61, July 19, 1996, pp. 37657-37662.

⁵³ P.L. 107-296, Sec. 103(d)(3). Responsibilities of the Chief Human Capital Officer are described in Sec. 704.

⁵⁴ P.L. 107-296, Sec. 103(d)(1).

⁵⁵ Information received from U.S. Secret Service, Office of Government Liaison and Public Affairs, via telephone conversation, July 3, 2002.

⁵⁶ P.L. 107-296, Sec. 905.

Table 1. Positions Created by the Homeland Security Act

Section	Position	Appointment Authority	Compensation^a
102(a)	Secretary	PAS position	Level I
102(f)	Special Assistant to the Secretary (Office of Private Sector Liaison)	Secretary appointment	not specified (n.s.)
103(a)(1)	Deputy Secretary	PAS position	Level II
103(a)(2)	Under Secretary for Information Analysis and Infrastructure Protection	PAS position	Level III
103(a)(3)	Under Secretary for Science and Technology	PAS position	Level III
103(a)(4)	Under Secretary for Border and Transportation Security	PAS position	Level III
103(a)(5)	Under Secretary for Emergency Preparedness and Response	PAS position	Level III
103(a)(7)	Under Secretary for Management	PAS position	Level III
103(a)(6) and 451(a)(2)	Director of the Bureau of Citizenship and Immigration Services	PAS position	May be Level III or Level IV
103(a)(8)	Up to 12 Assistant Secretaries	PAS positions	Level IV
103(a)(9)	General Counsel	PAS position	Level IV
103(b)	Inspector General	PAS position	Level IV
103(c)	Commandant, United States Coast Guard	PAS position with grade of admiral while serving (14 U.S.C. 44)	
103(e)(1)	Director, United States Secret Service	PA position	n.s.
103(e)(2) and 703	Chief Information Officer	PA position	Level IV
103(e)(3) and 704	Chief Human Capital Officer	PA position	n.s.
103(e)(4) and 702	Chief Financial Officer	PA position	Level IV
103(e)(5) and 705	Officer for Civil Rights and Liberties	PA position or Secretary appointment (implemented as PA position)	Level IV

Section	Position	Appointment Authority	Compensation^a
201(b)(1)	Assistant Secretary for Information Analysis	PA position	Level IV
201(b)(2)	Assistant Secretary for Infrastructure Protection	PA position	Level IV
222	Privacy Officer	Secretary Appointment	n.s.
231(b)	Director, Office of Science and Technology, Department of Justice	Requires approval by the Office of Personnel Management of the individual's "executive qualifications." ^b	n.s.
307(b)(2)	Director, Homeland Security Advanced Research Projects Agency	Secretary appointment	n.s.
411	Commissioner of Customs	PAS Position	Level III
430	Director, Office for Domestic Preparedness	PAS Position	n.s.
442(a)(2)	Assistant Secretary of the Bureau of Border Security (now the Assistant Secretary for the Bureau of Immigration and Customs Enforcement) ^c	not specified by the Act — identified as PAS position during reorganization ^c	May be Level III or Level IV
442(b)	Chief of Policy and Strategy, Bureau of Border Security ^c	n.s.	n.s.
442(c)	Legal Advisor to the Assistant Secretary of the Bureau of Border Security ^c	n.s.	n.s.
451(c)	Chief of Policy and Strategy for the Bureau of Citizenship and Immigration Services	n.s.	n.s.
451(d)	Legal Advisor to the Director of the Bureau of Citizenship and Immigration Services	n.s.	n.s.
451(e)	Budget Officer for the Bureau of Citizenship and Immigration Services	n.s.	n.s.
451(f)	Chief of the Office of Citizenship	n.s.	n.s.

Section	Position	Appointment Authority	Compensation ^a
452	Citizenship and Immigration Services Ombudsman	n.s.	n.s.
475	Director of Shared Services	n.s.	n.s.
878	Counternarcotics Officer ^d	Secretary appointment ^e	n.s.
879	Director, Office of International Affairs	Secretary appointment	n.s.
882(a)(2)	Director, Office for National Capital Region Coordination	Secretary appointment	n.s.
905	Executive Secretary, Homeland Security Council	PA position (must be civilian)	“The President is authorized to fix the pay ... at a rate not to exceed the rate of pay payable to the Executive Secretary of the National Security Council.”
1111(a)(2)	Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice	Attorney General appointment	Level III
1111(d)(2)	Administrator, Bureau of Tax and Trade, Department of Justice	Senior Executive Service, career-reserved position	Senior Executive Service pay schedule

Notes:

n.s. - not specified

a. Compensation, where provided for, is stipulated either in the section creating the position or in Sec. 1702. Level refers to the level of the Executive Schedule.

b. The Signing Statement (p. 2093) directs Attorney General to appoint this director.

c. The Bureau of Border Security was reorganized under the modification of the President’s reorganization plan and renamed the Bureau of Immigration and Customs Enforcement. “Border Reorganization Fact Sheet,” at [http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0073.xml], visited May 8, 2003.

d. Sec. 878 states that the secretary will appoint “a senior official” in the department to carry out specific functions. This person will also serve as the United States Interdiction Coordinator for the Director of National Drug Control Policy.

e. The Signing Statement (p. 2094) provides that “In making this appointment, the Secretary of Homeland Security will consult with and seek recommendations from the Director of the Office of National Drug Control Policy.”

Entities and Functions Transferred or Created

Under the provisions of the Homeland Security Act, a number of entities, including authorities, functions, personnel, assets, and, as determined to be necessary, obligations or liabilities are transferred into the new department or an existing department. These transfers are shown in **Table 2**. In addition, a number of new organizational entities are established, both within and outside the new department. The new units are identified in **Table 3**. The tables also show the planned date of transfer or establishment as identified in the Department of Homeland Security Reorganization Plan.⁵⁷ All transfers are to be completed by September 30, 2003.

Table 2. Entities and Functions Transferred or Abolished by the Homeland Security Act

Section	Unit or Function Transferred	Current Location	New Location ^a	Transfer Date
201(g)(1)	National Infrastructure Protection Center (other than the Computer Investigations and Operations Section)	Federal Bureau of Investigation	Directorate for Information Analysis and Infrastructure Protection	3/1/03
201(g)(2)	National Communications System	Department of Defense	Directorate for Information Analysis and Infrastructure Protection	3/1/03
201(g)(3)	Critical Infrastructure Assurance Office	Department of Commerce	Directorate for Information Analysis and Infrastructure Protection	3/1/03
201(g)(4)	National Infrastructure Simulation and Analysis Center and the energy security and assurance and activities of the department	Department of Energy	Directorate for Information Analysis and Infrastructure Protection	3/1/03
201(g)(5)	Federal Computer Incident Response Center	General Services Administration	Directorate for Information Analysis and Infrastructure Protection	3/1/03

⁵⁷ U.S. President (George W. Bush), "Department of Homeland Security Reorganization Plan," Nov. 25, 2002. The plan may be found at [http://www.whitehouse.gov/news/releases/2002/11/reorganization_plan.pdf], visited May 8, 2003.

Section	Unit or Function Transferred	Current Location	New Location^a	Transfer Date
303(1)(A)	Chemical and biological national security and supporting programs and activities of the non-proliferation and verification research and development program	Department of Energy	Directorate for Science and Technology	3/1/03
303(1)(B)	Nuclear smuggling programs and activities within the proliferation detection program of the non-proliferation and verification research and development program	Department of Energy	Directorate for Science and Technology (May be designated by the President to be transferred or to be jointly operated by the secretaries of the two departments)	3/1/03
303(1)(C)	Nuclear assessment program and activities of the assessment, detection, and cooperation program of the international materials protection and cooperation program	Department of Energy	Directorate for Science and Technology	3/1/03
303(1)(D)	As designated by the President, life sciences activities of the biological and environmental research program related to microbial pathogens	Department of Energy	Directorate for Science and Technology	3/1/03
303(1)(E)	Environmental Measurements Laboratory	Department of Energy	Directorate for Science and Technology	3/1/03
303(1)(F)	Advanced scientific computing research program and activities at Lawrence Livermore National Laboratory	Department of Energy	Directorate for Science and Technology	3/1/03
303(2)	National Bio-Weapons Defense Analysis Center ^b	Department of Defense	Directorate for Science and Technology	3/1/03
310	Plum Island Animal Disease Center	Department of Agriculture	Directorate for Science and Technology	6/1/03

Section	Unit or Function Transferred	Current Location	New Location^a	Transfer Date
403(1); see also Title IV, Subtitle B	United States Customs Service	Department of the Treasury	Directorate for Border and Transportation Security	3/1/03
403(2); see also 423 and 424	Transportation Security Administration	Department of Transportation	Directorate for Border and Transportation Security; to be maintained as a "distinct entity"	3/1/03
403(3)	Federal Protective Service	General Services Administration	Directorate for Border and Transportation Security	3/1/03
403(4); see also 884	Federal Law Enforcement Training Center	Department of the Treasury	Directorate for Border and Transportation Security	3/1/03
403(5); see also 430	Office for Domestic Preparedness	Office of Justice Programs, Department of Justice	Directorate for Border and Transportation Security	3/1/03
421	Certain agricultural import and entry inspection functions	Department of Agriculture	Directorate for Border and Transportation Security	3/1/03
426	Transportation Security Oversight Board	Department of Transportation	Directorate for Border and Transportation Security	1/24/03
430(c)(8)	Assigns to the Office for Domestic Preparedness the primary responsibility for "preparedness of the United States for acts of terrorism, including ... those elements of the Office of National Preparedness of the Federal Emergency Management Agency which relate to terrorism, which shall be consolidated within the Department in the Office of Domestic Preparedness" Unclear if this transfer of responsibility transfers functions, assets, personnel, authorities, or obligations.			Not specified (presume 3/1/03)
441(1)	Border Patrol program	Immigration and Naturalization Service, Department of Justice (DOJ)	Directorate for Border and Transportation Security	3/1/03

Section	Unit or Function Transferred	Current Location	New Location^a	Transfer Date
441(2)	Detention and removal program	Immigration and Naturalization Service, DOJ	Directorate for Border and Transportation Security	3/1/03
441(3)	Intelligence program	Immigration and Naturalization Service, DOJ	Directorate for Border and Transportation Security	3/1/03
441(4)	Investigations program	Immigration and Naturalization Service, DOJ	Directorate for Border and Transportation Security	3/1/03
441(5)	Inspections program	Immigration and Naturalization Service, DOJ	Directorate for Border and Transportation Security	3/1/03
451(b)	Adjudications of immigrant visa petitions, naturalization petitions, and asylum and refugee applications. Adjudications performed at service centers and all other adjudications performed by the Immigration and Naturalization Service	Immigration and Naturalization Service, DOJ	Bureau of Citizenship and Immigration Services	3/1/03
462(a)	Functions "... with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization"	Immigration and Naturalization Service, DOJ	Office of Refugee Resettlement, Department of Health and Human Services	3/1/03
471(a)	Immigration and Naturalization Service (DOJ) abolished upon completion of all transfers			
503(1)	Federal Emergency Management Agency	Independent Agency	Directorate of Emergency Preparedness and Response	3/1/03
503(2)	Integrated Hazard Information System	National Oceanic and Atmospheric Administration, Department of Commerce	Directorate of Emergency Preparedness and Response	3/1/03

CRS-19

Section	Unit or Function Transferred	Current Location	New Location^a	Transfer Date
503(3)	National Domestic Preparedness Office	Federal Bureau of Investigation	Directorate of Emergency Preparedness and Response	3/1/03
503(4)	Domestic Emergency Support Teams	Department of Justice	Directorate of Emergency Preparedness and Response	3/1/03
503(5)	Office of Emergency Preparedness	Department of Health and Human Services	Directorate of Emergency Preparedness and Response	3/1/03
503(5)	National Disaster Medical System	Department of Health and Human Services	Directorate of Emergency Preparedness and Response	3/1/03
503(5)	Metropolitan Medical Response System	Department of Health and Human Services	Directorate of Emergency Preparedness and Response	3/1/03
503(6)	Strategic National Stockpile	Department of Health and Human Services	Directorate of Emergency Preparedness and Response	3/1/03
504	Nuclear Incident Response Team	Operates as an organizational unit of the department at the direction of the secretary in the event of an actual or threatened terrorist attack, major disaster, or other emergency in the U.S. Otherwise, under the purview of the Secretary of Energy and the Administrator of the Environmental Protection Agency		3/1/03
701(b)(2)	Functions performed in the Statistics Branch pertaining to the programs transferred by Sections 441 and 451	Statistics Branch, Office of Policy and Planning, Immigration and Naturalization Service	Directorate for Management	Not specified
821	United States Secret Service	Department of the Treasury	Department of Homeland Security; to be maintained as a "distinct entity"	3/1/03

Section	Unit or Function Transferred	Current Location	New Location ^a	Transfer Date
888	United States Coast Guard	Department of Transportation	Department of Homeland Security; to be maintained as a “distinct entity”	3/1/03
1111(c)	Many functions of the Bureau of Alcohol, Tobacco and Firearms ^c	Department of the Treasury	Department of Justice; to be maintained as a “distinct entity”	Not specified

Notes:

- For the purposes of this table, it is assumed that the unit or function would be transferred to the directorate that would be created under the same title in which the transferring provision is located, unless the provision specifies otherwise.
- The National Bio-Weapons Defense Analysis Center is established in the Department of Defense by Sec. 1708, and it is transferred from Defense to the new department by Sec. 303(2).
- The transfer, in Sec. 1111(c), of many functions of the Bureau of Alcohol, Tobacco, and Firearms from the Department of the Treasury to the Department of Justice would occur in conjunction with the establishment, in Sec. 1111(a), of the Bureau of Alcohol Tobacco, Firearms, and Explosives in the Department of Justice.

Table 3. New Entities Created by the Homeland Security Act^a

Section	Unit	Location	Establishment Date
102(f)	Office of Private Sector Liaison	Department of Homeland Security	Not specified
224	NET Guard (national technology guard)	Directorate of Information Analysis and Infrastructure Protection	Not specified
231	Office of Science and Technology ^b	National Institute of Justice, Department of Justice	Not specified
307(b)(1)	Homeland Security Advanced Research Projects Agency	Director reports to the Under Secretary for Science and Technology	1/24/03
309(g)	Office for National Laboratories	Directorate of Science and Technology	1/24/03
311	Homeland Security Science and Technology Advisory Committee	Department of Homeland Security; members appointed by Under Secretary for Science and Technology	6/1/03
312	Homeland Security Institute	Administered as a “separate entity by the Secretary” of Homeland Security	Not specified

Section	Unit	Location	Establishment Date
313	Technology clearinghouse program	Established by the secretary acting through the Under Secretary for Science and Technology	Not specified
442	Bureau of Border Security (now the Bureau of Immigration and Customs Enforcement) ^c	Head of bureau to report directly to Under Secretary for Border and Transportation Security	1/24/03
451	Bureau of Citizenship and Immigration Services	Head of bureau to report directly to Deputy Secretary of Homeland Security	1/24/03
451(f)	Office of Citizenship	Bureau of Citizenship and Immigration Services	Not specified
452	Citizenship and Immigration Services Ombudsman	Ombudsman to report directly to the Deputy Secretary	1/24/03
461(c)	Technology Advisory Committee	To assist the secretary	Not specified
801	Office for State and Local Government Coordination	Office of the Secretary of Homeland Security	1/24/03
879	Office of International Affairs	Office of the Secretary of Homeland Security	1/24/03
882	Office for National Capital Region Coordination	Office of the Secretary of Homeland Security	1/24/03
885	Joint Interagency Homeland Security Task Force	Established and operated by the Secretary of Homeland Security	Not specified
901	Homeland Security Council	Executive Office of the President	Not specified
1111(a)	Bureau of Alcohol, Tobacco, Firearms, and Explosives ^d	Department of Justice	Not specified
1111(d)	Tax and Trade Bureau	Department of the Treasury	Not specified
1114	Explosives Training and Research Facility	Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice	Not specified
1303	Chief Human Capital Officers Council	Chaired by the Director of the Office of Personnel Management	Not specified

Section	Unit	Location	Establishment Date
1708	National Bio-Weapons Defense Analysis Center ^e	Department of Defense	Not specified (to be transferred to Department of Homeland Security 3/1/03)

Notes:

- a. This table does not include the directorates created in the department.
- b. The Office of Science and Technology is established in the National Institute of Justice by Sec. 231. Sec. 234 is entitled “Abolishment of Office of Science and Technology of National Institute of Justice; Transfer of Functions.” Despite the title, it does not appear to abolish the office created by Sec. 231. It does, however, provide for the transfer of functions to the office.
- c. The Bureau of Border Security was reorganized under the modification of the President’s reorganization plan and renamed the Bureau of Immigration and Customs Enforcement. “Border Reorganization Fact Sheet,” at [http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0073.xml], visited May 8, 2003.
- d. The establishment, in Sec. 1111(a), of the Bureau of Alcohol Tobacco, Firearms, and Explosives in the Department of Justice would occur in conjunction with the transfer, in Sec. 1111(c), of many functions of the Bureau of Alcohol, Tobacco, and Firearms from the Department of the Treasury to the Department of Justice.
- e. The National Bio-Weapons Defense Analysis Center is established in the Department of Defense by Sec. 1708, and it is transferred from Defense to the new department by Sec. 303(2).

Cross-Agency Provisions

The Homeland Security Act establishes chief human capital officers, to be appointed by the head of each agency, in every agency in which there is a chief financial officer.⁵⁸ The Act does not provide for the compensation of these officers. It establishes a Chief Human Capital Officers Council comprising the Director of the Office of Personnel Management (OPM) (chair), the Deputy Director for Management of the Office of Management and Budget (OMB) (vice-chair), the chief human capital officers of the executive departments, and other individuals as designated by the OPM Director.⁵⁹

The Act also provides law enforcement powers to criminal investigators in statutory inspectors general offices. Under these provisions, the Attorney General may authorize such agents to, among other things, carry firearms and make arrests.⁶⁰

⁵⁸ P.L. 107-296, Sec. 1302.

⁵⁹ P.L. 107-296, Sec. 1303.

⁶⁰ P.L. 107-296, Sec. 812. For additional information on inspectors general, see CRS Report 98-379, *Statutory Offices of Inspector General: Establishment and Evolution*, by Frederick M. Kaiser.

Transitional Provisions

The Homeland Security Act includes several provisions regarding the transition of current officials and their functions to the new agency. Transition plans are further specified in the Department of Homeland Security Reorganization Plan.

Assistance to the Secretary. The Act directs current officials “having authority over or functions relating to” an agency being transferred to provide assistance to the new secretary, as he requests.⁶¹

Appointments to Initial Vacancies. Under the Act the President has two options for making more rapid appointments to initial vacancies in the new department. First, the President is authorized, during the transition period,⁶² to designate an officer already serving in a Senate-confirmed position to serve, in an acting capacity, in a position within the department. The applicable provision states that

During the transition period, pending the advice and consent of the Senate to the appointment of an officer required by this Act to be appointed by and with such advice and consent, the President may designate any officer whose appointment was required to be made by and with such advice and consent and who was such an officer immediately before the effective date of this Act (and who continues in office) or immediately before such designation, to act in such office until the same is filled as provided in this Act.⁶³

The intention of this section may be further clarified by report language concerning an identical provision in an earlier version of the homeland security legislation:

This section ... allows the President to designate incumbents in organizations being transferred who are currently in advice and consent positions, to act in the same capacity during the transition period, until the position is filled as provided for in this legislation.⁶⁴

⁶¹ P.L. 107-296, Sec. 1511(a).

⁶² The transition period is defined as “the 12-month period beginning on the effective date of this act. (P.L. 107-296, Sec. 1501(2); 116 Stat. 2308)

⁶³ P.L. 107-296, Sec. 1511(c)(1); 116 Stat. 2309. As of May 8, 2003, President George W. Bush had appointed six individuals to DHS positions using this provision: Gordon England (Deputy Secretary); Janet Hale (Under Secretary for Management); Asa Hutchinson (Under Secretary for Border and Transportation Security); Michael J. Garcia (Assistant Secretary for the Bureau of Immigration and Customs Enforcement); Eduardo Aguirre, Jr. (Director of the Bureau of Citizenship and Immigration Services); and Clark Kent Ervin (Inspector General). The first three had subsequently been nominated and confirmed for the positions, while the remaining three had been nominated but not confirmed.

⁶⁴ U.S. Congress, House Select Committee on Homeland Security, *Homeland Security Act of 2002*, report to accompany H.R. 5005, 107th Cong., 2nd sess., H. Rept. 107-609, (Washington: GPO, 2002), p. 127.

Such acting officers are compensated at the higher of two rates: the one at which they were paid in their original position or the rate for the position they are temporarily filling.⁶⁵

Second, reconfirmation by the Senate is not required by the law for “any officer whose agency is transferred to the Department pursuant to this Act and whose duties following such transfer are germane to those performed before such transfer.”⁶⁶

Termination of Positions Not Transferred. Regarding the disposition of top leadership positions that are not specifically transferred with their agency or office, the Homeland Security Act provides that

Except as otherwise provided in this Act, whenever all functions vested by law in any agency have been transferred pursuant to this Act, each position and office the incumbent of which was authorized to receive compensation at the rates prescribed for an office or position at level II, III, IV, or V, of the Executive Schedule, shall terminate.⁶⁷

Discussion and Options

The Homeland Security Act establishes a number of principal officers and other positions for the new department. Congress may wish to consider amending the Act in ways that could serve to strengthen the new law administratively and address some of the uncertainties identified earlier in this report.

Option: Assure that each position created or transferred has a clearly identified appointment authority, compensation provision, and organizational context. Congress may wish to more clearly state its intentions in this area.

Option: Address the apparent statutory conflict with regard to organizational status and compensation between the Assistant Secretary of Border Security⁶⁸ and the Director of the Bureau of Citizenship and Immigration Services.

⁶⁵ For more information on limited-term appointments, see CRS Report RS21412, *Limited-Term Appointments to Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue. For more information on the Vacancies Act, see CRS Report 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative*, by Morton Rosenberg.

⁶⁶ P.L. 107-296, Sec. 1511(c)(2); 116 Stat. 2309. Michael D. Brown, formerly the deputy director of the Federal Emergency Management Agency (FEMA), was appointed as under secretary of emergency preparedness and response under this provision.

⁶⁷ P.L. 107-296, Sec. 1513.

⁶⁸ As previously noted, this position was renamed the Assistant Secretary of the Bureau of Immigration and Customs Enforcement during the reorganization of border functions within the new department. Department officials have indicated that this position and the Director of the Bureau of Citizenship and Immigration Services are being compensated at the same rate, but have not provided information on what the rate of compensation is.

- Option: Require confirmation for all assistant secretary positions with general areas of responsibility to be identified by the President at the time of each nomination. The secretary would retain the flexibility within those areas.
- Option: Consider whether as many as 12 assistant secretaries are needed. Congress may explore the responsibilities and rationale for these positions. It could create any number of assistant secretary positions, subject to confirmation and paid at Executive Schedule rates. It could allow the secretary to name deputy assistant secretaries to be among the noncareer SES personnel in the department. This might be a means to avoid the inconsistencies of appointment status, to avoid having presidential appointees in the executive departments, and to work within the existing appointments framework.
- Option: Establish the department CFO as a PAS position.
- Option: Establish the CIO position in conformity with 44 U.S.C. 3506 to maintain uniformity among these position across the departments and within the CIO Council.
- Option: Establish the chief human capital officer for the new department as a secretary-appointed position to conform to the appointment provisions for the other chief human capital officers created by the Act.
- Option: Clarify congressional intent by moving the provision concerning reconfirmation of existing office holders out of the section on acting officials or specifying that the provision applies to acting officials only.

Conclusion

The Homeland Security Act of 2002, which created the Department of Homeland Security, is complex and far-reaching. The Act creates a number of new statutory positions, transfers a variety of units and functions to the new department and elsewhere, and creates a number of new units. It also includes several provisions to facilitate a smooth leadership transition as the Act is implemented. Congress may wish to consider amendments to the Act that may improve the appointments framework for the new department.