

Report for Congress

Received through the CRS Web

Homeland Security: Management Positions for the Proposed Department

Updated November 15, 2002

Henry B. Hogue
Analyst in American National Government
Government and Finance Division

Homeland Security: Management Positions for the Proposed Department

Summary

The House has passed H.R. 5710, which would create an executive department to address the national need for homeland security. The Senate is considering an identical measure in the form of an amendment to H.R. 5005. The proposal would transfer organizational units, functions, and personnel from several departments and agencies and also create new organizational entities.

A hierarchy of positions would be established to manage the department and its activities. Some would be newly created, and some would be drawn from those transferring agencies. This report analyzes the proposals in light of the provisions for appointment of that managerial hierarchy. It identifies the positions that would be created or transferred, existing units that would be transferred, new units that would be created, and provisions affecting the transfer of existing positions and the temporary filling of new positions. Potential problems are identified and options for congressional consideration are discussed.

Contents

Introduction	1
The Departmental Framework for Political Appointments	1
Compensation	3
Management Provisions for the Proposed Department	3
Secretary	3
Deputy Secretary	4
Under Secretaries	4
Assistant Secretaries	4
Other Proposed Presidentially Appointed Positions Requiring	
Senate Confirmation	5
Inspector General	5
General Counsel	6
Commandant of the Coast Guard	6
Commissioner of Customs	6
Director, Office for Domestic Preparedness	6
Other Proposed Presidentially Appointed Positions Not Requiring	
Senate Confirmation	7
Chief Financial Officer	7
Officer for Civil Rights and Civil Liberties	7
Chief Information Officer	7
Chief Human Capital Officer	8
Director of the Secret Service	8
Executive Secretary	8
Other Positions	8
Agencies Proposed to Be Transferred	11
New Units Proposed	17
Cross-Agency Provisions	19
Transitional Provisions	19
Discussion and Options	20
Conclusion	21

Homeland Security: Management Positions for the Proposed Department

Introduction

The principal legislation for organizing to prevent and respond to domestic terrorism calls for the creation of a new department in the federal executive branch.¹ H.R. 5710, passed by the House of Representatives, would create a Department of Homeland Security. The Senate is considering an identical measure in the form of an amendment to H.R. 5005.² The proposal calls for a new structure, rather than the reorganization of an existing administrative entity, and it includes statutory provisions for staffing the top echelons of management within the new organization. H.R. 5710 would transfer a number of existing organizational units and functions and would also create a number of new units.

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 proposal that would create positions in the new department, and it provides an analysis of the provisions within this context. The report identifies units proposed for transfer, as well as those proposed to be created. The provisions affecting the transfer of existing positions and the temporary filling of new positions are discussed.

H.R. 5710 deviates in some ways from the existing appointments framework. These differences and problems that may result are identified throughout the report. At the end, 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:

¹For overview of the departmental proposals, see “Department of Homeland Security,” by Harold C. Relyea, in the *CRS Electronic Briefing Book on Terrorism*, available at [<http://www.congress.gov/brbk/html/ebter220.html>]; and CRS Issue Brief IB93026, *Executive Branch Reorganization and Management Initiatives*, by Harold C. Relyea.

²H.R. 5710, “To establish the Department of Homeland Security, and for other purposes,” was introduced November 12, 2002, by Rep. Richard K. Arney with 9 cosponsors. It was passed by the House on November 13, 2002. All discussions of the provisions of the proposal refer to H.R. 5710, as passed.

... 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 distinction between principal and lower offices has been statutorily defined with the creation of each new office, and Congress has the ability to further refine this definition when shaping legislation.

The principal officers in a department are established in the organic legislation or reorganization plan.³ Currently more than 1,200 presidentially appointed civilian executive or legislative branch positions require Senate confirmation (PAS positions).⁴ More than 330 of these are in the 14 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 statutorily limited to 10% throughout the government and 25% of total SES within any given department or agency.⁵

Schedule C positions are used to fill lower-level positions that are excepted from the competitive service because of their confidential or policy-determining

³For 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.

⁴U.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.

⁵5 U.S.C. 3134.

character. Most Schedule C positions are paid at rates on the General Schedule⁶ 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 \$121,600 to \$166,700.⁷ Almost without exception, statutory positions on the Executive Schedule are positions requiring confirmation.

The current compensation package for the recently created position of Under Secretary of Transportation Security, 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.⁸ If that bonus were applied, the aggregate pay for the under secretary would be \$195,000 in 2002.⁹ H.R. 5710 contains no similar provision.

Management Provisions for the Proposed Department

Secretary

H.R. 5710 would establish the position of Secretary as the head of the new department. The Secretary would be a PAS position, compensated at Level I of the Executive Schedule.¹⁰ The bill provides that the Secretary would have direction, authority, and control over the department. All functions of all officers, employees, and organizational units of the department would be vested in the Secretary. Specific functional authorities are detailed, including delegation of authority, coordination with non-federal entities, and promulgation of regulations. The bill would provide

⁶The 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>].

⁷Executive Schedule positions are listed at 5 U.S.C. 5312-5316.

⁸P.L. 107-71, Sec. 101(c)(1) and (2); Nov. 19, 2001; 115 Stat. 602.

⁹The salary for the Vice President, the Speaker of the House of Representatives, and the Chief Justice of the United States is projected to be \$198,600, effective January 2003.

¹⁰H.R. 5710, Sec. 102(a) and Sec. 1702.

that the Secretary may, at the direction of the President, be part of National Security Council meetings.

Deputy Secretary

The proposal would establish the position of deputy secretary as a PAS position, compensated at Level II of the Executive Schedule.¹¹ The deputy secretary would be the first in line of succession to act on behalf of the Secretary.

Under Secretaries

H.R. 5710 would establish 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 Emergency Preparedness and Response; and for Management.¹² All the under secretary positions would be PAS positions compensated at Level III of the Executive Schedule.¹³ The bill would also create the position of Director of the Bureau of Citizenship and Immigration Services, which would be compensated at the same level as the under secretaries.¹⁴

Assistant Secretaries

H.R. 5710 proposes two separate categories of assistant secretaries. The bill would create up to 12 PAS positions with no specified functions.¹⁵ In addition, two assistant secretary positions with specific responsibilities in the Directorate for Information Analysis and Infrastructure Protection, and not subject to Senate confirmation, would be created: Assistant Secretary for Information Analysis and Assistant Secretary for Infrastructure Protection.¹⁶ An additional position, Assistant Secretary of the Bureau of Border Security, would also be created, but the appointment authority is not clear.¹⁷ It is also unclear whether this position is intended to be one of the 12 above. All assistant secretaries would be compensated at Level IV of the Executive Schedule.¹⁸

The creation of two or three presidentially appointed assistant secretary positions not subject to Senate confirmation would be a marked departure from past

¹¹H.R. 5710, Sec. 103(a)(1) and Sec. 1702.

¹²H.R. 5710, Secs. 103(a)(2), (3), (4), (5), and (7). Titles II, III, IV, V, and VII of the bill set out the authorities and responsibilities associate with these positions.

¹³H.R. 5710, Sec. 1702.

¹⁴H.R. 5710, Secs. 103(a)(6) and 1702.

¹⁵H.R. 5710, 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.

¹⁶H.R. 5710, Sec. 201(b).

¹⁷H.R. 5710, Sec. 442(a)(2).

¹⁸H.R. 5710, Sec. 1702.

practices in the other departments. PA positions¹⁹ 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. At the current time, as far as it can be determined, there is only one PA position in the executive departments.²⁰ 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. Appointees to PA positions do not come under the same scrutiny as nominees to PAS positions. 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.

The designation of some assistant secretary positions, but not others, as PAS positions might also challenge the present constitutional framework for political appointments. As noted above, the Constitution provides that “Officers of the United States” require confirmation, whereas “inferior Officers” may be appointed by the President, and others, without Senate approval. In both proposals, some assistant secretaries would be placed in the former category, and others in the latter category. The proposals implicitly alter the distinction between principal and lower offices, dividing one title into two categories.

This creation of assistant secretary positions of different stature also might cause confusion or disharmony in the new agency. The likely effect of the provisions in H.R. 5710 would be to create, in a department, a mix of officers sharing the same title and pay rate, but having significantly different appointment standing.

Other Proposed Presidentially Appointed Positions Requiring Senate Confirmation

The positions identified in this section would be established as PAS positions by the proposal.

Inspector General. H.R. 5710 provides for the creation of an inspector general (IG) position, appointed as provided in Sec. 3(a) of the Inspector General Act

¹⁹As of September 2001, the Office of Personnel Management reported 86 full-time and 111 part-time presidential appointees not requiring Senate confirmation, [<http://opm.gov/feddata>], with link to “Data from the CPDF.” Visited July 2, 2002.

²⁰42 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. The Assistant Secretary of Defense for Force Management Policy, the Deputy Secretary of Education, the Deputy Secretary of Labor, and the Department of Transportation Administrator, Research and Special Programs Administration, all are statutory positions requiring Senate confirmation.

of 1978.²¹ The referenced section of the Inspector General Act provides for the appointment by and with the advice and consent of the Senate. The bill would place the IG at Level IV of the Executive Schedule,²² on a par with other departmental IGs.²³ The proposal includes provisions that would give the Secretary greater authority, direction, and control over the IG, under certain circumstances, than is provided for in the IG statute. These provisions also include steps to be taken to notify Congress under such circumstances.²⁴ The bill also specifies new law enforcement powers for IGs.²⁵

General Counsel. H.R. 5710 would create, as a PAS position, a general counsel as chief legal officer of the department, to be paid at Level IV of the Executive Schedule.²⁶ 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 Schedule²⁷ and all require confirmation as part of the appointment process.

Commandant of the Coast Guard. H.R. 5710 would establish 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 [would] report directly to the Secretary.” In addition, the duties of the commandant would “include those required by section 2 of title 14, United States Code.”²⁸

Commissioner of Customs. The bill would establish the position of Commissioner of Customs as a PAS position at the head of the Customs service in the new department. The position would be compensated at Level III of the Executive Schedule. The bill explicitly provides that the office holder immediately prior to the proposed law’s effective date may continue until the appointment of a new commissioner.²⁹

Director, Office for Domestic Preparedness. An Office for Domestic Preparedness would be created by H.R. 5710, and the office would be headed by a presidentially appointed, Senate-confirmed director.³⁰ The compensation for the position is not specified in the bill.

²¹H.R. 5710, Sec. 103(b).

²²H.R. 5710, Sec. 1702.

²³5 U.S.C. 5315.

²⁴H.R. 5710, Sec. 811.

²⁵H.R. 5710, Sec. 812.

²⁶H.R. 5710, Secs. 103(a)(9) and 1702.

²⁷5 U.S.C. 5315.

²⁸H.R. 5710, Sec. 103(c). An additional subsection providing that the commandant report directly to the Secretary may be found at Sec. 888(g).

²⁹H.R. 5710, Sec. 411(b).

³⁰H.R. 5710, Sec. 430.

Other Proposed Presidentially Appointed Positions Not Requiring Senate Confirmation

The positions identified in this section would be appointed by the President but would 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 assistant secretary positions, as discussed above, would be presidentially appointed without Senate confirmation.

Chief Financial Officer. Under the provisions of the Chief Financial Officers Act of 1990,³¹ 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.³² In a departure from this provision of law, H.R. 5710 would establish the position of chief financial officer as a PA position in the new department.³³ The CFO would be appointed by the President and compensated at Level IV, as are the current departmental CFOs but would not require Senate confirmation. Current law provides that the CFO reports directly to the head of the agency, in this case the Secretary. Notwithstanding this provision of law, the bill provides that the CFO would report to the Secretary, or to “another official of the Department, as the Secretary may direct.”³⁴

Officer for Civil Rights and Civil Liberties. An Officer for Civil Rights and Civil Liberties would be created, as a PA position, by the proposal.³⁵ This officer would be compensated at Level IV of the Executive Schedule.³⁶

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).³⁷ H.R. 5710 would create the CIO as a PA position, to be compensated at Level IV of the Executive Schedule.³⁸ The CIO would be required

³¹P.L. 101-576, Nov. 15, 1990, Sec. 205.

³²31 U.S.C. 901(a)(1).

³³H.R. 5710, Sec. 103(d)(4).

³⁴H.R. 5710, Sec. 702.

³⁵H.R. Sec. 103(d)(5). Responsibilities of the officer are described in Sec. 705.

³⁶H.R. 5710, Sec. 1702

³⁷P.L. 104-106; Feb. 10, 1996; 110 Stat. 684-686.

³⁸H.R. 5710, Secs. 103(d)(2) and 1702.

to report to the Secretary or to “another official of the Department as the Secretary may direct.”³⁹

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 could affect the CIO Council.⁴⁰

Chief Human Capital Officer. H.R. 5710 would create a Chief Human Capital Officer as a PA position in the new department.⁴¹ Compensation for this position is not specified. The proposal would also create similar positions in other federal departments and agencies. (See “Cross-Agency Positions,” below.)

Director of the Secret Service. The bill would establish the Director of the Secret Service as a PA position in the new department.⁴² At present, the Director of the Secret Service is 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.⁴³ Compensation for the position is not specified.

Executive Secretary. A Homeland Security Council would be created by H.R. 5710, and the council staff would be led by an executive secretary appointed by the President without Senate confirmation.⁴⁴ The bill would require this officer to be a civilian. The pay for this position would be 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

H.R. 5710 would create additional positions not identified in one of the above categories. These positions are include in Table 1 below, which identifies all positions created by the bill. The last entry in the table identifies one position that would be created in the Department of Justice. All other entries refer to positions in the new department.

³⁹H.R. 5710, Sec. 703.

⁴⁰The Chief Information Officer Council was established under Executive Order 13011, “Federal Information Technology,” July 16, 1996. S. 803, as passed the Senate June 27, 2002, would establish a statutory authority for the Chief Information Officer Council.

⁴¹H.R. 5710, Sec. 103(d)(3). Responsibilities of the Chief Human Capital Officer are described in Sec. 704.

⁴²H.R. 5710, Sec. 103(d)(1)

⁴³Information received from U.S. Secret Service, Office of Government Liaison and Public Affairs, via telephone conversation, July 3, 2002.

⁴⁴H.R. 5710, Sec. 905.

Table 1. Positions That Would Be Created by H.R. 5710

Section	Position	Appointment Authority	Compensation^a
102(a)	Secretary	PAS position	Level I
102(f)	Special Assistant to the Secretary	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)	Director of the Bureau of Citizenship and Immigration Services	PAS position	Level III
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	Level IV
201(b)(1)	Assistant Secretary for Information Analysis	PA position	Level IV

Section	Position	Appointment Authority	Compensation^a
201(b)(2)	Assistant Secretary for Infrastructure Protection	PA position	Level IV
222	Privacy Officer	Secretary Appointment	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	n.s. - May be one of the 12 asst. secs. above	Level IV
442(b)	Chief of Policy and Strategy, Bureau of Border Security	n.s.	n.s.
442(c)	Legal Advisor to the Assistant Secretary of the Bureau of Border Security	n.s.	n.s.
451(a)(2)	Director, Bureau of Citizenship and Immigration Services	n.s.	Same level as the Assistant Secretary of the Bureau of Border Security (Level IV)
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 Office of Citizenship	n.s.	n.s.
452	Citizenship and Immigration Services Ombudsman	n.s.	n.s.
475	Director of Shared Services	n.s.	n.s.
878	Counternarcotics Officer ^b	Secretary Appointment	n.s.

Section	Position	Appointment Authority	Compensation^a
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	Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice	Attorney General Appointment	Level III

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 It is unclear whether this is a distinct position.

Agencies Proposed to Be Transferred

Under the provisions of H.R. 5710, a number of entities, including authorities, functions, personnel, assets, and, as determined to be necessary, obligations or liabilities are proposed to be transferred into the new department or an existing department. The proposed transfers are shown in Table 2.

Table 2. Entities and Functions That Would Be Transferred or Abolished by H.R. 5710

Section (H.R. 5710)	Unit or function proposed for transfer	Current location	Proposed location^a
201(g)(1)	National Infrastructure Protection Center (other than the Computer Investigations and Operations Section)	Federal Bureau of Investigation	Under Secretary for Information Analysis and Infrastructure Protection
201(g)(2)	National Communications System	Department of Defense	Directorate for Information Analysis and Infrastructure Protection
201(g)(3)	Critical Infrastructure Assurance Office	Department of Commerce	Directorate for Information Analysis and Infrastructure Protection
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
201(g)(5)	Federal Computer Incident Response Center	General Services Administration	Directorate for Information Analysis and Infrastructure Protection
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
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)

Section (H.R. 5710)	Unit or function proposed for transfer	Current location	Proposed location^a
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
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
303(1)(E)	Environmental Measurements Laboratory	Department of Energy	Directorate for Science and Technology
303(1)(F)	Advanced scientific computing research program and activities at Lawrence Livermore National Laboratory	Department of Energy	Directorate for Science and Technology
303(2)	National Bio-Weapons Defense Analysis Center ^b	Department of Defense	Directorate for Science and Technology
303(3); see also 310	Plum Island Animal Disease Center	Department of Agriculture	Directorate for Science and Technology
403(1); see also Title IV, Subtitle B	United States Customs Service	Department of the Treasury	Directorate for Border and Transportation Security
403(2); see also 423 and 424	Transportation Security Administration	Department of Transportation	Directorate for Border and Transportation Security
403(3)	Federal Protective Service	General Services Administration	Directorate for Border and Transportation Security
403(4); see also 884	Federal Law Enforcement Training Center	Department of the Treasury	Directorate for Border and Transportation Security

Section (H.R. 5710)	Unit or function proposed for transfer	Current location	Proposed location^a
403(5)	Office for Domestic Preparedness	Office of Justice Programs, Department of Justice	Directorate for Border and Transportation Security
421	Certain agricultural import and entry inspection functions	Department of Agriculture	Directorate for Border and Transportation Security
426	Transportation Security Oversight Board	Department of Transportation	Directorate for Border and Transportation Security
441(1)	Border Patrol program	Immigration and Naturalization Service	Directorate for Border and Transportation Security
441(2)	Detention and removal program	Immigration and Naturalization Service	Directorate for Border and Transportation Security
441(3)	Intelligence program	Immigration and Naturalization Service	Directorate for Border and Transportation Security
441(4)	Investigations program	Immigration and Naturalization Service	Directorate for Border and Transportation Security
441(5)	Inspections program	Immigration and Naturalization Service	Directorate for Border and Transportation Security
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	Bureau of Citizenship and Immigration Services

Section (H.R. 5710)	Unit or function proposed for transfer	Current location	Proposed location^a
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	Office of Refugee Resettlement, Department of Health and Human Services
471(a)	Immigration and Naturalization Service abolished		
503(1)	Federal Emergency Management Agency	Independent Agency	Directorate of Emergency Preparedness and Response
503(2)	Integrated Hazard Information System	National Oceanic and Atmospheric Administration, Department of Commerce	Directorate of Emergency Preparedness and Response
503(3)	National Domestic Preparedness Office	Federal Bureau of Investigation	Directorate of Emergency Preparedness and Response
503(4)	Domestic Emergency Support Teams	Department of Justice	Directorate of Emergency Preparedness and Response
503(5)	Office of Emergency Preparedness	Department of Health and Human Services	Directorate of Emergency Preparedness and Response
503(5)	National Disaster Medical System	Department of Health and Human Services	Directorate of Emergency Preparedness and Response
503(5)	Metropolitan Medical Response System	Department of Health and Human Services	Directorate of Emergency Preparedness and Response
503(6)	Strategic National Stockpile	Department of Health and Human Services	Directorate of Emergency Preparedness and Response

Section (H.R. 5710)	Unit or function proposed for transfer	Current location	Proposed location^a
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	
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
821	United States Secret Service	Department of the Treasury	Department of Homeland Security; to be maintained as a “distinct entity”
888	United States Coast Guard	Department of Transportation	Department of Homeland Security; to be maintained as a “distinct entity”
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”

^a 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.

^b 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).

^c 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.

New Units Proposed

Under H.R. 5710, new organizational entities would be established, both within and outside the new department. The proposed new units are identified in Table 3.

Table 3. New Entities That Would Be Created by H.R. 5710^a

Section (H.R. 5710)	Proposed unit	Proposed location
231	Office of Science and Technology ^b	National Institute of Justice, Department of Justice
307(b)(1)	Homeland Security Advanced Research Projects Agency	Director reports to the Under Secretary for Science and Technology
309(g)	Office for National Laboratories	Directorate of Science and Technology
311	Homeland Security Science and Technology Advisory Committee	Department of Homeland Security; members appointed by Under Secretary for Science and Technology
312	Homeland Security Institute	Administered as a “separate entity by the Secretary of Homeland Security
313	Technology clearinghouse program	Established by the Secretary acting through the Under Secretary for Science and Technology
430	Office for Domestic Preparedness	Directorate of Border and Transportation Security
442	Bureau of Border Security	Head of bureau to report directly to Under Secretary for Border and Transportation Security
451	Bureau of Citizenship and Immigration Services	Head of bureau to report directly to Deputy Secretary of Homeland Security
451(f)	Office of Citizenship	Bureau of Citizenship and Immigration Services
452	Citizenship and Immigration Services Ombudsman	Ombudsman to report directly to the Deputy Secretary
461(c)	Technology Advisory Committee	To assist the Secretary

Section (H.R. 5710)	Proposed unit	Proposed location
801	Office for State and Local Government Coordination	Office of the Secretary of Homeland Security
879	Office of International Affairs	Office of the Secretary of Homeland Security
882	Office for National Capital Region Coordination	Office of the Secretary of Homeland Security
885	Joint Interagency Homeland Security Task Force	Established and operated by the Secretary of Homeland Security
901	National Homeland Security Council	Executive Office of the President
1111(a)	Bureau of Alcohol, Tobacco, Firearms, and Explosives ^c	Department of Justice
1111(d)	Tax and Trade Bureau	Department of the Treasury
1114	Explosives Training and Research Facility	Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice
1303	Chief Human Capital Officers Council	Chaired by the Director of the Office of Personnel Management
1708	National Bio-Weapons Defense Analysis Center ^d	Department of Defense

^a This table does not include the directorates created in the proposed department

^b The Office of Science and Technology would be 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 establishment, in Sec. 1111(a), of the Bureau of Alcohol Tobacco, Firearms, and Explosives in the Department of Justice would occur in conjunction with 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.

^d 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 proposal would establish chief human capital officers, to be appointed by the head of each agency, in every agency in which there is a chief financial officer.⁴⁵ The proposal does not provide for the compensation of these officers. The bill also would establish 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.⁴⁶

Transitional Provisions

H.R. 5710 includes several provisions regarding the transition of current officials and their functions to the new agency.

Assistance to the Secretary. The bill would direct current officials “having authority over or functions relating to” an agency being transferred to provide assistance to the new Secretary, as he or she requests.⁴⁷

Acting Officials. In order to temporarily fill PAS positions while awaiting confirmation, the President would be able to “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 [Act’s] effective date (and who continues in office) or immediately before such designation, to act in such office until the same is filled as provided” in the Act. Such acting officers would be compensated at the higher of two rates: the one they were paid in their original position or the rate for the position they are filling temporarily.⁴⁸ This provision would allow for indefinite temporary appointments and would give the President greater temporary appointment power than he now has under the Vacancies Act.⁴⁹

Reconfirmation of Present Office Holders. H.R. 5710 would provide that reconfirmation by the Senate would not be required by the Act 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.”⁵⁰ This language is in the context of providing the authority for acting officials, and it is unclear whether or not it would apply to permanent appointments.

⁴⁵H.R. 5710, Sec. 1302.

⁴⁶H.R. 5710, Sec. 1303.

⁴⁷H.R. 5710, Sec. 1511(a).

⁴⁸H.R. 5710, Sec. 1511(c)(1).

⁴⁹For 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.

⁵⁰H.R. 5710, Sec. 1511(c)(2).

Termination of Positions Not Transferred. Regarding the disposition of top leadership positions that are not specifically transferred with their agency or office, H.R. 5710 would provide 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.⁵¹

Discussion and Options

The House bill, H.R. 5710, would establish a number of principal officers and other positions for the new department. Congress might consider other options that might serve to strengthen the proposals 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: 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: Change the temporary appointment provision to be consistent with the Vacancies Act. This might provide the President with flexibility during the transition period while protecting the Senate's prerogative.

⁵¹H.R. 5710, Sec. 1513.

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.

Option: If the intention is to leave some appointment and compensation status vague, it might be useful to offer relevant discussion in report language. When a statute is silent, the report language becomes important as successor secretaries strive to follow congressional intent while implementing the statute and as successor Congresses conduct oversight.

Conclusion

This legislation to create a Department of Homeland Security is complex and far-reaching. The intent, certainly, is to effect a strong agenda and organizational mechanism for homeland security. However, attention to the details of administrative structure, such as appointment status and process and compensation designation for top managers, serves to allow departmental management to focus on the mission of the department.