

# Report for Congress

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## **Department of Homeland Security: Appropriations Transfer Authority**

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# Department of Homeland Security: Appropriations Transfer Authority

## Summary

The establishment of the Department of Homeland Security (DHS), as proposed by President George W. Bush and Members of Congress, involves in large part the transfer to the new department of existing functions carried out by many different agencies and programs. Along with the authority to transfer functions, the legislative proposals include authority to transfer related personnel and assets (including appropriations). The proposals for appropriations transfer authority for the new department have engendered controversy regarding the appropriate balance between providing executive flexibility and retaining congressional control over spending.

Generally, appropriations may be spent only on the purposes specified (31 U.S.C. 1301(a)) and may not be transferred to other accounts without statutory approval (31 U.S.C. 1532). Any appropriations so transferred are subject to the same limitations provided under the original appropriations, except as provided by law.

Congress has granted transfer authority to the executive branch in two types of measures—in substantive legislation, under the jurisdiction of House and Senate legislative committees, and in annual appropriations acts, under the jurisdiction of the House and Senate Appropriations Committees. Transfer authority in substantive law pertains mainly to agency reorganization; most appropriations transfer authority available to executive agencies on a regular basis is provided in annual appropriations acts and is renewed from year to year.

The Administration's proposal to establish the DHS, as reflected in the introduced version of H.R. 5005, the "Homeland Security Act of 2002," provides several different types of appropriations transfer authority for the department, including general, transitional, and incidental transfer authority.

With regard to general transfer authority, which would be provided to the Secretary of Homeland Security following the establishment of the department and would cover transfers between accounts within the department's budget, the Administration proposed permanent authority, subject to a 5% limit on the amount that may be transferred from any appropriation and a 15-day notice-requirement to the House and Senate Appropriations Committees. The House Appropriations Committee, and leaders of the Senate Appropriations Committee, strongly objected to the proposed general transfer authority, maintaining that sufficient transfer authority could be provided on an ongoing basis through the annual appropriations process. As passed by the House on July 26, 2002, H.R. 5005 would have reduced the general transfer authority limit to 2% and sunsetted the transfer authority after two years. On November 13, the House passed a modified version of the Homeland Security Act, H.R. 5710, which did not include any general transfer authority. Instead, such authority was included in H.J.Res. 124 (a continuing resolution for FY2003, also passed that day) and was limited to \$640 million (including \$140 million for start-up costs) and made available for two years. The Senate, which has been considering H.R. 5005 for some time, is expected to embrace the modifications on transfer authority reflected in the House actions on H.R. 5710 and H.J.Res. 124.

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# Department of Homeland Security: Appropriations Transfer Authority

In an address to the nation on June 6, 2002, President George W. Bush requested that Congress enact legislation creating a Department of Homeland Security (DHS). President Bush proposed legislation to accomplish this goal, the Homeland Security Act of 2002, on June 18.<sup>1</sup> The Administration's proposal was introduced by House Majority Leader Richard Armey on June 24 as H.R. 5005. In the course of reviewing the Administration's proposal, House and Senate committees have developed a wide range of modifications. The House passed H.R. 5005, with substantial amendments, on July 26; the Senate began consideration of the bill on September 3.

Establishment of the DHS involves in large part the transfer to the new department of existing functions carried out by many different agencies and programs.<sup>2</sup> Along with the authority to transfer functions, the Administration has requested the authority to transfer the personnel, assets (including appropriations), and other items connected with these functions. In addition to the grants of appropriations transfer authority to deal with the transition to the new organizational structure, the Administration has requested that the Secretary of Homeland Security have an ongoing grant of general transfer authority over appropriations that fund the department. The Administration argues that a general grant of transfer authority is necessary in order for the new department to be able to develop into an effective and efficient organization over the coming years.

The Administration's proposals regarding appropriations transfer authority have sparked controversy and engendered significant modifications in pending legislative proposals.<sup>3</sup> This report defines appropriations transfer authority and explains its legal

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<sup>1</sup>The text of the Administration's proposed legislation, together with an explanation and related materials, is available online at [<http://www.whitehouse.gov/homeland>].

<sup>2</sup>For an overview of the many issues involved in creating the Department of Homeland Security, see CRS Report RL31493, *Homeland Security: Department Organization and Management*, by Harold C. Relyea. Additional Congressional Research Service products on this topic may be found at the CRS Web site [<http://www.crs.gov>] by (1) searching all products under the phrase "homeland security"; (2) clicking on the Current Legislative Issues term "Homeland Security"; and (3) clicking on "Homeland Security Organization" in the online CRS Electronic Briefing Book on Terrorism.

<sup>3</sup>For example, see (1) "Appropriators Criticize Bush's Homeland Security Plan," in National Journal's *Congress Daily*, July 2, 2002; (2) "Senators Object to Budget Flexibility, Authority in Security Department Bill," in BNA's *Daily Report for Executives*, July 3, 2002, page A-15; (3) "Highlights of Panels' Input on New Security Department," in Congressional

(continued...)

basis, examines recent congressional practices in this area, and assesses the current proposals regarding appropriations transfer authority for the DHS.

## Legal Basis for the Transfer of Appropriations

Appropriations are provided to federal departments and agencies on the basis of accounts. For each account within a department or agency, the purposes for which the appropriation may be used are stated, usually with reference to the relevant authorizing law(s). For example, the VA-HUD-Independent Agencies Appropriations Act for FY2002 provided funds to the Agency for Toxic Substances and Disease Registry, as follows:

For necessary expenses for the Agency for Toxic Substances and Disease Registry (ATSDR) in carrying out activities set forth in sections 104(i), 111(c)(4), and 111(c)(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended; section 118(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), as amended; and section 3019 of the Solid Waste Disposal Act, as amended, \$78,235,000, ...<sup>4</sup>

As a general matter, appropriations may be spent only on the purposes specified. This requirement is codified in 31 U.S.C. 1301(a), which states: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”

Further, appropriations may not be transferred to other accounts without statutory approval; any appropriations so transferred are subject to the same limitations provided under the original appropriations, except as otherwise provided by law. This requirement is stated in 31 U.S.C. 1532, which reads in part:

An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount.

According to the General Accounting Office (GAO), an unauthorized transfer—which would violate the two statutory requirements cited above—could result in excessive spending in the receiving account, thereby incurring a violation of the Antideficiency Act as well.<sup>5</sup>

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<sup>3</sup>(...continued)

Quarterly’s *Weekly Report*, July 13, 2002, page 1860; and (4) “Hill Worries About Its Role in Overseeing Security Department,” in the *Washington Post*, July 17, 2002, page A9.

<sup>4</sup>See P.L. 107-73 (November 26, 2001; 115 Stat. 682).

<sup>5</sup>See the discussion of “Transfer and Reprogramming” in GAO Report OGC-91-5, *Principles of Federal Appropriations Law* (Washington: July 1991), second edition, volume I, pages 2-20 through 2-28. The Antideficiency Act (31 U.S.C. 1341-13420) requires that agencies not spend funds at a rate that would cause them to exceed their appropriations.

In the example of the Agency for Toxic Substances and Disease Registry (ATSDR) provided above, the agency could spend its appropriation of \$78 million for FY2002 solely for the activities set forth in the specified sections of CERCLA of 1980, SARA of 1986, and the Solid Waste Disposal Act, but not for activities set forth in other sections of those laws or that otherwise are unrelated. Further, other agencies could not transfer funds from their accounts to the ATSDR account, nor could ATSDR transfer funds from its account to other agencies, without explicit statutory authority to do so.

After an appropriations measure has been enacted into law, it sometimes becomes necessary to reallocate appropriations between accounts or within accounts. A reallocation of enacted appropriations from one account to another is referred to as a *transfer*, while a reallocation within an account from one program, project, or activity to another is called as a *reprogramming*.

A transfer, which involves a complete change in the purpose for which an enacted appropriation will be used, requires statutory authority in order to comply with the requirements of 31 U.S.C. 1301(a) and 1531. On the other hand, a reprogramming, which shifts funds within an account from one program to another, related one, does not require legislative action by Congress. As a matter of practice, participants in the federal budget process from time to time use these terms interchangeably and a careful review of the context may be necessary to determine in particular instances whether a transfer or a reprogramming is being discussed.

Transfer authority has been provided in law to executive officials since the earliest days of Congress.<sup>6</sup> Reprogramming practices, by contrast, developed in the mid-1950s (although they were preceded for some time by comparable practices that used different names, such as “adjustments”).<sup>7</sup> The use of both transfers and reprogrammings has become a routine part of the modern federal budget process.<sup>8</sup>

## **Congressional Grants of Transfer Authority**

Congress has granted transfer authority to the executive branch in two types of measures—in substantive legislation, under the jurisdiction of House and Senate legislative committees, and in annual appropriations acts, under the jurisdiction of the House and Senate Appropriations Committees.

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<sup>6</sup>Louis Fisher examines the history of appropriations transfer from the late 18<sup>th</sup> Century through the modern era in Chapter 5 (Transfers Between Accounts) of *Presidential Spending Power* (Princeton: Princeton University Press, 1975), pages 99-122. Reprogramming is addressed in Chapter 4 (Reprogramming of Funds), pages 75-98.

<sup>7</sup>Fisher, *ibid.*, pages 76-77.

<sup>8</sup>Recent congressional practices regarding transfers and reprogrammings is discussed briefly in *The Federal Budget: Politics, Policy, Process*, by Allen Schick (Washington: Brookings Institution Press, 2000), pages 247-251. For an example of executive documentation for a recent reprogramming request on a controversial matter (aircraft leasing by the Air Force), see the remarks of Senators McCain, Levin, and others, and inserted documentation, on pages S7794-7799 in the *Congressional Record* of August 1, 2002.

**Transfer Authority in Substantive Legislation.** With regard to substantive legislation, the leading examples of appropriations transfer authority provided to the executive branch arguably pertain to reorganization. Authority to transfer funds within an agency or between agencies in order to effectuate an approved transfer of functions is provided in 31 U.S.C. 1531(a), which states:

The balance of an appropriation available and necessary to finance or discharge a function or activity transferred or assigned under law within an executive agency or from one executive agency to another may be transferred to and used—

- (1) by the organizational unit or agency to which the function or activity was transferred or assigned; and
- (2) for a purpose for which the appropriation was originally available.<sup>9</sup>

Subsections 1531(b) and (c) set forth procedures for implementing appropriations transfers in connection with such reorganizations.

Several different types of appropriations transfer authority also have been included in substantive legislation creating various departments. The Department of Education Organization Act of 1979,<sup>10</sup> for example, contained five provisions related to the issue of transfer authority.

First, Section 501(a) of the act transferred to the new department the funds, together with the personnel, property, records, and other relevant items, associated with the functions being transferred under the act. The subsection stated:

Except as otherwise provided in this Act, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions and offices, or portions thereof transferred by this Act, subject to section 202 of the Budget and Accounting Procedures Act of 1950, shall be transferred to the Secretary for appropriate allocation. Unexpended funds transferred pursuant to this subsection shall only be used for the purposes for which the funds were originally authorized and appropriated.<sup>11</sup>

A second provision, Section 504(a), also provided the Director of the Office of Management and Budget (OMB) with the authority to make “determinations” regarding the transfer of functions under the act, and to make “additional incidental dispositions” of funds and related items in connection with the transfers of functions. The section stated:

The Director of the Office of Management and Budget, at such time or times as the Director shall provide, is authorized and directed to make such determinations as may be necessary with regard to the functions, offices, or

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<sup>9</sup>31 U.S.C. 1531 originated as Section 202 of the Budget and Accounting Procedures Act of 1950 (P.L. 81-874; 64 Stat. 832-845).

<sup>10</sup>P.L. 96-88; October 17, 1979; 93 Stat. 668-696; 20 U.S.C. 3411 et. seq.

<sup>11</sup>93 Stat. 689; 20 USC 3501.

portions thereof transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, offices, or portions thereof, as may be necessary to carry out the provisions of this Act. The Director shall provide for the termination of the affairs of all entities terminated by this Act and for such further measures and dispositions as may be necessary to effectuate the purposes of this Act.<sup>12</sup>

A third provision, Section 511, effectively transferred certain other funds to the Secretary to facilitate the transition to the new organizational structure. The section stated:

With the consent of the appropriate department or agency head concerned, the Secretary is authorized to utilize the services of such officers, employees, and other personnel of the departments and agencies from which functions or offices have been transferred to the Secretary or the Department, and funds appropriated to such functions or offices for such period of time as may reasonably be needed to facilitate the orderly implementation of this Act.<sup>13</sup>

With respect to the ongoing operations of the new department, a general authorization pertaining to the transfer of funds was set forth in Section 424 of the act, which stated:

The Secretary may, when authorized in an appropriation Act in any fiscal year, transfer funds from one appropriation to another within the Department, except that no appropriation for any fiscal year shall be either increased or decreased pursuant to this section by more than 5 percent and no such transfer shall result in increasing any such appropriation above the amount authorized to be appropriated therefor.<sup>14</sup>

Section 424 anticipated the need for the department secretary to make transfers in the future in the course of conducting the department's ongoing operations. On its face, however, the section did not provide authority to transfer funds. Instead, it authorized the inclusion of such authority in subsequent annual appropriations acts, with each transfer subject to a 5-percent limitation as to amount and a bar against exceeding the authorized levels set in substantive law. The secretary, therefore, would only be able to transfer funds as the authority to do so was included in annual appropriations acts.

Finally, Section 423 authorized the transfer of funds and other assets as part of the establishment of a working capital fund for the department.<sup>15</sup>

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<sup>12</sup>93 Stat. 690; 20 U.S.C. 3502.

<sup>13</sup>93 Stat. 695; 20 U.S.C. 3510.

<sup>14</sup>93 Stat. 688; 20 U.S.C. 3484.

<sup>15</sup>93 Stat. 687-688; 20 U.S.C. 3483.

With some differences, these transfer provisions largely parallel those included in the Department of Energy Organization Act of 1977<sup>16</sup>, enacted 2 years earlier.

**Transfer Authority in Annual Appropriations Acts.** Most appropriations transfer authority available to executive agencies on a regular basis is provided in annual appropriations acts and is renewed from year to year.

Congress may respond to the need to provide transfer authority in annual appropriations acts in several ways. First, the President may request, or Congress may initiate on its own, appropriations legislation authorizing a specific transfer after the affected appropriations already have been enacted. For example, a provision in the Consolidated Appropriations Act for FY2001 transferred funds from an Air Force account in the Defense Department, that had been enacted several months earlier, to a program in the Interior Department:

Sec. 311. Of the funds made available in the Department of Defense Appropriations Act, 2001 (Public Law 106-259), the Secretary of the Air Force shall transfer \$5,000,000 of the funds provided for “Operation and Maintenance, Air Force” to the Secretary of the Interior for maintenance, protection, or preservation of the land and interests in land described in section 3 of the Minuteman Missile National Historic Site Establishment Act of 1999 (Public Law 106-115; 113 Stat. 1540): *Provided*, That the transfer authority provided in this section is in addition to any other transfer authority available to the Department of Defense for fiscal year 2001.<sup>17</sup>

Second, a specific transfer may be anticipated and provided for in advance. For example, the Defense Appropriations Act for FY2002 provided advance authority to transfer funds for a specific program from one set of Defense Department accounts to other accounts:

Sec. 8015. Funds appropriated in title III of this Act for the Department of Defense Pilot Mentor-Protege Program may be transferred to any other appropriation contained in this Act solely for the purpose of implementing a Mentor-Protege Program developmental assistance agreement pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 10 U.S.C. 2301 note), as amended, under the authority of this provision or any other transfer authority contained in this Act.<sup>18</sup>

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<sup>16</sup>P.L. 95-91; August 4, 1977; 91 Stat. 565-613; 42 U.S.C. 7131 et. seq. The following sections of P.L. 95-91 pertained to appropriations transfer authority: Section 653, dealing with transfers to set up a working capital fund; Section 659, regarding ongoing transfer authority, subject to approval in annual appropriations acts; Section 701(a), dealing with transfers upon establishment of the department; and Section 704, dealing with “incidental” transfers by the OMB director.

<sup>17</sup>See Section 311 (114 Stat. 2763A-182) in Division A of H.R. 5666, the Miscellaneous Appropriations Act for FY2001, as enacted into law by cross-reference by Section 1(a)(4) of P.L. 106-554, the Consolidated Appropriations Act for FY2001.

<sup>18</sup>See Section 8015 of the Defense Appropriations Act for FY2002 (P.L. 107-117; January 10, 2002; 115 Stat. 2250).

Finally, the need for a general grant of transfer authority may be anticipated and provided for in advance, with specific transfers being determined thereunder at a later time. For example, the Department of Justice Appropriations Act for FY2002 provided advance authority to transfer funds generally between department accounts, subject to percentage limitations and other restrictions:

Sec. 107. Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Department of Justice in this Act may be transferred between such appropriations, but no such appropriation, except as otherwise specifically provided, shall be increased by more than 10 percent by any such transfers: *Provided*, That any transfer pursuant to this section shall be treated as a reprogramming of funds under section 605 of this Act and shall not be available for obligation except in compliance with the procedures set forth in that section.<sup>19</sup>

House and Senate rules generally require that appropriations first be authorized in substantive law. Some programs are authorized on a permanent basis and the substantive law usually authorizes the appropriation of “such sums as may be necessary”; other programs are authorized on a recurring basis with authorizations of appropriations set at specific levels for each fiscal year covered by the legislation. In the case of annual or biennial authorization measures, most notably for defense programs, the legislation sometimes provides for the transfer of “authorizations” in a manner similar to the way annual appropriations acts often provide for the transfer of appropriations, with comparable limitations. For example, Section 1001 of the National Defense Authorization Act for Fiscal Year 2002 (P.L. 107-107; December 28, 2001; 115 Stat. 1201) states:

(a) Authority To Transfer Authorizations.—(1) Upon determination by the Secretary of Defense that such action is necessary in the national interest, the Secretary may transfer amounts of authorizations made available to the Department of Defense in this division for fiscal year 2002 between any such authorizations for that fiscal year (or any subdivisions thereof). Amounts of authorizations so transferred shall be merged with and be available for the same purposes as the authorization to which transferred.

(2) The total amount of authorizations that the Secretary may transfer under the authority of this section may not exceed \$2,000,000,000.

(b) Limitations.—The authority provided by this section to transfer authorizations—

(1) may only be used to provide authority for items that have a higher priority than the items from which authority is transferred; and

(2) may not be used to provide authority for an item that has been denied authorization by Congress.

(c) Effect on Authorization Amounts.—A transfer made from one account to another under the authority of this section shall be deemed to increase the amount authorized for the account to which the amount is transferred by an amount equal to the amount transferred.

(d) Notice to Congress.—The Secretary shall promptly notify Congress of each transfer made under subsection (a).

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<sup>19</sup>See Section 107 of the Department of Justice Appropriations Act (115 Stat. 765) in the Commerce-Justice-State Appropriations Act for FY2002 (P.L. 107-77; November 28, 2001).

Congress has sometimes protected its prerogatives with regard to agency reprogramming by establishing rules for the practice in statute or committee report language. (See example of such reprogramming rules, taken from a recent appropriations act.) In some instances, statutory reprogramming rules are cross-referenced in appropriations transfer language as a further restriction on the use of the transfer authority.

### **Example of Statutory Reprogramming Rules Sometimes Applied to Transfer Authority by Cross-Reference**

Sec. 605. (a) None of the funds provided under this Act, or provided under previous appropriations Acts to the agencies funded by this Act that remain available for obligation or expenditure in fiscal year 2002, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the agencies funded by this Act, shall be available for obligation or expenditure through a reprogramming of funds which (1) creates new programs; (2) eliminates a program, project, or activity; (3) increases funds or personnel by any means for any project or activity for which funds have been denied or restricted; (4) relocates an office or employees; (5) reorganizes offices, programs, or activities; or (6) contracts out or privatizes any functions or activities presently performed by Federal employees; unless the Appropriations Committees of both Houses of Congress are notified 15 days in advance of such reprogramming of funds.

(b) None of the funds provided under this Act, or provided under previous appropriations Acts to the agencies funded by this Act that remain available for obligation or expenditure in fiscal year 2002, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the agencies funded by this Act, shall be available for obligation or expenditure for activities, programs, or projects through a reprogramming of funds in excess of \$500,000 or 10 percent, whichever is less, that (1) augments existing programs, projects, or activities; (2) reduces by 10 percent funding for any existing program, project, or activity, or numbers of personnel by 10 percent as approved by Congress; or (3) results from any general savings from a reduction in personnel which would result in a change in existing programs, activities, or projects as approved by Congress; unless the Appropriations Committees of both Houses of Congress are notified 15 days in advance of such reprogramming of funds.

**Source:** Section 605 of the Commerce-Justice-State Appropriations Act for FY2002 (P.L. 107-77; November 28, 2001; 115 *Stat.* 798-799).

During the appropriations cycle for FY2002, provisions granting transfer authority to cabinet secretaries were included in most of the regular appropriations acts. Although transfer authority may be found in any component of an appropriations act, most grants of transfer authority are found toward the beginning of the “General Provisions” section of the act.

**Table 1** lists general grants of anticipatory transfer authority to the heads of nine Cabinet departments provided in regular appropriations acts for FY2002. In some instances, especially in the case of the Defense Department, the department secretary

was granted other types of appropriations transfer authority as well. In five other cases, involving the Departments of Energy, Housing and Urban Development, Interior, Transportation, and Veterans' Affairs, general grants of anticipatory transfer authority were not readily identifiable, although other forms of transfer authority usually were provided.

As the excerpted text from the appropriations acts provided in **Table 1** shows, the general grants of anticipatory transfer authority varied in their design. Limitations on the amount that could be transferred from a donor account were expressed as a percentage in some cases, and as a fixed dollar amount in another. The percentages varied from one percent, to two percent, to five percent. In addition, the total amount that could be transferred to a receiving account usually was limited to a percentage ranging from two percent to 10 percent.

In addition, further restrictions were placed on the use of transferred funds, such as requiring for the Defense Department that they be used only for "higher priority" items and in no case for items previously denied by Congress. Some of the restrictions were keyed to statutory rules regulating the use of reprogrammings. Finally, the transferred authority either required prior notification to, or the prior approval of, the House and Senate Appropriations Committees.

**Table 1. Examples of Transfer Authority Granted to Cabinet Secretaries  
in Regular Appropriations Acts for FY2002**

Department	Regular appropriations act	Legislative text
Agriculture	Agriculture Appropriations Act P.L. 107-76, Section 704 (November 28, 2001) 115 Stat. 732	The Secretary of Agriculture may transfer unobligated balances of funds appropriated by this Act or other available unobligated balances of the Department of Agriculture to the Working Capital Fund for the acquisition of plant and capital equipment necessary for the delivery of financial, administrative, and information technology services of primary benefit to the agencies of the Department of Agriculture: <i>Provided</i> , That none of the funds made available by this Act or any other Act shall be transferred to the Working Capital Fund without the prior approval of the agency administrator: <i>Provided further</i> , That none of the funds transferred to the Working Capital Fund pursuant to this section shall be available for obligation without the prior approval of the Committees on Appropriations of both Houses of Congress.
Commerce	Commerce-Justice-State Appropriations Act P.L. 107-77, Section 204 (November 28, 2001) 115 Stat. 778	Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Department of Commerce in this Act may be transferred between such appropriations, but no such appropriation shall be increased by more than 10 percent by any such transfers: <i>Provided</i> , That any transfer pursuant to this section shall be treated as a reprogramming of funds under section 605 of this Act and shall not be available for obligation or expenditure except in compliance with the procedures set forth in that section.

Department	Regular appropriations act	Legislative text
Defense	Defense Appropriations Act P.L. 107-117, Section 8005 (January 10, 2002) 115 Stat. 2247-2248	<p>Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed \$2,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: <i>Provided</i>, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: <i>Provided further</i>, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act: <i>Provided further</i>, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: <i>Provided further</i>, That a request for multiple reprogrammings of funds using authority provided in this section must be made prior to May 1, 2002.</p>
Education	Labor-HHS-Education Appropriations Act P.L. 107-116, Section 304 (January 10, 2002) 115 Stat. 2208	<p>Not to exceed 1 percent of any discretionary funds (pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985, as amended) which are appropriated for the Department of Education in this Act may be transferred between appropriations, but no such appropriation shall be increased by more than 3 percent by any such transfer: <i>Provided</i>, That the Appropriations Committees of both Houses of Congress are notified at least 15 days in advance of any transfer.</p>

Department	Regular appropriations act	Legislative text
Health and Human Services	Labor-HHS-Education Appropriations Act P.L. 107-116, Section 207 (January 10, 2002) 115 Stat. 2199	Not to exceed 1 percent of any discretionary funds (pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985, as amended) which are appropriated for the current fiscal year for the Department of Health and Human Services in this Act may be transferred between appropriations, but no such appropriation shall be increased by more than 3 percent by any such transfer: <i>Provided</i> , That an appropriation may be increased by up to an additional 2 percent subject to approval by the House and Senate Committees on Appropriations: <i>Provided further</i> , That the Appropriations Committees of both Houses of Congress are notified at least 15 days in advance of any transfer.
Justice	Commerce-Justice-State Appropriations Act P.L. 107-77, Section 107 (November 28, 2001) 115 Stat. 765	Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Department of Justice in this Act may be transferred between such appropriations, but no such appropriation, except as otherwise specifically provided, shall be increased by more than 10 percent by any such transfers: <i>Provided</i> , That any transfer pursuant to this section shall be treated as a reprogramming of funds under section 605 of this Act and shall not be available for obligation except in compliance with the procedures set forth in that section.
Labor	Labor-HHS-Education Appropriations Act P.L. 107-116, Section 102 (January 10, 2002) 115 Stat. 2185	Not to exceed 1 percent of any discretionary funds (pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985, as amended) which are appropriated for the current fiscal year for the Department of Labor in this Act may be transferred between appropriations, but no such appropriation shall be increased by more than 3 percent by any such transfer: <i>Provided</i> , That the Appropriations Committees of both Houses of Congress are notified at least 15 days in advance of any transfer.

Department	Regular appropriations act	Legislative text
State	Commerce-Justice-State Appropriations Act P.L. 107-77, Section 402 (November 28, 2001) 115 Stat. 789	<p>Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Department of State in this Act may be transferred between such appropriations, but no such appropriation, except as otherwise specifically provided, shall be increased by more than 10 percent by any such transfers: <i>Provided</i>, That not to exceed 5 percent of any appropriation made available for the current fiscal year for the Broadcasting Board of Governors in this Act may be transferred between such appropriations, but no such appropriation, except as otherwise specifically provided, shall be increased by more than 10 percent by any such transfers: <i>Provided further</i>, That any transfer pursuant to this section shall be treated as a reprogramming of funds under section 605 of this Act and shall not be available for obligation or expenditure except in compliance with the procedures set forth in that section.</p>
Treasury	Treasury-Postal Service Appropriations Act P.L. 107-67, Sections 113-115 (November 12, 2001) 115 Stat. 524	<p>Sec. 113. Not to exceed 2 percent of any appropriations in this Act made available to the Federal Law Enforcement Training Center, Financial Crimes Enforcement Network, Bureau of Alcohol, Tobacco and Firearms, United States Customs Service, Interagency Crime and Drug Enforcement, and United States Secret Service may be transferred between such appropriations upon the advance approval of the Committees on Appropriations. No transfer may increase or decrease any such appropriation by more than 2 percent.</p> <p>Sec. 114. Not to exceed 2 percent of any appropriations in this Act made available to the Departmental Offices, Office of Inspector General, Treasury Inspector General for Tax Administration, Financial Management Service, and Bureau of the Public Debt, may be transferred between such appropriations upon the advance approval of the Committees on Appropriations. No transfer may increase or decrease any such appropriation by more than 2 percent.</p> <p>Sec. 115. Not to exceed 2 percent of any appropriation made available in this Act to the Internal Revenue Service may be transferred to the Treasury Inspector General for Tax Administration's appropriation upon the advance approval of the Committees on Appropriations. No transfer may increase or decrease any such appropriation by more than 2 percent.</p>

## Transfer Authority for the Department of Homeland Security

The Administration's proposal to establish the DHS, as reflected in the introduced version of H.R. 5005, provides several different types of appropriations transfer authority for the department, including (1) general transfer authority; (2) transitional transfer authority prior to agency transfer; (3) transitional transfer authority upon agency transfer; and (4) incidental transfer authority.

The House's initial response to the Administration's recommendations was reflected in H.R. 5005, as reported on July 24, 2002, by the House Select Committee on Homeland Security.<sup>20</sup> In addition, the bill was referred for comment to various standing committees of the House, including the House Appropriations Committee.<sup>21</sup> As reported by the House Select Committee, H.R. 5005 did not reflect all of the recommendations made by the other House committees.

On July 26, the House passed H.R. 5005 by a vote of 295-132, after adopting various amendments on July 25 and 26. Armev amendment #21, an *en bloc* manager's amendment, was adopted on July 26 by a vote of 222-204; it encompassed some of the amendments requested by several House committees, including the Appropriations Committee, and various technical amendments.<sup>22</sup>

Initially, the leading proposal in the Senate was embodied in Lieberman amendment S.Amdt. 4471.<sup>23</sup> The amendment originally took the form of a substitute to S. 2452, the National Homeland Security and Combating Terrorism Act of 2002, a bill that had been reported earlier by the Senate Governmental Affairs Committee.<sup>24</sup> Senator Joseph Lieberman, chairman of the committee, proposed the substitute on July 19, which was marked up in business meetings of the committee on July 24 and 25 and authorized to be offered by him as a floor amendment during consideration

<sup>20</sup>H.Rept. 107-609, pt. 1 (July 24, 2002). The select committee is chaired by the majority leader, Representative Richard Armev. Representative Nancy Pelosi serves as the ranking minority member. The select committee maintains a Web site at [<http://hsc.house.gov>].

<sup>21</sup>The views of the House Appropriations Committee regarding transfer authority in H.R. 5005, "Recommendations to the Select Committee on Homeland Security" (July 11, 2002), are available at [[http://www.house.gov/appropriations/news/107\\_2/03homeland.htm](http://www.house.gov/appropriations/news/107_2/03homeland.htm)]. In addition, Representatives C.W. Bill Young and David R. Obey, the chairman and ranking minority member of the Appropriations Committee, respectively, presented testimony before the House Select Committee, available at [<http://hsc.house.gov/docs/0717/list.asp>].

<sup>22</sup>See pages H5817-5829 in the *Congressional Record* of July 26, 2002, for the text of the amendment and its consideration; the vote on the amendment may be found on pages H5837-5838.

<sup>23</sup>The initial Lieberman amendment was #4467 (see the *Congressional Record* of August 1, 2002, no. 108—part II, at pages S7967-8003). The Lieberman amendment was resubmitted with modification as S.Amdt. 4471 in the *Congressional Record* of September 3, 2002, no. 109, at pages S8100-8137. Senator Lieberman's statement on the amendment, together with other explanatory materials, is found in the *Congressional Record* of September 4, 2002, no. 110, at pages S8155-8180.

<sup>24</sup>The Senate Governmental Affairs Committee reported S. 2452 on June 24, 2002 (S.Rept. 107-175).

of homeland security legislation. On August 1, the Senate agreed by unanimous consent to move to proceed to consider H.R. 5005, in lieu of S. 2452, on September 3. The Senate agreed to the motion by a vote of 94-0 on September 3 and began consideration of H.R. 5005 that day.

On November 13, the House passed (by a vote of 299-121) a modified version of the Homeland Security Act, H.R. 5710, which did not include any general transfer authority but which did include transitional and incidental transfer authority. Under a compromise plan, general transfer authority instead was included in H.J.Res. 124, a continuing resolution for FY2003, which the House also passed on November 13 (by a vote of 270-143).

The Senate is scheduled to bring its consideration of H.R. 5005 to a close soon and to then reconcile its differences with the House so that the Homeland Security Act can be presented to the President before sine die adjournment of the Congress. With regard to appropriations transfer authority, the Senate is expected to embrace the modifications reflected in House passage of H.R. 5710 and H.J.Res. 124 on November 13.

The initial proposals regarding appropriations transfer authority, as proposed by the Administration, the House (in H.R. 5005), and the Senate Governmental Affairs Committee (in S.Amdt. 4471), are discussed below according to the type of transfer authority involved.<sup>25</sup> In addition, the modified House position regarding general transfer authority, as reflected in its passage of H.R. 5710 and H.J.Res. 124, is discussed. **Table 2** summarizes the initial transfer authority proposals, while **Table 3** provides a side-by-side comparison of the legislative text for these proposals.

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<sup>25</sup>In addition to the types of transfer authority identified here, the proposals also include transfer authority for specific entities that are not to be part of DHS. For example, H.R. 5005, as passed by the House, transfers assets and related items from the Immigration and Naturalization Service to the new Bureau of Citizenship and Immigration Services.

**Table 2. Summary of Initial Proposals for  
Appropriations Transfer Authority  
for the Department of Homeland Security**

<b>Administration</b>	<b>House (H.R. 5005)</b>	<b>SGA Committee (S.Amdt. 4471)</b>
<b>General Transfer Authority</b>		
Permanent authority for Secretary, subject to 5% limit in any fiscal year and 15 days' notice to Appropriations Committees.	2-year authority for Secretary, subject to 2% limit in any fiscal year and 15 days' notice to Appropriations Committees.	None.
<b>Transitional Transfer Authority—Prior to Agency Transfer</b>		
Authority for Secretary, subject to 5% limit and 15 days' notice to Appropriations Committees and without regard to original purposes.	Authority for Secretary, subject to 2% limit for DHS administrative expenses and 3% limit for other, original purposes and 15 days' notice to Appropriations Committees.	None; however, officials of agencies or functions to be transferred are authorized to provide "assistance, including the use of personnel and assets" to the Secretary until the transfer occurs.
<b>Transitional Transfer Authority—Upon Agency Transfer</b>		
Automatic transfer of assets to Secretary, subject to OMB director approval and without regard to original purposes.	Automatic transfer of assets to Secretary, subject to OMB director approval, but limited to original purposes.	Automatic transfer of assets to Secretary, subject to OMB director approval, but limited to original purposes.
<b>Incidental Transfer Authority</b>		
Authority for OMB director, in consultation with Secretary, to make incidental dispositions of assets and other items.	None.	Same as administration proposal.

**Table 3. Side-by-Side Comparison of Initial Appropriations Transfer Authority Proposals: Administration, House, & Senate Governmental Affairs Committee (Lieberman Amendment)**

Administration proposal (H.R. 5005, as introduced by request)	House (H.R. 5005, as passed)	Senate Governmental Affairs Committee proposal (S.Amdt. 4471)
<b>General Transfer Authority</b>		
<p>Transfer of Appropriations.—Except as otherwise specifically provided by law, not to exceed five percent of any appropriation available to the Secretary in any fiscal year may be transferred between such appropriations, except that not less than fifteen days’ notice shall be given to the Committees on Appropriations of the Senate and House of Representatives before any such transfer is made.</p> <p>[Section 733(b)]</p>	<p>(1) In General.—Except as otherwise specifically provided by law, not to exceed two percent of any appropriation available to the Secretary in any fiscal year may be transferred between such appropriations, except that not less than 15 days’ notice shall be given to the Committees on Appropriations of the Senate and House of Representatives before any such transfer is made.</p> <p>(2) Expiration of Authority.—The authority under paragraph (1) shall expire 2 years after the date of enactment of this Act.</p> <p>[Section 764(b)]</p>	<p>[none]</p>

<p><b>Administration proposal (H.R. 5005, as introduced by request)</b></p>	<p><b>House (H.R. 5005, as passed)</b></p>	<p><b>Senate Governmental Affairs Committee proposal (S.Amdt. 4471)</b></p>
<p><b>Transitional Transfer Authority—Prior to Agency Transfer</b></p>		
<p>Transfer of Funds.—Until the transfer of an agency to the Department, the President is authorized to transfer to the Secretary not to exceed five percent of the unobligated balance of any appropriation available to such agency, to fund the purposes authorized in this Act, except that not less than 15 days’ notice shall be given to the Committees on Appropriations of the Senate and House of Representatives before any such funds transfer is made. [Section 803(c)]</p>	<p>Transfer of Funds.—Until the transfer of an agency to the Department, the President is authorized to transfer to the Secretary to fund the purposes authorized in this Act— (1) for administrative expenses related to the establishment of the Department of Homeland Security, not to exceed two percent of the unobligated balance of any appropriation enacted prior to October 1, 2002, available to such agency; and (2) for purposes for which the funds were appropriated, not to exceed three percent of the unobligated balance of any appropriation available to such agency; except that not less than 15 days’ notice shall be given to the Committees on Appropriations of the House of Representatives and the Senate before any such funds transfer is made. [Section 811(c)]</p>	<p>[none]  [Although explicit transitional transfer authority is not provided, Section 183(a) states: Provision of Assistance by Officials.—Until an agency is transferred to the Department, any official having authority over, or functions relating to, the agency immediately before the effective date of this division shall provide to the Secretary such assistance, including the use of personnel and assets, as the Secretary may reasonably request in preparing for the transfer and integration of the agency into the Department.]</p>

<p><b>Administration proposal (H.R. 5005, as introduced by request)</b></p>	<p><b>House (H.R. 5005, as passed)</b></p>	<p><b>Senate Governmental Affairs Committee proposal (S.Amdt. 4471)</b></p>
<p><b>Transitional Transfer Authority—Upon Agency Transfer</b></p>		
<p>Transfer of Personnel, Assets, Liabilities, and Functions.—Upon the transfer of an agency to the Department— (1) the personnel, assets, and liabilities held by or available in connection with the agency shall be transferred to the Secretary for appropriate allocation, subject to the approval of the Director of the Office of Management and Budget and notwithstanding the provisions of section 1531(a)(2) of title 31, United States Code; and (2) the Secretary shall have all functions relating to the agency that any other official could by law exercise in relation to the agency immediately before such transfer, and shall have in addition all functions vested in the Secretary by this Act or other law.  [Section 803(e)]</p>	<p>Transfer of Personnel, Assets, Obligations, and Functions.—Upon the transfer of an agency to the Department— (1) the personnel, assets, and obligations held by or available in connection with the agency shall be transferred to the Secretary for appropriate allocation, subject to the approval of the Director of the Office of Management and Budget and in accordance with the provisions of section 1531(a)(2) of title 31, United States Code; and (2) the Secretary shall have all functions relating to the agency that any other official could by law exercise in relation to the agency immediately before such transfer, and shall have in addition all functions vested in the Secretary by this Act or other law. Paragraph (1) shall not apply to appropriations transferred pursuant to section 763(b).  [Section 811(e)]</p>	<p>Except as otherwise provided in this title, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the agencies transferred under this title, shall be transferred to the Secretary for appropriate allocation, subject to the approval of the Director of the Office of Management and Budget and to section 1531 of title 31, United States Code. Unexpended funds transferred under this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.  [Section 186]  <i>(continued)</i></p>

<p><b>Administration proposal (H.R. 5005, as introduced by request)</b></p>	<p><b>House (H.R. 5005, as passed)</b></p>	<p><b>Senate Governmental Affairs Committee proposal (S.Amdt. 4471)</b></p>
<p><b>Transitional Transfer Authority—Upon Agency Transfer (continued)</b></p>		
		<p>(a) Applicability of This Section.—Notwithstanding any other provision of this Act of any other law, this section shall apply to the use of any funds, disposal of property, and acceptance, use, and disposal of gifts, or donations of services or property, of, for, or by the Department, including any agencies, entities, or other organizations transferred to the Department under this Act, the Office, and the National Combating Terrorism Strategy Panel.</p> <p>(b) Use of Transferred Funds.—Except as may be provided in an appropriations Act in accordance with subsection (d), balances of appropriations and any other funds or assets transferred under this Act—</p> <p>(1) shall be available only for the purposes for which they were originally available;</p> <p>(2) shall remain subject to the same conditions and limitations provided by the law originally appropriating or otherwise making available the amount, including limitations and notification requirements related to the reprogramming of appropriated funds; and</p>

<p><b>Administration proposal (H.R. 5005, as introduced by request)</b></p>	<p><b>House (H.R. 5005, as passed)</b></p>	<p><b>Senate Governmental Affairs Committee proposal (S.Amdt. 4471)</b></p>
<p><b>Transitional Transfer Authority—Upon Agency Transfer (continued)</b></p>		
		<p>(3) shall not be used to fund any new position established under this Act.</p> <p>(c) Notification Regarding Transfers.—The President shall notify Congress not less than 15 days before any transfer of appropriations balances, other funds, or assets under this Act.</p> <p>(d) Additional Uses of Funds During Transition.—Subject to subsection (c), amounts transferred to, or otherwise made available to, the Department may be used during the transition period for purposes in addition to those for which they were originally available (including by transfer among accounts of the Department), but only to the extent such transfer or use is specifically permitted in advance in an appropriations Act and only under the conditions and for the purposes specified in such appropriations Act.</p> <p>[Section 189(a)-(d)]</p>

Administration proposal (H.R. 5005, as introduced by request)	House (H.R. 5005, as passed)	Senate Governmental Affairs Committee proposal (S.Amdt. 4471)
<b>Incidental Transfer Authority</b>		
<p>The Director of the Office of Management and Budget, in consultation with the Secretary, is authorized and directed to make such additional incidental dispositions of personnel, assets, and liabilities held, used, arising from, available, or to be made available, in connection with the functions transferred by this Act, as he may deem necessary to accomplish the purposes of this Act.</p> <p>[Section 806]</p>	<p>[none]</p>	<p>Incidental Transfers.—The Director of the Office of Management and Budget, in consultation with the Secretary, shall make such additional incidental dispositions of personnel, assets, and liabilities held, used, arising from, available, or to be made available, in connection with the functions transferred by this title, as the Director determines necessary to accomplish the purposes of this title.</p> <p>[Section 184(a)]</p>

**General Transfer Authority.** *General transfer authority* refers to appropriations transfer authority provided to the Secretary of Homeland Security following establishment of the department. Such authority would cover transfers between accounts within the department's budget and would be used to provide ongoing flexibility in departmental operations and activities.

Section 733(a) of the Administration's proposal authorizes the secretary to reorganize functions and organizational units within the department, subject to certain constraints. Section 733(b) of the proposal grants the secretary the authority to transfer up to five percent from one appropriation to another in any fiscal year, also subject to certain constraints. According to the Administration's explanation accompanying the proposed legislation, the grants of reorganizational authority and appropriations transfer authority provided in Section 733(a) and (b) are important elements in the overall proposal:

These authorities are critical to the successful establishment and organization of a new department. They allow the Secretary to fulfill the purpose of the bill by bringing together the many different functions and organizational units that will be consolidated in the new department and having them work together in new ways, and with new priorities. Similar reorganization authority was granted in the acts creating the Department of Energy and the Department of Education.<sup>26</sup>

The authority granted to the secretary under this proposal would be permanent and ongoing; Congress would not be required to provide and renew it in annual legislation. Constraints on the secretary's transfer authority include (1) a limit of 5% on the amount that may be transferred in any fiscal year from one appropriation to others; (2) a 15-day prior-notice requirement to the House and Senate Appropriations Committees before a transfer may be made; and (3) the precedence of any other constraints specifically provided by law over the five-percent limitation and prior-notice requirement.

In the House, H.R. 5005, as reported by the Select Committee, did not reflect the recommendations of the House Appropriations Committee on this matter. In response to the various transfer authorities recommended in the Administration's proposal, the Appropriations Committee noted:

The Committee believes that the enactment of H.R. 5005, as introduced, would constitute a major erosion of the separation of powers as established in the United States Constitution, abrogating the central role of the Congress—the direction and oversight of public expenditures. The bill would provide the Secretary of the Department of Homeland Security with extraordinary and unprecedented powers that would in effect be both legislative and executive in nature and undermine the fundamental precept of the founding fathers, “checks and balances.”<sup>27</sup>

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<sup>26</sup>The Administration's explanation of the Homeland Security Act of 2002 is available on the White House Website at [<http://www.whitehouse.gov/deptofhomeland/analysis/index.html>].

<sup>27</sup>House Appropriations Committee Recommendations, *ibid.*, page 41

With regard specifically to the request for general transfer authority, the Appropriations Committee proposed that Section 733(b) be deleted. Instead, the committee recommended that traditional procedures be followed:

[t]he Committee strongly believes that whether and in what amounts to grant sweeping transfer authority and the restrictions that should apply are matters that should and can be addressed through the annual appropriations process, rather than through a permanent blanket of general authority.<sup>28</sup>

The Appropriations Committee also noted that while general transfer authority provided in the organization act for the Department of Energy in 1977 and the Department of Education in 1979 was “authorized,” it did not allow appropriations to be transferred except as provided subsequently in annual appropriations acts.

Notwithstanding the objections stated by the Appropriations Committee, the House included general transfer authority in H.R. 5005 upon passage (Section 764(b)), but reduced the limitation on transfer amounts from 5% to 2% and sunsetted the authority after 2 years from the date of enactment.

The Senate Governmental Affairs Committee proposal (Lieberman amendment #4467) does not provide any general transfer authority.

The modified House proposal, H.R. 5710, does not include any general transfer authority, but it does include transitional and incidental transfer authority. Under a compromise plan, general transfer authority instead is included in H.J.Res. 124, a continuing resolution for FY2003, which the House also passed on November 13 (by a vote of 270-143). The general transfer authority provided in the continuing resolution is limited to \$640 million, which includes \$500 million from appropriations for FY2003-2004 and another \$140 million for start-up costs from appropriations first provided for FY2002 and earlier years. The entire \$640 million in transfer authority also is subject to a 2% limit on the amount that can be transferred from any single appropriation and other restrictions, such as the requirement for 15 days’ notice to the Appropriations Committees before a transfer can be made.

**Transitional Transfer Authority—Prior to Agency Transfer.** During the transition phase to the new organizational structure, two types of appropriations transfer authority may apply. The first type entails transfers made by the President from existing agencies to the secretary of the new department and would apply “until the transfer of an agency to the department.” Both the Administration and House proposals (in H.R. 5005) provide for such transfer authority, but no such authority is provided in the Senate Governmental Affairs Committee proposal.

The Administration’s provision, Section 803(c), authorizes transfers, subject to a 5% limit on the amount that may be transferred and a 15-day prior-notice requirement to the House and Senate Appropriations Committees before a transfer may be made. In addition, Section 803(c) does not require that the use of transferred

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<sup>28</sup>House Appropriations Committee Recommendations, *ibid.*, page 8.

appropriations be limited to their original purposes. The House's provision, Section 811(c), is the same, except that transfers "for administrative expenses related to the establishment of the Department of Homeland Security" are limited to 2%, and transfers "for purposes for which the funds were appropriated" are limited to 3%.

The House Appropriations Committee also strongly opposed this provision and recommended that it be deleted. The committee observed:

... The amounts transferred [pursuant to Section 803(c)] would then be available to finance any of the purposes of the new department, without regard to the purposes for which they were originally appropriated. In other words, the new department could start its operations with initial funding of \$1 billion or more, provided not through an appropriation for that purpose, but rather through a five percent surcharge against appropriations made for agencies such as the Coast Guard, the Customs Service, and the Federal Emergency Management Agency. Again, no Congressional approval is required.

Although explicit transitional transfer authority is not provided in the Senate Governmental Affairs Committee proposal, Section 183(a) directs officials of agencies or functions to be transferred to provide "assistance, including the use of personnel and assets" to the secretary during the period immediately before the transfer occurs. Section 183(a) is roughly comparable in effect to Section 511 of the Department of Education Organization Act of 1979, discussed previously.

Although the modified House proposal, H.R. 5710, does not include this type of transitional transfer authority, Section 1511(a) does include the same directive for agency officials to provide "assistance" that is found in Section 183(a) of the Senate Governmental Affairs Committee proposal.

**Transitional Transfer Authority—Upon Agency Transfer.** A second type of transfer authority used during the transition phase to the new organizational structure automatically transfers the assets and related items of any agency to the secretary of the new department upon the agency's transfer. All three of the initial proposals provide for such transfer authority, with individual transfers subject to the approval of the OMB director. However, the Administration proposal (Section 803(e)), unlike the House proposal (in H.R. 5005) and Senate Governmental Affairs Committee proposal (Section 811(e) and Section 186, respectively), does not limit the use of transferred funds to their original purposes.

The House Appropriations Committee recommended that this grant of transitional transfer authority be modified in part to restore the requirement that the use of transferred funds be limited to their original purposes; the House Select Committee, and eventually the House itself, accepted the Appropriations Committee's recommendation. The full modification recommended by the Appropriations Committee (which was not accepted by the House Select Committee or the full House), also would have required that transferred funds be subject to the original conditions and limitations accompanying their use, that the President notify Congress at least 15 days before making any transfers, and that the use of funds for other than their original purposes be approved in advance in appropriations acts. The full modification, including two new subsections, reads as follows:

(e) Use of Transferred Funds.—Except as may be provided in an appropriation Act pursuant to subsection (g), balances of appropriations and any other funds transferred pursuant to this Act shall—

(1) be available only for the purposes for which they were originally available; and

(2) remain subject to the same conditions and limitations provided by the law originally appropriating or otherwise making available the amount, including limitations and notification requirements related to the reprogramming of appropriated funds.

(f) Notification Regarding Transfers.—The President shall notify Congress at least 15 days in advance of any transfer of appropriations balances or other funds pursuant to this Act.

(g) Additional Uses of Funds During Transition.—During the transition period and provided that the Committees on Appropriations are notified at least 15 days in advance, amounts transferred to or otherwise made available to the Department may be used for purposes in addition to those for which they were originally available (including by transfer among accounts of the Department), but only to the extent such transfer or use is specifically permitted in advance in an appropriation Act and only under the conditions and for the purposes specified in such appropriation Act.<sup>29</sup>

During the meetings of the Senate Governmental Affairs Committee on July 24 and 25, when the Lieberman amendment was under consideration, a new provision (Section 189) was added dealing with transitional appropriations transfer authority. Section 189 incorporates, but also expands upon, the language that had been recommended by the House Appropriations Committee. In expanded form, the section also bars the use of transferred appropriations to fund any new position. Further, the section includes other provisions that (1) require the DHS secretary, in disposing of property, to comply with section 204 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 485) and deposit the proceeds therefrom into the Treasury in accordance with 31 U.S.C. 3302(b); (2) require that gifts may only be accepted or used as provided for in annual appropriations acts; and (3) require the President to submit a detailed budget request for DHS in his FY2004 budget.

The modified House proposal, H.R. 5710, provides in Section 1511(d) for the automatic transfer of appropriations to the new department, subject to the approval of the OMB director and the restriction that appropriations be used only for their original purposes. In addition, Section 873 of the bill incorporates the requirements pertaining to the disposal of surplus property, the use of gifts, and the President's detailed budget request for DHS in his FY2004 budget discussed above.

**Incidental Transfer Authority.** Under this authority, the OMB director, in consultation with the Secretary of Homeland Security, is directed to make “additional incidental dispositions” of personnel and assets connected with functions transferred under the measures. Apart from the requirement for consultation with the secretary, the only limitation on the OMB director's authority is that the dispositions be “incidental” and deemed necessary by the director to accomplish the purposes of the legislation. The term “incidental” is not defined in the legislation. As previously

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<sup>29</sup>House Appropriations Committee Recommendations, *ibid.*, page 2

mentioned, comparable provisions were included in the organization acts for the Departments of Energy and Education.

Nearly identical sections providing incidental transfer authority are provided in Section 806 of the Administration proposal and Section 184(a) of the Senate Governmental Affairs Committee proposal. Similar language also had been included in Section 814 of H.R. 5005, as reported by the House Select Committee, but the House Appropriations Committee recommended that the provision be deleted. Consequently, Section 814 was stricken from H.R. 5005 by the House on July 26; the language striking the provision was included in Arney amendment #21, the *en bloc* manager's amendment.

The modified House proposal, H.R. 5710, restores incidental transfer authority to the OMB director in Section 1516.