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Calendar No. 1108

110TH CONGRESS *2d Session*	SENATE	REPORT 110–517

SENIOR EXECUTIVE SERVICE DIVERSITY ASSURANCE ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 2148

TO PROVIDE FOR GREATER DIVERSITY WITHIN, AND TO IMPROVE POLICY DIRECTION AND OVERSIGHT OF, THE SENIOR EXECUTIVE SERVICE

OCTOBER 1 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

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SENIOR EXECUTIVE SERVICE DIVERSITY ASSURANCE ACT

OCTOBER 1 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2148]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2148) to provide for greater diversity within, and to improve policy direction and oversight of, the Senior Executive Service, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

I. PURPOSE AND SUMMARY

The purpose of S. 2148 is to promote diversity in the SES. S. 2148, as amended, would create a new Senior Executive Service Resource Office (SESRO) at the Office of Personnel Management (OPM) to develop and monitor programs for the advancement and training of senior executives, including the Senior Executive Service Federal Candidate Development Program. The bill also requires each agency to submit a plan to OPM on how the agency is identifying and eliminating barriers to minorities, women, and individuals with disabilities to obtain appointments to the SES. The involvement of individuals with a variety of experiences and perspectives in the consideration of SES candidates helps ensure the selection of a strong and diverse SES workforce. S. 2148 requires agencies, to the extent practicable, to include minorities, women, and individuals with disabilities on their Executive Resources Boards (ERB) as well as any other panels that evaluate SES candidates.

II. BACKGROUND

GENERAL BACKGROUND ON THE SENIOR EXECUTIVE SERVICE

The SES was established by Title IV of the Civil Service Reform Act of 1978, P.L. 95–454, and encompasses managerial, super-

visory, and policy positions above the GS–15 level that are not filled by presidential appointment. The SES includes nearly 7,000 federal employees.[1] Of those, approximately 6,000 are career appointed executives.[2] SES career appointments do not have time limitations, whereas non-career SES employees are limited in their promotion potential and time in service. Career SES employees are provided more job protections and advancement potential than non-career SES employees, such as adherence to merit system principles and whistleblower rights. However, career-SES employees still do not have rights such as collective bargaining that are afforded other federal employees.[3]

Career appointees are selected for the SES on the basis of leadership qualifications. Candidates are initially evaluated by an internal agency Executive Resources Board (ERB) made up of SES volunteers or selected by an agency head. The candidates are ranked by the ERB and written recommendations are made to the Office of Personnel Management (OPM). OPM is required to establish Qualifications Review Boards (QRBs) to certify candidate qualifications. The appointing authority in an agency makes the final determination of which candidate will be hired. Non-career appointees do not have to meet the same competitive selection requirements as career SES candidates and do not receive the same entitlements as career senior executives.

The Civil Service Reform Act of 1978 required that OPM have primary oversight of the SES and help agencies establish programs for systematic and continuing development of senior executives.[4] OPM had a centralized office that handled the programs and policy development of the SES. However, in 2003, OPM decentralized those office functions as part of a larger internal management reorganization. Since then, senior executives have not had a central office to provide needed resources. According to the Senior Executives Association (SEA):

> Until several years ago, a central office at the Office of Personnel Management dealt with all issues regarding SES policy and programs, allowing for appropriate changes in policy to reflect the realities of managing the SES workforce. It has become evident that, with no focal point for the SES at OPM, policy and implementation have been disconnected, and problems have ensued. The most glaring example of this has been the poor implementation of certification of SES performance management systems at the agency level. With inadequate support from OPM, congressional oversight and investigation ultimately forced OPM to take note and provide agencies with greater guidance on the requirements for certification. By having an office that is responsible for developing and implementing policy with

[1] U.S. Office of Personnel Management, Senior Executive Service Survey Results, May 2008.

[2] Statement of Katherine Siggerud, Director of Physical Infrastructure Issues, and George Stalcup, Director of Strategic Issues, Government Accountability Office, Human Capital: Diversity in the Federal SES and Senior Levels of the U.S. Postal Service and Processes for Selecting New Executives (GAO–08–609T) (hereinafter "GAO Statement"), for the Joint Hearing on "Managing Diversity of Senior Leadership in the Federal Workforce and Postal Service" Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia and the House Oversight and Government Reform Subcommittee on the Federal Workforce, the Postal Service, and the District of Columbia: April 3, 2008 (hereinafter "Joint Hearing").

[3] 5 U.S.C. § 7103.

[4] Pub. L. No. 95–454 (Oct. 10, 1978).

> is responsible for developing and implementing policy with regard to the executive corps, as well as conducting oversight, there will be greater accountability and response to concerns from both agencies and Congress.[5]

As the Executive Director of the Asian American Government Executive Network (AAGEN) testified at the Joint Hearing, a single office providing effective oversight of the SES is essential to ensuring that OPM's and agencies' SES recruitment efforts adequately address diversity.[6] S. 2148 requires OPM to re-establish the SESRO at OPM. The SESRO will serve as a central resource for agencies and will provide oversight of agency recruitment and candidate development efforts.

OPM believes that the requirement under S. 2148 to establish a Senior Executive Service Resource Office (SESRO) would undo significant aspects of their 2003 reorganizational structure and have substantial cost implications.[7] Based on the concerns raised by senior executives, the Committee recognizes the need for a central office at OPM to address policy and program development for the SES.

IMPROVING DIVERSITY IN THE SENIOR EXECUTIVE SERVICE

According to a 2003 Government Accountability Office (GAO) report, "Senior Executive Service: Enhanced Agency Efforts Needed to Improve Diversity as the Senior Corps Turns Over," as the demographics of federal employees change, "diversity has evolved from public policy to a business need."[8] Diversity within the SES will help better ensure the executive management of the federal government is responsive to the needs, policies, and goals of the Nation. As GAO witnesses testified at the Joint Hearing, having "[a] diverse SES corps, which generally represents the most experienced segment of the federal workforce, can be an organizational strength that can bring a wider variety of perspectives and approaches to bear on policy development and implementation, strategic planning, problem solving, and decision making."[9] At the same hearing, the witness for AAGEN said, "[t]he federal government should have a diverse workforce not only to demonstrate that it represents the American population, but also because diversity enhances the effectiveness of government." That witness specified law enforcement agencies as an example of how diversity among senior executives can impact the public: "our various law enforcement agencies at all levels and across the country must begin to mirror our nation's diversity if they are to maintain domestic peace and equitably enforce our laws within and across our social strata."[10]

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[5] Letter to Senator Daniel K. Akaka, Chairman, Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, and Representative Danny K. Davis, Chairman, House Subcommittee on Federal Workforce, the Postal Service, and the District of Columbia, from Carol Bonosaro, President, Senior Executives Association: October 9, 2007.

[6] Statement of Carson Eoyang, Executive Director, Asian American Government Executive Network for the Joint Hearing (hereinafter Eoyang Statement).

[7] Statement of Nancy Kichak, Associate Director, Office of Personnel Management for the Joint Hearing (hereinafter Kichak Statement).

[8] GAO, Senior Executive Service: Enhanced Agency Efforts Needed to Improve Diversity as the Senior Corps Turns Over, GAO–03–34, Washington, DC: January 2003.

[9] See GAO Statement at p. 2.

[10] See Eoyang Statement at p. 3.

The percentage of minorities and women at senior pay levels in the federal government, including the SES, is lower than in the civilian workforce and the federal workforce as a whole. According to the 2007 Federal Equal Opportunity Recruitment Program report by OPM, minorities represent 32.8 percent of the overall federal workforce and women represent 43.9 percent of the overall federal workforce.[11] GAO reports that in the SES, minorities represent less than 16 percent of the senior executive workforce and women represent 29 percent of the senior executive workforce.[12]

There also are lower numbers of minorities and women in the SES compared to the numbers of minorities and women employed in the GS–14 and GS–15 levels, the feeder pools for the SES. GAO reports that in 2007, minorities made up 22.5 percent of the employees in the SES development pool (compared to the previously cited 16 percent of career SES employees), and that women made up 34 percent of the employees serving at the GS–14 and GS–15 levels (compared to the previously cited 29 percent of the career SES in 2007).[13]

In a GAO report from January 2003, OPM cited a number of steps it had taken to diversify the SES, including fostering the establishment and growth of agency development programs.[14] OPM's subsequent strategy, launched in 2003, for increasing executive diversity included efforts to encourage agencies to enhance diversity at entry and middle levels, identify individuals with leadership ability early in their careers, and provide experience and learning opportunities to prepare them for senior level positions.[15]

In 2003, OPM announced the Candidate Development Program (CDP) to "bring together a diverse cadre of potential executives."[16] The CDP was designed to create pools of qualified executives for SES positions and was intended to include a variety of elements that prepare candidates for career success. Elements of the program include rotational assignments, formal training, mentoring, and performance assessment. Graduates of the CDP are certified by the SES Qualifications Review Board and may be selected for an SES position anywhere in the federal government without further competition. The program is open to individuals at the GS–14 and GS–15 grade levels, or the equivalent from outside the federal government, with the duration of the candidate's participation lasting 12 to 24 months.

Despite these efforts, there is room for improvement. In 2003, GAO evaluated data from 2000 on diversity in the SES.[17] At the time, the report showed 67 percent of senior executives were white males; 19 percent were white females; and about 14 percent were minority males and females.[18] According to GAO's testimony at the April 3, 2008, joint hearing, by the end of fiscal year 2007, there

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[11] Federal Equal Opportunity Recruitment Program Report for Fiscal Year 2007, Linda Springer, Director, Office of Personnel Management, *http://www.opm.gov/About_OPM/Reports/FEORP/2007/feorp2007.pdf.*

[12] See GAO Statement.

[13] See id.

[14] Enhanced Agency Efforts Needed to Improve Diversity as the Senior Corps Turns Over, Government Accountability Office, GAO–03–34, January 17, 2003.

[15] Building and Maintaining a Diverse and High Qualified Workforce, A Guide for Federal Agencies, Office of Personnel Management, 2003, *http://www.opm.gov/diversity/guide.htm.*

[16] News Release: OPM Launches the SES Candidate Development Program, Office of Personnel Management, April 10, 2003, *http://www.opm.gov/pressrel/2003/EB-SESCDP.asp.*

[17] Supra note 13.

[18] Id.

were small improvements made in the overall representation of women and minorities over the past six years, but gains were inconsistent among the 25 federal agencies analyzed and offset by losses of women and minorities at nine agencies.[19] More than 60 percent of SES employees serving in 2000 had retired by 2007, and in the next ten years, 90 percent of senior executives serving today will be eligible for retirement.[20] The new hiring required as a result of turnover in the SES workforce presents an opportunity for improving diversity among SES employees.

S. 2148, as amended, attempts to improve the diversity of the SES by encouraging diversity in the ERB panels that review applicants. This provision would allow the reviewing panels to reflect the diversity of the candidate pool. The SESRO would be required to develop a range of programs focused on recruitment and mentoring for women, minorities, and individuals with disabilities. Agencies would have to work with OPM and the Chief Human Capital Officers Council to develop plans to improve diversity in the SES. In addition, the SESRO would be required to collect data on diversity in the SES and report that information to Congress.

CONSTITUTIONAL CONCERNS

OPM and the Department of Justice (DOJ) have expressed concerns over the constitutionality of the provisions in S. 2148, as introduced, and the provisions of the companion House legislation, H.R. 3774. Specifically, they argued that provisions in the two bills violated the equal protection requirements under the Due Process Clause of the Fifth Amendment and the Appointments Clause of the Constitution.[21] In a letter to Congressman Henry Waxman, DOJ elaborated on the concerns that several of the provisions in the legislation violated the equal protection requirements pursuant to the Due Process Clause of the Fifth Amendment.[22] For example, DOJ argued that requiring "at least one woman and one minority" sit on a three-person review panel would impose an unconstitutional racial and gender quota. DOJ also argued that provisions requiring targeted recruitment of minorities and women, and requiring that hiring officials be notified of the racial and gender demographics of the applicant pool, may be held unconstitutional on equal protection grounds.[23]

During its consideration of S. 2148, the Committee adopted a substitute amendment offered by Senator Akaka that included provisions addressing the agencies' constitutional concerns. For example, the amendment removed the requirement for a three-person review panel to be made up of one woman and one ethnic or racial minority. The substitute amendment requires that "to the extent practicable" agencies create diversity in the existing Executive Review Boards, which evaluate and select candidates for the SES.

In a memo prepared for the Senate Subcommittee on Oversight of Government Management, the Congressional Research Service

[19] See GAO Statement at p. 4.
[20] Congressional Budget Justification, Performance Budget, Fiscal Year 2009, U.S. Office of Personnel Management, February 4, 2008.
[21] See Kichak Statement at p. 3.
[22] Letter to Congressman Henry Waxman, Chairman, House Oversight and Government Reform Committee, from the U.S. Department of Justice, Office of Legislative Affairs, April 30, 2008.
[23] Id.

(CRS) provided a legal analysis of the amended version of S. 2148 as it pertains to the equal protection concerns raised by OPM and DOJ, and concluded that the new provisions contained in Senator Akaka's substitute amendment likely would survive a constitutional challenge.[24] CRS noted that "the distinction between 'inclusive' forms of affirmative action—such as recruitment, advertising in minority media, and other outreach to minority communities—and 'exclusive' affirmative action—such as quotas, set-asides, or layoff preferences—has featured prominently in many decisions."[25]

OPM and DOJ had raised concerns that requiring the collection of data and statistical information on diversity in the SES violated equal protection requirements. OPM and DOJ argued that under the original legislation a provision requiring that demographic information be given to hiring officials "is likely to be construed as a means of impelling the consideration of race in hiring decisions."[26] The requirement to provide hiring officials with this statistical data was removed in the amended bill, although the SESRO is still required to collect the data. CRS noted that courts generally have not found data collection activities concerning the racial or gender makeup of a workforce to violate the Constitution.[27]

In addition, DOJ raised concerns with the requirement for the minority recruitment program proposed by the bill.[28] However, there is already a requirement under section 7201 of title 5, U.S.C., for OPM to conduct a minority recruitment program. Furthermore, under section 2302(b) of title 5, hiring officials may not take into consideration "race, color, religion, sex, or national origin" when making employment decisions. According to the U.S. Court of Appeals for the Eleventh Circuit, "where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable."[29] CRS noted in its legal analysis:

> The SES recruitment provision as currently drafted, appears strikingly similar to the dozens, if not hundreds, of existing federal statutory and regulatory provisions that specifically refer to race, ethnicity, gender, or disability as factors to be considered in the administration of federal programs. Such measures may include, but are not limited to, goals, timetables, set-asides, priorities, outreach, re-

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[24] Congressional Research Service (CRS) memorandum of legal analysis on the Akaka Substitute Amendment to S. 2148 to Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, by Jody Feder, June 24, 2008 (hereinafter "CRS Memo") at p. 5.

[25] See CRS Memo at p. 3 (citing *Allen* v. *Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999) (racially conscious outreach efforts to broaden applicant pool not subject to strict scrutiny), vacated 216 F.3d 1263 (11th Cir. 2000); *Duffy* v. *Wolle*, 123 F.3d 1026, 1038–39 (8th Cir. 1997) ("An employer's affirmative efforts to recruit female and minority applicants does not constitute discrimination."); Ensley Branch, NAACP, 31 F.3d 1548, 1571 (11th Cir. 1994) (describing efforts to actively encourage minorities to apply for jobs, including waivers of application fees, as "race-neutral"); *Billish* v. *City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992) (describing aggressive recruiting as "race-neutral procedures") rev'd on other grounds, 989 F.2d 890 (7th Cir. 1993) (en banc)).

[26] Supra note 23.

[27] See CRS Memo at p. 3 (citing *Sussman* v. *Tanoue*, 39 F.Supp.2d 13, 24 (D.D.C. 1999) (quoting *U.S.* v. *New Hampshire*, 539 F.2d 277, 280 (1st Cir. 1976) ("Statistical information as such is a rather neutral entity, which only becomes meaningful when it is interpreted").

[28] Supra note 23.

[29] *Allen* v. *Alabama State Bd. of Educ.*, 164 F.3d at 1352.

cruitment, and quotas, and few, if any, of these provisions appear to have been subject to constitutional scrutiny.[30]

DOJ also expressed concerns that the legislation violated the Appointments Clause of the Constitution. DOJ argued that the authority proposed for the SESRO in S. 2148 "would entail the kind of delegated sovereign authority, or significant governmental authority, that can only be exercised by Officers of the United States appointed in accordance with the Appointments Clause, U.S. Constitution Article 2, section 2, clause 2."[31] Senator Akaka's substitute amendment addressed the Appointments Clause concern by explicitly giving the Director of OPM the authority to appoint employees to staff the SESRO.

III. Legislative History

S. 2148, the Senior Executive Service Diversity Assurance Act, was introduced by Senator Daniel K. Akaka on October 4, 2007. The bill was read twice and referred to the Committee on Homeland Security and Governmental Affairs. S. 2148 was referred to the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia on October 19, 2007. Representative Danny K. Davis introduced a companion bill, H.R. 3774, on October 9, 2007.

On April 3, 2008, the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia held a joint hearing with the House Subcommittee on Federal Workforce, the Postal Service, and the District of Columbia on the Senior Executive Service Diversity Assurance Act. Testimony was received from: Nancy Kichak, Associate Director, OPM; George Stalcup, Director, Strategic Issues, GAO; Katherine Siggerud, Director, Physical Infrastructure Issues, GAO; William Bransford, General Counsel, Senior Executives Association; William Brown, President, African American Federal Executives Association; Rhonda Trent, President, Federally Employed Women; Carson Eoyang, Executive Director, Asian American Government Executives Network; Jose Osegueda, President, National Association of Hispanic Federal Executives; and Darlene Young, President, Blacks in Government.

The Committee considered S. 2148 on June 25, 2008. By voice vote the Committee ordered the bill favorably reported, as amended by Senator Akaka's amendment in the nature of a substitute, with Senator Coburn recorded as "no." Members present were Lieberman, Akaka, Carper, Pryor, McCaskill, Collins, Coleman, Coburn, and Sununu. The substitute amendment offered by Senator Akaka added a findings section to the bill to demonstrate the need for improving diversity in the SES. It also assigned specific duties to the SESRO that included tracking statistical data on diversity in the SES, establishing a diversity recruitment program, and helping agencies improve diversity in their SES. The substitute amendment deleted the language from the original bill establishing a diversity panel, and instead required agencies to make

[30] See CRS Memo at p. 5 (citing CRS Report RL32565, Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-Asides, or Other Preferences Based on Race, Gender, or Ethnicity, by Charles V. Dale and Cassandra Foley).

[31] Supra note 23.

the ERBs diverse to the extent practical. Finally, language was added requiring agencies to develop plans to improve diversity, coordinate the development of those plans with OPM and the Chief Human Capital Officers Council, and report the progress to Congress on the extent to which the agency has demonstrated a commitment to diversity.

IV. Section-by-Section Analysis

Section 1. Short title

This section provides that the short title of the bill is the "Senior Executive Service Diversity Assurance Act."

Section 2. Findings

This section provides findings, including statistics from GAO and OPM that demonstrate the need for this legislation. The statistics reveal the under-representation of women and minorities in the SES.

Section 3. Definitions

This section includes the following definitions:

- The term "Director" means the Director of OPM.
- The term "Senior Executive Service" means Senior Executive Service positions, which include any position in an agency which is classified above GS–15 or in level IV or V of the Executive Schedule, or an equivalent position which fits certain criteria and does not require a Senate confirmed presidential appointment.
- The term "agency" has the meaning provided in 5 U.S.C. 3132 which is an executive agency, except a government corporation and GAO, and excluding some agencies identified in section 3132 such as the Federal Bureau of Investigation, the Drug Enforcement Agency, and the Central Intelligence Agency.
- The term "career appointee" means an individual in an SES position whose appointment to the position or previous appointment to another SES position was based on approval by OPM of the individual's executive qualifications.
- The term "career reserved position" means a position which is required to be filled by a career appointee and which is designated as a career reserved position by the head of the agency.
- The term "SES Resource Office" refers to the Senior Executive Service Resource Office established by section four of the bill.

Section 4. Senior Executive Service Resource Office

This section re-establishes the Senior Executive Service Resource Office (SESRO) within OPM. Subsection (a) requires the Director of OPM to establish the SESRO within six months of enactment. This subsection provides that the mission of the new office is to improve the efficiency, effectiveness, and productivity of the SES; to advance the professionalism of the SES; and to ensure that in seeking to achieve an SES that is reflective of the nation's diversity, recruitment is from qualified individuals.

Subsection (b) describes the functions of the SESRO, including recommending regulations to the Director of OPM and providing guidance to agencies on the structure, management, and diverse composition of the SES. This subsection provides a number of ways

that the SESRO must carry out its responsibilities, including: creating policies for the management and improvement of the SES; providing oversight of the performance, structure, and composition of the SES; managing the SES pay system; developing standards for certification of each agency's SES performance management system; and developing programs for the advancement and training of senior executives. OPM is currently required by 5 U.S.C. § 3393(c) to establish qualifications review boards (QRBs) to certify the qualifications of SES candidates. Under subsection (b), the SESRO will be responsible for administering QRBs.

Subsection (b) also requires the SESRO to compile and maintain annual statistics related to the composition of the SES and requires OPM to make those statistics publicly available on its website. The SESRO must collect information such as the number of career reserve positions at each agency; the number of vacant career reserve positions at each agency; the time it takes to fill a position; how long the position is vacant; the number of individuals who have been certified as having the qualifications necessary to be appointed to the SES and the make-up of that group with regard to race, ethnicity, sex, age, and individuals with disabilities; and the make-up of the SES with regard to race, ethnicity, sex, age, and individuals with disabilities. The SESRO must also collect data on the makeup of executive resources boards (ERBs) with regard to race, ethnicity, sex, and individuals with disabilities. OPM does not currently collect data on the composition of these boards.

Subsection (b) also requires the SESRO to establish mentoring programs for potential SES candidates, conduct a continuing program to recruit women, minorities, and individuals with disabilities for SES positions, advise agencies on how an agency's equal employment or diversity office could be helpful in the SES appointments process, and evaluate and implement strategies to ensure that agencies conduct outreach to identify SES candidates in other agencies.

Subsection (c) provides that, in making the annual statistics publicly available, the SESRO may combine data for smaller agencies to protect individually identifiable information.

Subsection (d) requires the head of each agency to provide OPM with the information needed for the SESRO to compile its annual statistics.

Subsection (e) provides that the Director of the OPM shall appoint employees to staff the SESRO.

Section 5. Career appointments

Subsection (a) requires the head of an agency, to the extent practicable, to ensure diversity of the agency's ERBs by including minorities, women, and individuals with disabilities on these boards.

Subsection (b) requires OPM to issue regulations to implement subsection (a) within one year of enactment.

Subsection (c) requires OPM to report to the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs within one year of enactment with an evaluation of agency efforts to improve the diversity of ERBs based on the annual statistics maintained by the SESRO.

Section 6. Encouraging a more diverse senior executive service

Subsection (a) requires each agency, in consultation with OPM and the Chief Human Officers Council, to submit to OPM a plan to improve opportunities for the advancement and appointment of minorities, women, and individuals with disabilities to the SES. Each agency plan must address how the agency will identify and eliminate barriers that impair the ability of minorities, women, and individuals with disabilities to obtain SES appointments and any actions the agency is taking to provide opportunities for advancement. Such plans will be included in agencies' overall human capital plan. Subsection (a) provides examples of ways agencies can help employees advance, including conducting outreach, providing training programs to foster leadership development, identifying opportunities for employees to enhance their careers, assessing internal availability of candidates for SES positions, and taking inventory of employee skills and addressing any gaps in skills identified.

Under subsection (a), agency plans are required to be updated at least every two years during the ten years following enactment of this Act. OPM is required to evaluate whether each agency plan sufficiently demonstrates the agency's commitment to providing opportunities for SES appointments of minorities, women, and individuals with disabilities and determine whether to approve the plan.

Subsection (b) requires OPM, within six months after the deadline for agencies to submit a report or update, to submit a summary and evaluation of agency plans to the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs.

Subsection (c) requires OPM to evaluate existing reporting requirements such as section 717 of the Civil Rights Act of 1964 and determine how agency reporting can be done in a way that is consistent with similar reporting requirements but does not duplicate those requirements.

V. Estimated Cost of Legislation

JUNE 27, 2008.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2148, the Senior Executive Service Diversity Assurance Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 2148—Senior Executive Service Diversity Assurance Act

Summary: S. 2148 would establish a Senior Executive Service Resource Office within the Office of Personnel Management (OPM) to oversee executive agencies' efforts to improve the management of the Senior Executive Service (SES). The bill also would require agencies to prepare plans to increase diversity within the SES.

CBO estimates that implementing S. 2148 would cost $2 million in 2009 and $22 million over the 2009–2013 period, assuming appropriation of the necessary amounts. Enacting the legislation would not affect direct spending or revenues. S. 2148 contains no intergovernmental or private-sector mandates as defined in Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2148 is shown in the following table. The costs of this legislation fall primarily within budget function 800 (general government).

	By fiscal year, in millions of dollars—					
	2009	2010	2011	2012	2013	2009–2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	2	5	5	5	5	22
Estimated Outlays	2	5	5	5	5	22

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2009 and that spending would follow historical patterns for similar programs.

The SES was created in 1979 to provide a systematic program to recruit, retain, develop, and manage senior executives in the federal government. Its members generally represent the most experienced segment of the federal workforce and operate and oversee approximately 75 federal agencies. OPM manages the overall program and assists agencies as they select, develop, and manage federal executives. According to the Government Accountability Office (GAO), there are currently about 6,500 SES employees.

According to OPM, GAO, and selected agencies with SES employees, most of the provisions of S. 2148 would expand the current SES-related duties of OPM and affected agencies. The legislation would establish a new office within OPM to provide additional oversight of executive agencies' efforts to recruit and develop candidates for SES positions. In addition, the legislation would require individual agencies to develop and implement plans to enhance the diversity of their SES employees and to report on those efforts.

Based on information from OPM and other affected agencies, CBO estimates that implementing S. 2148 would cost $2 million in 2009 and $22 million over the 2009–2013 period, assuming appropriation of the necessary amounts. Those costs would cover additional staff and expenses related to the new office in OPM, which CBO expects would be fully operational in 2010. Our estimate also includes increased costs for other agencies to comply with new reporting requirements.

Intergovernmental and private-sector impact: S. 2148 contains no intergovernmental or private-sector impact as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On May 22, 2008, CBO provided a cost estimate for H.R. 3774, the Senior Executive Service Diversity Assurance Act, as ordered reported by the House Committee on Oversight and Government Reform on May 1, 2008. The two pieces of legislation are similar, and the CBO cost estimates are identical.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Elizabeth Cove, Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VI. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. CBO states that there are no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and no costs on State, local, or tribal governments. The legislation contains no other regulatory impact.

VII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic and existing law, in which no change is proposed, is shown in roman):

TITLE 5

PART III—EMPLOYEES

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Subpart B—Employment and Retention

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CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

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Subchapter VIII—Appointment, Reassignment, Transfer, and Development in the Senior Executive Service

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§ 3393. Career appointments

(a) * * *

(b) Each agency shall establish one or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency or commissioned officers of the uniformed services serving on active duty in such agency. In establishing an executive resources board, the head of the agency shall, to the extent practicable, ensure diversity of the board and of any subgroup thereof or other evaluation panel related to the merit staffing process for career appointees, by including members of racial and ethnic minority groups, women, and individuals with disabilities. The boards shall, in accordance with merit staffing requirements established by the

Office, conduct the merit staffing process for career appointees, including—

(1) all groups of qualified individuals within the civil service; or

(2) all groups of qualified individuals whether or not within the civil service.

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