



Administrative Conference Recommendation 2015-2

Technical Assistance by Federal Agencies in the Legislative Process

Adopted December 4, 2015

Federal agencies play a significant role in the legislative process.¹ While agencies can be the primary drafters of the statutes they administer, it is more common for agencies to respond to Congressional requests to provide technical assistance in statutory drafting. Despite the extent of agency involvement in drafting legislation, the precise nature of the interactions between agencies and Congress in the drafting process remains obscure.

Generally speaking, federal agencies engage in two kinds of legislative drafting activities: substantive and technical. Legislative activities considered “substantive” are subject to the Office of Management and Budget (OMB) coordination and preclearance process governed by OMB Circular A-19, which does not explicitly define substantive legislative activities or technical legislative assistance.² Substantive legislative activities include the submission of agencies’ annual legislative programs, proposed legislation such as draft bills and supporting documents an agency may present to Congress, any endorsement of federal legislation, and the submission of agency views on pending bills before Congress as well as official agency testimony before a Congressional committee.³

Agencies also provide Congress with technical drafting assistance. Rather than originating with the agency or the Administration, in the case of technical assistance, Congress originates

¹ See Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting 1-4* (November 2015), available at <https://www.acus.gov/report/technical-assistance-draft-report> [hereinafter Walker Report].

² Office of Management and Budget, Circular A-19 (revised Sept. 20, 1979), https://www.whitehouse.gov/omb/circulars_a019/ [hereinafter OMB Circular A-19].

³ *Id.* §§ (6)(a), (7)(a).



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the draft legislation and asks an agency to review and provide feedback on the draft. Circular A-19 advises agencies to keep OMB informed of their activities and to clarify that agency feedback does not reflect the views or policies of the agency or Administration.⁴ No other standard procedures or requirements apply when agencies respond to Congressional requests—from committee staff, staff of individual Members of Congress, or Members themselves—for technical assistance. In consequence, agency procedures and practices appear multifarious.

Congress frequently requests technical assistance from agencies on proposed legislation. Congressional requests for technical assistance in statutory drafting can range from review of draft legislation to requests for the agency to draft legislation based on specifications provided by the Congressional requester. Despite the fact that technical assistance does not require OMB preclearance, there is some consistency in the assistance process across agencies. Agencies often provide technical drafting assistance on legislation that directly affects those agencies and respond to Congressional requests regardless of factors such as the likelihood of the legislation being enacted, its effect on the agency, or the party affiliation of the requesting Member. Agency actors involved in the process include the agency's legislative affairs office, program and policy experts, and legislative counsel.⁵ In some agencies, regulatory counsel also participate routinely. Moreover, agency responses range from oral discussions of general feedback to written memoranda to suggested legislative language or redlined suggestions on the draft legislation.

A well-run program to provide Congress with technical assistance on draft legislation yields important benefits to the agency. Responding to such Congressional requests assists the agency in maintaining a healthy and productive relationship with Congress, ensures the proposed legislation is consonant with the existing statutory and regulatory scheme, helps educate

⁴ *Id.* § 7(i). Independent agencies routinely provide technical assistance, outside of the OMB Circular A-19 process, in line with their enabling statutes.

⁵ While this recommendation uses the term “legislative affairs office,” some agencies may have different offices or individuals responsible for legislative affairs, and this recommendation encompasses such arrangements.



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Congressional staff about the agency's statutory and regulatory framework, and keeps the agency informed of potential legislative action that could affect the agency.

Although agencies, as a rule, strive to respond to all requests, they continue to face challenges in providing technical assistance. Congressional staff may be unfamiliar with an agency's enabling legislation and governing statutes. Technical assistance provided informally does not always involve the offices of legislative counsel or legislative affairs, although both offices should be kept informed and involved. The distinction between substantive and technical drafting assistance is not always self-evident, and Congressional requesters of technical drafting assistance often are actually seeking substantive feedback from the agency experts on the proposed legislation. The provision of technical assistance on appropriations legislation presents unique demands on both agency legislative counsel and budget offices.

Various agencies have developed distinct practices and procedures to address the provision of technical assistance that the Conference believes should be considered best practices. For example, many agencies have established internal guidelines governing the agency procedures for providing technical assistance. Memorializing agency procedures ensures that the provision of technical assistance is consistent throughout the agency. By stating in written guidance that legislative counsel and legislative affairs offices must be involved, for instance, agencies can help diminish the prospect of substantive assistance being provided under the guise of technical assistance. Although agencies should have flexibility to adopt procedures that are tailored to their agency-specific structures, norms, and internal processes, memorializing their legislative drafting processes, as the Departments of Homeland Security, Interior, and Labor have done, can ensure that all agency officials involved understand the processes and can help educate personnel new to the agency.

Some agencies, the Department of Housing and Urban Development among them, utilize a practice of providing Congressional requesters with a Ramseyer/Cordon draft as part of the technical assistance response. A Ramseyer/Cordon draft is a redline of the existing law that



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shows how the proposed legislation would affect current law by underscoring proposed additions to existing law and bracketing the text of proposed deletions. Providing such drafts, when feasible, helps Congressional staffers unfamiliar with the agency's governing statutes to better comprehend the ramifications of the contemplated legislation.

Maintaining separate roles for legislative affairs and legislative counsel offices also has proven beneficial. Legislative affairs staff engage Congress directly and must often make politically sensitive decisions when communicating with Congress. By contrast, legislative counsel offices, by providing expert drafting assistance regardless of the Administration's official policy stance on the legislation, maintain the non-partisan status of the agency in the legislative process. These offices play important yet distinct roles in an agency's legislative activities that help maintain a healthy working relationship with Congress and enhance the recognition of the agency's expertise in legislative drafting and in the relevant subject matter. This division, especially when both offices communicate regularly, can help agencies monitor the line between legislative assistance that is purely technical and assistance that merges into an agency's official views on pending legislation.

Appropriations legislation presents agencies with potential coordination problems as substantive provisions or "riders" may require technical drafting assistance, but agency processes for reviewing appropriations legislation are channeled through agency budget or finance offices. It is crucial for the budget office to communicate with an agency's legislative counsel office to anticipate and later address requests for technical assistance related to appropriations bills. Agencies have taken a variety of approaches to address this issue, ranging from tasking a staffer in an agency legislative counsel office with tracking appropriations bills; to holding weekly meetings with budget, legislative affairs, and legislative counsel staff; to emphasizing less informally that the offices establish a strong working relationship.

Educational outreach on the part of both agencies and Congress, by further developing expertise on both sides and by cultivating professional working relationships, has the potential



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to enhance the provision of technical assistance over time. In-person educational efforts may include briefings of Members and their staff on an agency's statutory and regulatory scheme as well as its programs and initiatives, face-to-face meetings with legislative counsel and Congressional staff, and training in statutory drafting for both Congressional staff and agency legislative counsel attorneys.

The following recommendations derive from the best practices that certain agencies have developed to navigate these challenges and focus on both external practices that may strengthen agencies' relationship with Congress in the legislative process and internal agency practices to improve the technical drafting assistance process and external practices that may strengthen agencies' relationship with Congress in the legislative process.

RECOMMENDATION

Congress–Agency Relationship in the Legislative Process

1. Congressional committees and individual Members should aim to reach out to agencies for technical assistance early in the legislative drafting process.
2. Federal agencies should endeavor to provide Congress with technical drafting assistance when asked. A specific Administration directive or policy may make the provision of technical assistance inappropriate in some instances. Agencies should recognize that they need not expend the same amount of time and resources on each request.
3. To improve the quality of proposed legislation and strengthen their relations with Congress, agencies should be actively engaged in educational efforts, including in-person briefings and interactions, to educate Congressional staff about the agencies' respective statutory and regulatory frameworks and agency technical drafting expertise.



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Agency Technical Drafting Assistance

4. To improve intra-agency coordination and processing of Congressional requests for drafting assistance, agencies should consider memorializing their agency-specific procedures for responding to technical assistance requests. These procedures should provide that requests for technical assistance be referred to the agency's office with responsibility for legislative affairs.

5. Similarly, agencies should consider ways to better identify and involve the appropriate agency experts—in particular, the relevant agency policy and program personnel in addition to the legislative drafting experts—in the technical drafting assistance process. These efforts may involve, for example, establishing an internal agency distribution list for technical drafting assistance requests and maintaining an internal list of appropriate agency policy and program contacts.

6. When feasible and appropriate, agencies should provide the Congressional requester with a redline draft showing how the bill would modify existing law (known as a Ramseyer/Cordon draft) as part of the technical assistance response.

7. Agencies should maintain the distinct roles of, and strong working relationships among, their legislative affairs personnel, policy and program experts, and legislative counsel.

8. Agencies also should strive to ensure that the budget office and legislative counsel communicate so that legislative counsel will be able to provide appropriate advice on technical drafting of substantive provisions in appropriations legislation.