



Technical Assistance by Federal Agencies in the Legislative Process

Committee on Rulemaking

Proposed Recommendation | December 4, 2015

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Council members (with source shown in the margin).

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

6 Generally speaking, federal agencies engage in two kinds of legislative drafting activities:
7 substantive and technical. Legislative activities considered "substantive" are subject to the
8 Office of Management and Budget (OMB) coordination and preclearance process governed by
9 OMB Circular A-19, which does not explicitly define substantive legislative activities or technical
10 legislative assistance.² Substantive legislative activities include the submission of agencies'
11 annual legislative programs, proposed legislation such as draft bills and supporting documents
12 an agency may present to Congress, any endorsement of Federal legislation, and the

¹ See Christopher J. Walker, *Federal Agencies in the Administrative Process: Technical Assistance in Statutory Drafting*, pp 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].



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13 submission of agency views on pending bills before Congress as well as official agency
14 testimony before a Congressional committee.³

15 Agencies also provide Congress with technical drafting assistance. Rather than
16 originating with the agency or the Administration, in the case of technical assistance, Congress
17 originates the draft legislation and asks an agency to review and provide objective feedback on
18 the draft. Circular A-19 advises agencies to keep OMB informed of their activities and to clarify
19 that agency feedback does not reflect the views or policies of the agency or Administration.⁴
20 No other standard procedures or requirements apply when agencies respond to Congressional
21 requests—from committee staff, staff of individual Members of Congress, or Members
22 themselves—for technical assistance. In consequence, agency procedures and practices appear
23 multifarious.

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

³ *Id.* §§ (6)(a), (7)(a).

⁴ *Id.* § 7(i).

⁵ This recommendation acknowledges that, in some circumstances, a specific administrative directive or policy may make the provision of technical assistance inappropriate.



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35 general feedback to written memoranda to suggested legislative language or redlined
36 suggestions on the draft legislation.

37 A well-run program to provide Congress with technical assistance on draft legislation
38 yields important benefits to the agency. Responding to such Congressional requests assists the
39 agency in maintaining a healthy and productive relationship with Congress, ensures the
40 proposed legislation is consonant with the existing statutory and regulatory scheme, helps
41 educate Congressional staff about the agency's statutory and regulatory framework, and keeps
42 the agency informed of potential legislative action that could affect the agency.

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

52 Various agencies have developed distinct practices and procedures to address the
53 provision of technical assistance that the Conference believes should be considered best
54 practices. For instance, many agencies have established internal guidelines governing the
55 agency procedures for providing technical assistance. Memorializing agency procedures
56 ensures that the provision of technical assistance is consistent throughout the agency. By
57 stating in written guidance that legislative counsel and legislative affairs offices must be
58 involved, agencies can help diminish the prospect of substantive assistance being provided
59 under the guise of technical assistance. Although agencies should have flexibility to adopt
60 procedures that are tailored to their agency-specific structures, norms, and internal processes,



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61 memorializing their legislative drafting processes, as the Departments of Homeland Security,
62 Interior, and Labor have done, can ensure that all agency officials involved understand the
63 processes and can help educate personnel new to the agency.

64 Some agencies, the Department of Housing and Urban Development among them,
65 utilize a practice of providing congressional requesters with a Ramseyer/Cordon draft as part of
66 the technical assistance response. A Ramseyer/Cordon draft is a redline of the existing law that
67 shows how the proposed legislation would affect current law by underscoring proposed
68 additions to existing law and bracketing the text of proposed deletions. Providing such drafts,
69 when feasible, helps Congressional staffers unfamiliar with the agency's governing statutes to
70 better comprehend the ramifications of the contemplated legislation.

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

82 Appropriations legislation presents agencies with potential coordination problems as
83 substantive provisions or "riders" may require technical drafting assistance, but agency
84 processes for reviewing appropriations legislation are channeled through agency budget or
85 finance offices. It is crucial for the CFO/budget office to communicate with an agency's
86 legislative counsel office to anticipate and later address requests for technical assistance



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87 related to appropriations bills. Agencies have taken a variety of approaches to address this
88 issue, ranging from tasking a staffer in an agency legislative counsel office with tracking
89 appropriations bills; to weekly meetings with budget, legislative affairs, and legislative counsel
90 staff; to informal emphasis on offices' establishing a strong working relationship.

91 Educational outreach on the part of both agencies and Congress, by further developing
92 expertise on both sides and by cultivating professional working relationships, has the potential
93 to enhance the provision of technical assistance over time. In-person educational efforts may
94 include Hill briefings on an agency's statutory and regulatory scheme as well as its programs
95 and initiatives, face-to-face meetings with legislative counsel and Congressional staff, and
96 training in statutory drafting for both Congressional staff and agency legislative counsel
97 attorneys.

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

RECOMMENDATION

102 Congress–Agency Relationship in the Legislative Process

103 1. Congressional committees that have a relationship with particular agencies (including
104 exercising oversight authority over particular agencies) should reach out to agencies for
105 technical assistance early in the legislative drafting process.

106 2. Consistent with OMB Circular A-19 (when applicable) and Administration policy or
107 directives, federal agencies should endeavor to provide Congress with technical drafting
108 assistance when asked and appropriate to facilitate precision in legislative drafting and to
109 ensure legislation is consonant with agencies' existing statutory schemes. Agencies should

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110 recognize that they need not expend the same amount of time and resources on each and
111 every request.

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112 3. To improve the quality of proposed legislation and strengthen their relations,
113 agencies and Congress should be actively engaged in education efforts, including in-person
114 briefings and interactions on the Hill to educate Congressional staff about the agencies'
115 respective statutory and regulatory frameworks. Such outreach should also emphasize the
116 agencies' expertise in providing technical assistance in legislative drafting.

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117 Agency Technical Drafting Assistance

118 4. To improve intra-agency coordination and processing of Congressional requests for
119 drafting assistance, agencies should consider memorializing their agency-specific procedures
120 for responding to technical assistance requests.

121 5. Similarly, agencies should consider ways to better identify and involve the
122 appropriate agency experts—in particular, the relevant agency policy and program personnel in
123 addition to the legislative drafting experts—in the technical drafting assistance process. These
124 efforts may involve, for example, creating a directory developing an internal list of appropriate
125 agency contacts and establishing internal agency distribution lists for technical drafting
126 assistance requests.

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

130 7. Agencies should maintain the distinct roles of, and strong working relationships
131 between, their legislative affairs personnel and their legislative counsel.

132 8. To ensure agencies leverage their technical drafting expertise, a agencies also should
133 strive to ensure that the budget office and legislative counsel communicate so that legislative



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134 counsel will be able to provide appropriate advice on technical drafting of substantive
135 provisions in appropriations legislation.