Best Practices for Technical Assistance by Federal Agencies in the Legislative Process

Committee on Rulemaking


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 assistance: substantive and technical. Legislative assistance considered “substantive” is 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 or technical legislative endeavors.2 Substantive legislative activities include 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 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

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3 Id. §§ (6)(a), (7)(a).
originates the draft legislation and asks an agency to review and provide objective 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 every request 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. 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

\(^4\) Id. § 7(i).
educate 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 of 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 instance, 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, 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
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 that 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 CFO/budget offices 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 weekly meetings with budget, legislative affairs, and legislative counsel
staff; to informal emphasis on offices’ establishing 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
to enhance the provision of technical assistance over time. In-person educational efforts may include Hill briefings 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 both on 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 that have a relationship with particular agencies (including exercising oversight authority over particular agencies) should reach out to agencies for technical assistance early in the legislative drafting process.

2. Federal agencies should provide Congress with technical drafting assistance when asked. Agencies should recognize that they need not expend the same amount of time and resources on each and every request.

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

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, creating a directory of appropriate agency contacts and establishing internal agency distribution lists for technical drafting assistance requests.

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 between, their legislative affairs personnel and their legislative counsel.

8. To ensure agencies leverage their technical drafting expertise, agencies 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.