



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

Committee on Rulemaking

Proposed Recommendation for Council | November 3, 2015

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
7 assistance: substantive and technical. Legislative assistance considered “substantive” is subject
8 to the Office of Management and Budget (OMB) coordination and preclearance process
9 governed by OMB Circular A-19, which does not explicitly define substantive or technical
10 legislative endeavors.² Substantive legislative activities include agencies’ annual legislative
11 programs, proposed legislation such as draft bills and supporting documents an agency may
12 present to Congress, any endorsement of Federal legislation, and agency views on pending bills
13 before Congress as well as official agency testimony before a congressional committee.³

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

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].

³ *Id.* §§ (6)(a), (7)(a).



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

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

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

⁴ *Id.* § 7(i).



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

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

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

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



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

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

81 Appropriations legislation presents agencies with potential coordination problems as
82 substantive provisions or "riders" may require technical drafting assistance, but agency
83 processes for reviewing appropriations legislation are channeled through agency budget or
84 finance offices. It is crucial for the CFO/budget offices to communicate with an agency's
85 legislative counsel office to anticipate and later address requests for technical assistance
86 related to appropriations bills. Agencies have taken a variety of approaches to address this
87 issue, ranging from tasking a staffer in an agency legislative counsel office with tracking
88 appropriations bills; to weekly meetings with budget, legislative affairs, and legislative counsel
89 staff; to informal emphasis on offices' establishing a strong working relationship.

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



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

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

RECOMMENDATION

101 **Congress–Agency Relationship in the Legislative Process**

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

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

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



113 **Agency Technical Drafting Assistance**

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

117 5. Similarly, agencies should consider ways to better identify and involve the
118 appropriate agency experts—in particular, the relevant agency policy and program personnel in
119 addition to the legislative drafting experts—in the technical drafting assistance process. These
120 efforts may involve, for example, creating a directory of appropriate agency contacts and
121 establishing internal agency distribution lists for technical drafting assistance requests.

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

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

127 8. To ensure agencies leverage their technical drafting expertise, agencies should strive
128 to ensure that the budget office and legislative counsel communicate so that legislative counsel
129 will be able to provide appropriate advice on technical drafting of substantive provisions in
130 appropriations legislation.