



Administrative Conference Recommendation 2015

Draft for Discussion at Oct. 22 Committee Meeting

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 administrative state's extensive 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 clearance 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 originates the draft legislation and asks an agency to review and provide objective feedback on

¹ See Christopher J. Walker, Federal Agencies in the Administrative Process: Technical Assistance in Statutory Drafting, pp 1-4 (October, 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) [hereinafter OMB Circular A-19], https://www.whitehouse.gov/omb/circulars_a019/.

³ *Id.* §§ (6)(a), (7)(a).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the draft. Section 7(i) of 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 on proposed legislation. Despite its ubiquity, very little is publicly known about how agencies communicate with Congress in providing technical drafting assistance, or how agencies are organized internally to enable program experts, legislative counsel, and congressional liaisons to respond effectively and efficiently.

While some empirical studies have explored the role of federal agencies in the legislative process generally, there is no documentation, scholarly or otherwise, on the role federal agencies play in providing Congress with technical assistance in statutory drafting. How this assistance happens, the level of oversight, and who is involved in its provision have broader implications for inter-branch relations, for the quality of legislation Congress produces, and for statutory interpretation, i.e. the level of deference courts should accord agency interpretations of statutes given their role in drafting them.⁵

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. Moreover, agency responses range from verbal discussions of general feedback to written memoranda to suggested legislative language or

⁴ *Id.* § 7(i).

⁵ See Walker Report, note 14 (describing approaches to agency statutory interpretation in light of the extent of agency involvement in the legislative drafting process).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

redlined suggestions on the draft legislation. 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. The Conference has identified common obstacles agencies face in providing technical drafting assistance.

Agencies faces several challenges in providing technical assistance. It remains difficult to integrate technical assistance on appropriations legislation, despite the increase in appropriations "riders", because appropriations legislation follows a different process and is not governed by Circular A-19. Congressional staff may be unfamiliar with an agency's enabling legislation and governing statutes. Finally, 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 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION

1. Federal agencies should strive to respond to each Congressional request they receive for technical drafting assistance. 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 Congressional staff about the agency's statutory and regulatory framework, and keeps the agency informed of potential legislative action that could affect the agency. That agencies should respond to each request when feasible does not necessarily mean they should expend the same amount of time and resources on each and every request.

Agency Technical Drafting Assistance

2. To improve intra-agency coordination and processing of Congressional requests for drafting assistance, agencies should consider memorializing their agency-specific guidance on the agencies' role in legislative drafting. 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 can ensure that all agency officials involved understand the processes and can help educate personnel new to the agency.

3. Similarly, agencies should consider ways to better identify and involve the relevant agency experts—in particular, the agency policy and program experts in addition to the legislative drafting experts—in the technical drafting assistance process. These efforts may involve strengthening formal networks by, for example, creating a directory of relevant experts and/or establishing internal agency distribution lists for technical drafting assistance requests.

4. Agencies should consider providing, when feasible and appropriate, the congressional requester with a Ramseyer/Cordon draft as part of the technical assistance response. (A Ramseyer/Cordon draft is a redline of the existing law – not the proposed legislation – that



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

shows how the proposed legislation would affect current law by underscoring proposed additions to existing law and bracketing the text of proposed deletions.)

5. Agencies should maintain the distinct roles of, and strong working relationships between, their Congressional affairs personnel and their legislative counsel. 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 agency's expertise in legislative drafting and in the relevant subject matter.

6. Agencies should integrate their appropriations legislative activities in their technical drafting assistance process. This is particularly important in light of the emerging Congressional practice of including substantive provisions in appropriations legislation.

Congress – Agency Relationship in Legislative Process

7. To improve the quality of proposed legislation and strengthen their relationship with Congress, agencies should be actively engaged in Congressional 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.

8. Agencies should consider expanding upon their expertise to provide other forms of expert technical assistance to Congress.⁶ Agencies could consider, for instance, communicating the results of their regulatory impact analyses.

⁶ For instance, the Pension Benefit Guaranty Corporation provides expert economic modeling services to Congress, and the Federal Reserve highlights cutting-edge economic research published by its economists.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

9. Agencies should consider exploring opportunities for agency officials—legislative counsel as well as program and policy experts—to detail at the relevant Congressional committees and perhaps Members’ offices.