

OFFICE OF LEGISLATIVE COUNSEL GUIDANCE FOR DRAFTING LEGISLATIVE TEXT FOR PROPOSALS FOR THE ANNUAL NDAA

1. GENERAL STYLISTIC APPROACH.—When drafting legislative text for a proposal for the Department of Defense for inclusion in an annual National Defense Authorization Act (NDAA), Rule #1 is to follow the style found in NDAA as enacted. The answer to almost any stylistic or format question can be found by reviewing a recently-enacted NDAA. A link to each NDAA from fiscal year 1996 onward is available on the Pentagon library website, <http://www.whs.mil/library/defensenationalauthorization.htm>.

While there are many interesting debates among professional legislative drafters as to the best practice for certain wording choices, we do not face those uncertainties; for us, the choices have been made by the drafters at House Office of Legislative Counsel (HOLC) and Senate Office of Legislative Counsel, and we will follow the conventions they have settled on.

2. PROPOSALS PREVIOUSLY SUBMITTED.—For a proposal that has been submitted previously, take advantage of the work done on the proposal after it left your organization and work from the latest version of the proposal on the Department of Defense’s Office of Legislative Counsel (OLC) website. That is, do not resubmit the version your organization initially sent to OLC if that version was subsequently revised. In addition, if the proposal was approved by either the House or the Senate in its version of the NDAA, it would generally be advisable to follow the style and format of the proposal as acted upon by Congress. Please note that this refers only to matters of form and structure. Obviously, the substantive content should be in line with the current policy of the Department.
3. TO CODIFY OR NOT TO CODIFY.—Some legislative proposals would make a permanent change to current law or provide a permanent authority, while others would provide temporary authority or extend existing stand-alone authority. Generally, a proposal that would make a permanent change or establish a permanent authority should be prepared as an amendment to title 10, United States Code, or another permanent law (in other words, “codified”), rather than be prepared as a stand-alone provision. The general rule is that a proposal should be codified when the proposal is (1) permanent, and (2) of general applicability.
4. UNDERSTANDING CONTEXT OF EXISTING LAW BEING AMENDED.—When drafting amendments to an existing body of law (such as title 10, U.S.C., or the Small Business Act), be aware of the entire context of the law being amended. For example, certain matter that you may need for your proposal, such as definitions, may already be part of the law. On the other hand, a term that you are planning to use may already be defined in a way that is inconsistent with your intent, suggesting the need for a different term or an exception to the otherwise-applicable definition. Also, be alert to and follow matters of usage in the law you are proposing to amend. Readers of the law expect consistency. When you are preparing a

new section of title 10, be aware that it will, if enacted, have a larger context than just the proposal you are working on, or even the NDAA in which it is included. For example, in title 10, when regulations are created, the operative verb is always “prescribes”. Other verbs would work and are used in other statutes, but “prescribes” is the word used in title 10 and in NDAAAs.

5. VESTING FUNCTIONS, DUTIES, ETC., IN OFFICERS.—Functions and authorities should be vested in officials, not in offices or organizations. For example, authority should be vested in the Secretary of Defense, not in the Department of Defense. In addition, the official to be vested by law with an authority should be the Secretary of Defense or the Secretary of a military department, not a subordinate officer.
6. THINK AHEAD.—Remember that a provision speaks as of when it is being enacted, not the time when you are drafting it or while it is in the process of being enacted. When drafting a proposal for anticipated enactment a year or more in the future, it can be difficult to project forward rather than draft in present.
7. EXTENSION OF AUTHORITY PROVISIONS.—When drafting an extension of authority, specify in the section heading the duration of the extension. For example, the section heading for a proposal that would provide a five-year extension would begin “Five-Year Extension of ...”, rather than just “Extension of ...”.
8. USE OF “SHALL” VS. “WILL”.—For a provision specifying a mandatory action, use “shall”, not “will”. For example, provide that new regulations “shall” (not “will”) include certain matter. (Note that “will” can appear to be a prediction, rather than a substantive requirement.)
9. SINGULAR VS. PLURAL.—Whenever possible, draft in the singular. For example, for a new waiver authority, provide that the Secretary may grant “a request for a waiver” (not “requests for waivers”). Note that 1 U.S.C. 1 states “words importing the singular include and apply to several persons, parties, or things”.
10. DELEGATION.—There is no need to provide express delegation authority; the Secretary of Defense and the Secretaries of the military departments already have authority to delegate their functions (see 10 U.S.C. 133(d), 3013(f), 5013(f), and 8013(f)).
11. ACRONYMS.—No acronyms. Spell out everything.
12. DRAFTING MANUAL.—For a drafting manual that provides specific “dos and don’ts”, see the manual of the House Office of the Legislative Counsel at:
<http://www.house.gov/legcoun/pdf/draftstyle.pdf>.
NOTE: The early part of the Manual is aimed specifically at the attorneys at HOLC. The DoD user may wish to skip ahead to page 23 (page 35 of the PDF). And note that page 24/36 provides the answer to the ever-popular question of how to refer to the various levels of subdivision within a section. You will also note that the Manual itself shows the style described in the Manual.

13. ASK FOR ASSISTANCE. When in doubt about how to draft something, the correct word use or the proper format, please feel free to call or email the attorneys at OLC. We are here to help and would be happy to work with you on your initial submission to ensure it reflects these drafting principles.