

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 previous NDAAAs as enacted**. The answer to almost any stylistic or format question can be found by reviewing a recently-enacted NDAA. The most recent NDAA is Public Law 112-81. 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 at DoD do not face those uncertainties; it is the position of the Office of Legislative Counsel (OLC) that DoD legislative proposals for the annual NDAA will be drafted in accordance with the conventions used by the drafters at the House Office of Legislative Counsel (HOLC) and Senate Office of Legislative Counsel (SOLC) as reflected in recent NDAAAs.

In short, the drafting conventions to be followed in DoD legislative proposals are those found in annual NDAAAs.

2. PROPOSALS PREVIOUSLY SUBMITTED.—For a proposal that has been submitted previously, if the proposal was passed by either the House or the Senate in its version of the NDAA, follow the style and format of the proposal in that form. This guidance refers to matters of form and structure; obviously, the substantive content should reflect the current policy of the sponsoring component. If the previous version of the proposal did not pass either House, then use as your new baseline the latest version of the proposal on the OLC website. That is, do not resubmit an “outdated” version your organization previously sent to OLC if that version was later revised.
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 would only have limited applicability (such as applicability only to a specified contingency operation or at a specific installation). Generally, a proposal that would make a permanent change or establish a permanent general 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. For guidance as to how to draft such an amendment, see Rule #1 above.
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, for example, the Small Business Act), be aware of the entire context of the law being amended. 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 either 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. For amendatory provisions, follow the style and form of the law being amended (“When in Rome, ...”). 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 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. For guidance as to how an official may delegate an authority or function, see Rule #10 below.
6. CONSIDERATION OF WHEN THE DRAFT PROVISION WILL SPEAK.—Note that a provision of law speaks as of when it is being applied, not the time when you are drafting it or while it is in the process of being enacted. It becomes effective when enacted, unless the law provides otherwise, but will then be read as current when being applied. So, you can generally use the present tense, not the future tense.
7. EXTENSION OF AUTHORITY PROVISIONS.—When drafting an extension of authority, strike and insert the full date, not just the year of the expiration. And specify in the section heading the duration of the extension. For example, for the section heading for a proposal that would provide a five-year extension, use “Five-Year Extension of ...”, rather than just “Extension of ...”.
8. USE OF “SHALL” VS. “WILL” AND “MUST”.—For a provision specifying a mandatory action, use “shall”, not “will”. For example, provide that new regulations “shall” (not “will”) include certain matter. And note that the statutory convention for specifying a duty is to use “shall”, rather than “must”.
9. SINGULAR VS. PLURAL.—Whenever possible, draft in the singular. For example, for a new waiver authority, state 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. DEFINITIONS.—For amendments to title 10, U.S.C., be aware of the definitions in 10 U.S.C. 101. And be aware of the definition of “congressional defense committees” in section 3 of the annual NDAA.
13. 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 (subsection, paragraph, subparagraph, clause, etc.). You will also note that the Manual itself is written in the style expounded in the Manual.

14. ASK FOR ASSISTANCE.—When in doubt about how to draft something, please feel free to call or email the attorneys at OLC. We would be happy to work with you on your initial submission to ensure it conforms to congressional drafting conventions and otherwise reflects sound drafting practice. In this respect, please be aware that one of the OLC attorneys previously had a long career with the House Office of Legislative Counsel, including as the lead House drafter of the annual NDAA from 1977 through 2006, and had a hand in formulating many of the drafting conventions followed in the annual NDAA.