INSIDE THE AGENCY: HOW REGULATORS THINK WHEN THEY REGULATE

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AGENCY
STATUTORY
INTERPRETATION
Participating Agencies
INSIDE AGENCY STATUTORY INTERPRETATION

Inside Agency Statutory Interpretation,
AGENCY TECHNICAL DRAFTING ASSISTANCE
FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING

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Agency Case Studies
TECHNICAL DRAFTING ASSISTANCE PROCESS

1. Congressional Request
2. Agency Response
3. Congressional Reply
Rate of Providing Technical Assistance in Drafting Legislation

- Appropriations legislation that indirectly affects the agency: 2.7
- Enacted legislation that indirectly affects the agency: 3
- Introduced legislation that indirectly affects the agency: 3.2
- Introduced legislation that directly affects the agency: 4
- Enacted legislation that directly affects the agency: 4.5
- Appropriations legislation that directly affects the agency: 4.6

Scale: 1=never, 2=rarely, 3=sometimes, 4=often, 5=usually, 6=always
Factors That Affect Whether Agency Provides Technical Assistance

- Whether the technical assistance request comes from majority committee/member staff (as opposed to...): 2.0
- Whether the proposed legislation is likely to be enacted: 2.1
- Whether the technical assistance request comes from committee staff (as opposed to an individual member’s...): 2.4
- Whether the technical assistance request is for redline/comments on draft bill language (as opposed to...): 2.5
- Whether the agency has sufficient time/resources available to review and provide technical assistance on legislation: 2.5
- Whether the technical assistance request comes from committee/member staff of member from the...: 2.6
- Whether Congress has provided a reasonable deadline to review and provide technical assistance on legislation: 2.7
- Whether the proposed legislation furthers agency objectives (as opposed to undermining agency objectives): 2.8

Scale: 1=never, 2=rarely, 3=sometimes, 4=often, 5=usually, 6=always
In sum, agencies usually provide technical assistance when asked by Congress. Why?

1. Maintain a healthy and productive working relationship with Congress
2. Ensure proposed legislation does not unnecessarily disrupt the existing statutory (and regulatory) scheme
3. Educate the congressional staffers about the agency’s existing statutory and regulatory framework
4. Serves as “a very good source of intelligence”
Substance and Form of Agency Response

1. Oftentimes in writing and orally—from before legislation introduced through enactment

2. Informal process with congressional staffers really want “substantive” feedback in addition to technical drafting assistance

3. General theme is “do no harm”: agencies attempt to preserve existing regulatory authority by encouraging statutory language that is flexible, broad . . .

   ambiguous [?]
LEGISLATING

IN THE SHADOWS
AGENCY STRUCTURAL MODELS
Agency Organizational Models for Providing Technical Assistance


2. Decentralized Agency Experts Model: Commerce, Treasury, and to some extent FCC

3. Centralized Legislative Affairs Model: Federal Reserve and PBGC
General Counsel Organizational Models for Providing Technical Assistance

1. Centralized Legislative Counsel Model:
   • Divided Legislative and Regulatory Counsel: Agriculture, Education, Homeland Security, and Labor
   • Combined Legislative and Regulatory Counsel: Energy & HUD
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