GUIDELINES FOR FY18 CYCLE MAY CHANGE FOLLOWING ARRIVAL OF NEW SENIOR LEADERSHIP

Guidelines for Preparation of Legislative Proposals for the DoD Legislative Program

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I. REVIEW PROCESS FOR LEGISLATIVE PROPOSALS

A. Overview

Every legislative proposal from any element of the Department must be coordinated through the Department of Defense (DoD) legislative program as described in the Deputy Secretary of Defense's annual memorandum calling for legislative proposals for the upcoming fiscal year (referred to as the "Call Memo"). A legislative proposal may be transmitted to Congress only pursuant to the direction of the Assistant Secretary of Defense for Legislative Affairs. The transmittal of a legislative proposal other than through the DoD legislative program is unauthorized.

Each proposal submitted by one of the military departments, a combatant command, or another component outside of the Office of the Secretary of Defense (OSD) will be reviewed by the OSD component with responsibility for the subject matter to ensure that the proposal aligns with overall DoD priorities. OSD components will have a set period of time in which to either concur or non-concur on any such proposal. A non-OSD proposal will not move forward without the concurrence of the relevant OSD component.

B. The Legislative Review Panel

The Legislative Review Panel (LRP) will meet periodically during the legislative cycle to review legislative proposals submitted by the components. A legislative proposal will be submitted to OMB only with the approval of the LRP (unless otherwise directed by the Secretary or Deputy Secretary). The LRP is chaired by the Assistant Secretary of Defense for Legislative Affairs (ASD(LA)) and consists of the ASD(LA), the Director of the Joint Staff, representatives from the front offices of the Secretary of Defense and Deputy Secretary of Defense, and senior-level representatives of the Under Secretary of Defense (Comptroller) and the Director of Cost Assessment and Program Evaluation (CAPE).

The LRP may require changes to a proposal before transmission to the Office of Management and Budget (OMB) or Congress to ensure that proposals accurately reflect the

Department's priorities. The LRP will also resolve any outstanding disputes between components with respect to pending proposals that are referred to it by the Office of Legislative Counsel (OLC) for resolution. Any significant modification to a proposal after LRP approval and transmittal to OMB, especially as a result of comments received through the interagency review process, is subject to further review and approval by the LRP.

The LRP will enforce firm deadlines (both for the submission of proposals and for budget information) to ensure that only proposals submitted in response to actual exigencies or unforeseeable needs are accepted late. Failure of a sponsoring component to identify an issue or a needed extension of expiring authority does not qualify as either an actual exigency or an unforeseeable need.

C. Coordination

Legislative proposals will be coordinated throughout the Department by OLC through the OLC intranet website. Components will have the opportunity to review and comment on each proposal.

The coordination process requires that all participants engage in full and frank discussions of legislative proposals. Pursuant to DoD Directive 5500.1 and OMB Circular No. A-19, DoD will forward to OMB and Congress only those proposals that reflect a single, fully-coordinated DoD position. Accordingly, sponsors should monitor comments posted regarding their proposals and address any concerns raised.

If participants in the DoD legislative program are unable to resolve differences regarding a proposal through the coordination process, OLC may ask the differing components to set forth their respective positions in writing. These position papers should be concise, persuasive, and limited to one page and must be signed by the agency head. The sponsoring component should include in its paper a response to any objection that has been raised with which the sponsoring component is in disagreement.

If, after exhausting all options for resolution, the proposal remains in dispute, the proposal may be scheduled for review at the next meeting of the LRP. As part of its review, the LRP will consider the position papers submitted by the differing components, including whether a component did not submit a position paper. Should a proposal be scheduled for review at an LRP meeting, the LRP may request that the sponsoring component have a representative appear at the meeting to advocate its position and answer any questions from the LRP.

D. Late Proposals

Late submissions make the legislative proposal process less effective and efficient and require a significant expenditure of resources to obtain the necessary internal and interagency coordination on an expedited basis. Therefore, adherence to the deadline set forth in the Call Memo from the Deputy Secretary of Defense for submission of proposals to OLC is critical. Any proposal submitted after this deadline will be considered late and subject to the process set forth below.

The only proposals that will be accepted late will be those submitted in response to actual exigencies or unforeseeable needs. Failure by a component to identify an issue or to identify a needed extension of an expiring authority does not qualify as either an actual exigency or an unforeseeable need. Submitting a proposal late may result in that proposal being deferred until the next annual legislative cycle. Components should notify OLC as soon as possible if they intend to submit a late proposal and work with OLC to expedite the submission of the proposal.

For any proposal that is submitted late, the head of the component, in the cover memorandum accompanying the proposal, must explain the following:

- The circumstances that prevented the submission of the proposal by the submission deadline.
- How the proposal will be incorporated within the DoD budget for the upcoming fiscal year.
- Why it is essential for the proposal to be enacted in the current legislative cycle.

As discussed above, every late proposal will be referred to the LRP to determine whether it will be accepted for processing during the current legislative cycle. A late proposal will not be coordinated within the Department until that determination is made, most likely during a monthly LRP meeting. As a result, a proposal that is submitted late might not be coordinated within the Department for several weeks after it is received, if at all.

II. SUBMITTING LEGISLATIVE PROPOSALS

A. Authorization

Every proposal submitted to OLC must be authorized by the head of the sponsoring component, as shown by a memorandum accompanying the proposal that is signed by the component head (or principal deputy).

B. Legal Review

The sponsoring component for each proposal must certify that an attorney has reviewed and approved each proposal. Please note that the reviewing attorney is not an attorney from the Office of Legislative Counsel, but the component's own counsel.

C. Legislation as a Last Resort

Legislation is to be used sparingly and only when required to meet specific requirements or goals and, then, only after all other avenues (including administrative avenues) have proven unsuccessful. If a legal determination is made that a proposal includes unnecessary legislation, the proposal will be returned to the sponsor with a request for further explanation of why it should be included in the DoD legislative program.

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Components should review the statutes they use on a regular basis for possible expirations of authority and should submit legislative proposals to extend any of the laws they wish to extend where existing authority would expire on or before December 31 of the following calendar year.

D. Proposals to Repeal, Modify, or Consolidate Existing Reporting Requirements

To continue the Department's efforts to reduce the burden of congressional reporting requirements on the Department, each component should review all existing statutory reporting requirements within its purview and submit legislative proposals that would repeal outdated reporting requirements, consolidate duplicative requirements, make the preparation of reports more efficient, or otherwise reduce the burden on the Department of congressionally-mandated statutory reporting requirements.

As an alternative to a full legislative proposal, a component may submit the Excel spreadsheet titled "Information Required for Submission to Repeal, Modify, or Consolidate Statutory Reporting Requirements" (which is available on the OLC website) with the following information for each recommendation: (1) the name of the component; (2) the title of the report; (3) the statutory citation of the report; (4) the type of change requested (repeal, modification, or consolidation of two or more reports); (5) a summary of the recommended change; (6) a justification for the change; (7) the agency point of contact; and (8) the agency subject matter expert. Components should be aware that the justification will be provided to Congress; thus, it should focus on efficiency and/or manpower rationales rather than on whether or not the report is read or utilized by Congress.

For purposes of the DoD legislative program, components should only submit proposals or recommendations that address reporting requirements that are required by law, that is, those with a statutory citation. Reporting "requirements" from a joint statement of managers, committee report, or other non-statutory language are not appropriate for this process.

III. REQUIRED ELEMENTS OF A PROPOSAL

A component sponsoring a proposal shall include each of the elements described in subsections (A) through (G) below as part of the proposal as submitted to OLC, formatted in accordance with the "Template for Sample Proposals" (which is available on the OLC website). OLC will return to the sponsoring component a proposal that fails to meet these requirements.

A. Proposed Legislative Language

The proposal shall set forth the proposed legislative language. This language should be drafted to achieve the desired policy objective, either by amending existing law or by proposing a new provision of law. The proposed text should include a title of what the proposal substantively accomplishes (e.g., "TWO-YEAR EXTENSION OF ABC PROGRAM", not "AMENDMENT OF XYZ ACT"). In drafting legislative language, it is strongly recommended that components consult with drafters at OLC regarding proper language and format to accomplish the goal of their proposal. Components should also use previous NDAAs as enacted

into law as a reference and review the accompanying "GENERAL DRAFTING GUIDANCE" below.

B. Section-by-Section Analysis

The proposal shall include a section-by-section analysis describing the proposal and explaining why it is necessary. A section-by-section analysis should set out – in as much detail as is necessary – the factual and legal problems that necessitate the proposed legislative change, describe the proposed changes, and explain the beneficial consequences of these changes. If the proposal amends an existing law, the section-by-section analysis should also include a brief description of the current law and how the proposal would change that law.

The section-by-section analysis should be written so that it would be understandable by a layperson not familiar with the proposal or the policy background affected by the proposal. Accordingly, the section-by-section analysis should avoid the use of footnotes, jargon, and program-specific language and should spell out each acronym the first time it is used. In many instances, a poorly written analysis loaded with technical language and acronyms – or an analysis that fails to adequately address every significant issue raised by the proposal – will prevent a proposal from clearing DoD or OMB coordination.

C. Budget Implications

The proposal shall include a budget implications section. This section must identify for each proposal the funding source(s) and proposed funding and personnel profiles across the Future Years Defense Program (FYDP). Additionally, this section must describe the cost methodology used to calculate the budget implications for the additional legislative authority being requested.

See Section IV for additional information.

D. Component Priority

The proposal shall have a priority section setting forth the priority the sponsoring component places on the proposal. The sponsoring component must identify whether the proposal is a "must have" and, if it is identified as a "must have", explain why that proposal must be enacted during the current legislative cycle. The component should also indicate if the proposal is among its top five "must have" proposals for the cycle.

E. Resubmission Information

The proposal shall include a resubmission information section. This section should note whether the proposal has been submitted to OLC for a previous legislative cycle, including by a different component. If the proposal was submitted during a previous legislative cycle, the sponsoring component should identify each such cycle, the applicable proposal numbers (available on the OLC website), and any barriers the proposal encountered. The proposal should

also identify any changes made to the proposal to address these barriers or note external factors whose changes make passage more likely.

If the proposal has not been previously submitted to OLC, the resubmission information section should state: "This proposal is being submitted for the first time."

See Section V for additional information.

F. Contact Information

The proposal shall provide contact information for the proposal, including the name and contact information for a subject matter expert (SME), point of contact for OMB, and reviewing legal counsel.

Additionally, the proposal shall provide contact information for the reviewing comptroller point of contact. If the proposal is funded by military department appropriations, the proposal shall list the name and contact information for the Assistant Secretary for Financial Management & Comptroller point of contact(s) for the appropriate military department(s); if the proposal is funded by Defense-wide appropriations, the proposal shall list the name and contact information for the Comptroller for the Defense Agencies and Defense-wide activities point of contact. In neither case may the proposal list an individual from the Office of the Under Secretary of Defense (Comptroller) (OUSD(C)) as the point of contact.

G. Changes to Existing Law (CEL)

If the proposal would amend the text of an existing law, the proposal must show in red-line format how the proposal would change the text of existing law if enacted. The component should identify all of the changes the proposal would make to the text of existing law (no matter how small). Deletions from existing law should be shown as struck through (~~old~~); additions to existing law should be shown as underlined (new).

There are two exceptions. First, if the proposal would add a new section to title 10, United States Code (or another statute), it is not necessary to repeat the text of the new section in the Changes to Existing Law section. Second, an amendment to a table of contents (or a Code table of sections) does not need to be shown.

If the proposal would not change the text of an existing statute, this section of the proposal should state: "This proposal would not change the text of any existing provision of law."

IV. BUDGET IMPLICATIONS

A. Determining Budget Implications

As required by Section III, every proposal must address the budget implications of the proposal. A proposal has budget implications if the proposal would allow funds to be spent for a

purpose that is not currently authorized by law. USD(C) is responsible for assessing whether a proposal has budget implications.

A proposal that is determined to have budget implications must include budget tables for funding and personnel. The budget tables must identify the funding and personnel for FY 2018 to FY 2022, appropriation/account/fund, budget activity(s), and budget line item(s) for the proposal. For Overseas Contingency Operations (OCO)-funded proposals, the budget tables must identify the funding and personnel for FY 2018, appropriation/account/fund, budget activity(s), and budget line item(s) for the proposal. The funding information should reflect the marginal cost and number of personnel affected (i.e., "delta") of implementing the proposal, NOT the overall funding and personnel for the program or authority.

If a proposal has no budget implications, the proposal should state that "This proposal has no budget implications." and provide the specific rationale for that determination. Simply stating that a proposal would be funded within existing resources is incorrect and merely confirms that the proposal has budget implications that must be addressed as discussed above.

B. Confirming Funding

OMB will not clear a proposal with budget implications unless it is consistent with the President's budget. Therefore, the Department will not submit legislative proposals with budget implications to OMB that the Department does not intend to fund.

A military department should work closely with its Assistant Secretary for Financial Management & Comptroller and should engage with the Comptroller for the Defense Agencies and Defense-wide activities to ensure the following for each of its proposals:

- The overall funding levels are within its President's budget fiscal guidance controls for the upcoming fiscal year.
- If a proposal does not have funding and personnel from a Service or Agency by the deadline for submission of proposals to OLC, the proposal includes -- as set forth in the "Sample Proposal Template" -- for each Service or Agency the following statement: "(Service/Agency name) does not intend to use this authority, which would have been funded in the following account(s): (list full name of all accounts)." *This does not apply to the proposal's sponsor, which must provide its funding and personnel information at the time of submission.*
- If a certification memo does not list a proposal as funded, and the PB-16 does not reflect the funding and personnel , by the deadline for the submission of the certification memorandum set forth in the Call Memo, the proposal shall include -- as set forth in the "Sample Proposal Template" -- for each Service or Agency the following statement: "(Service/Agency name) does not intend to use this authority, which would have been funded in the following account(s): (list full name of all accounts)."
- The budget tables contain updates reflecting all of the changes to the proposal that occurred during the Program/Budget Review prior to the submission deadline for the certification memorandum.

- The certification memorandum and the PB-16 exhibit are provided.

The Assistant Secretary for Financial Management & Comptroller for the military department(s) and the Comptroller for the Defense Agencies and Defense-wide activities at the time of certification must provide a PB-16 exhibit which lists all of the legislative proposals being certified in one PB-16 exhibit, rather than a separate exhibit for each proposal. The consolidated PB-16 exhibit must include the total cost/savings for each proposal, a total for each appropriation/fund, and a grand total. If the proposal affects manpower, the consolidated PB-16 exhibit must also provide the end strength and work-year adjustments (average strength for military and full-time equivalents for civilians) by type of employment status.

C. Legislative Proposals Funded by Other Components

If a component intends to sponsor a legislative proposal for which funding is required from other components, the sponsoring component should submit the draft proposal to each component from which funding is required by January of the year before submission of the proposal so the proposal is considered for the Program/Budget process. The Assistant Secretary of the military department(s), the Defense Agencies, and Defense-wide activities can then decide whether to fund the proposal in its budget for the relevant fiscal year.

V. PREVIOUSLY SUBMITTED PROPOSALS

As required by Section III, a sponsoring component should provide a detailed justification for any proposal that is being resubmitted. This section should note whether the proposal has been previously submitted, including by a different component. If the proposal was submitted during a prior legislative cycle, the sponsoring component should identify each such cycle, the applicable proposal numbers (available on the OLC website), and any barriers the proposal encountered. The proposal should also identify any changes made to the proposal to address these barriers or note external factors whose changes make passage more likely. If the proposal has not been previously submitted, the proposal should state that "This proposal is being submitted for the first time."

A. Proposals Not Sent to Congress

If the proposal was not previously submitted to Congress, the sponsoring component should describe why the proposal was not approved, any changes to the proposal to address prior concerns, and any discussions or changes in circumstance that mitigate these concerns.

B. Proposals Sent to Congress

If a proposal has been previously submitted to Congress, the sponsoring component should describe why Congress did not enact the proposal (if known), any changes to the proposal to facilitate enactment, and why Congress could be expected to enact the proposal in this legislative cycle. If a proposal has been submitted three or more times and has not been enacted, the presumption will be that the proposal will likely not be enacted and, therefore, should not be transmitted to Congress.

C. Carryover Proposals

Each component should include with its submission any OMB-cleared proposals from the previous year that remain Departmental priorities and are pending in the NDAA as passed by the House of Representatives or the Senate (or both). Those pending proposals that are resubmitted for the new legislative cycle, pending the outcome of the previous cycle's NDAA, will be referred to as "carryover" proposals. When a component submits a carryover proposal, it should: (1) identify the proposal as a carryover proposal; (2) note whether the proposal was adopted by the House or Senate (including the section number(s) in the House or Senate NDAA); and (3) update the proposal as necessary (including the budget information). Once the previous cycle's NDAA is enacted, each carryover proposal will be reviewed and, as warranted, will either be dropped from the legislative program or be referred back to the sponsoring component for reconsideration and possible modification in view of the congressional action.

VI. GENERAL DRAFTING GUIDANCE FOR LEGISLATIVE TEXT

The legislative text of a proposal should be drafted for general application with broad authority to act. A proposal should not propose a limitation on the Secretary of Defense's authority to manage DoD, nor should it propose the creation of a new reporting requirement or the extension of an expiring reporting requirement.

A. Ask for Assistance

OLC has a number of experienced legislative drafters. 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.

B. General Stylistic Approach

When drafting legislative text, Rule #1 is to **follow the style found in previous NDAAs 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 1987 onward is available on the Pentagon library website, http://whs.mil.campusguides.com/content.php?pid=321436&sid=2631608.

C. Proposals Previously Submitted

For a proposal that has previously been included in either the House or Senate NDAA but not enacted, follow the style and format of that version. For a proposal that has not been included in either the House or Senate NDAA, use the latest version of the proposal on the OLC website. Do not submit an "outdated" version of the proposal.

D. 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 (U.S.C.), 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.

E. Understanding Context of Existing Law Being Amended

When drafting amendments to an existing body of law (such as title 10, U.S.C.), be aware of the entire context of the law being amended. Certain matters 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 NDAAs.

F. Vesting Functions, Duties, Etc., in Officials

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 generally be the Secretary of Defense or the Secretary of a military department, not a subordinate officer.

G. Effective Dates and Tense

Unless the law provides otherwise, legislative provisions become effective when enacted, but will then be read as current when being applied. As a result, you can generally use the present tense in your proposed legislative text, not the future tense.

H. Extensions of Authority

When drafting an extension of authority, strike and insert the full date -- not just the year -- the authority expires (e.g., ". . . is amended by striking 'January 1, 2014' and inserting 'January 1, 2018'"). Also, 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 should read "Five-Year Extension of …", rather than just "Extension of …".

I. Use of "Shall" vs. "Will" or "Must"

For a provision specifying a mandatory action, use “shall”, not “will”. For example, provide that new regulations “shall” (not “will”) include certain matter. Also, the statutory convention for specifying a duty is to use “shall”, rather than “must”.

J. 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”.

K. 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. 113(d), 3013(f), 5013(f), and 8013(f)).

L. Acronyms

Do not use acronyms in legislative text. Spell out everything.

M. Definitions

For amendments to title 10, U.S.C., be aware of the definitions in 10 U.S.C. 101. Also, be aware of the definition of “congressional defense committees” in section 3 of the annual NDAA.

N. Drafting Guide From HOLC

For a guide to legislative drafting that provides specific “dos and don’ts”, see the “Quick Guide to Legislative Drafting” prepared by the House Office of the Legislative Counsel at: http://legcounsel.house.gov/HOLC/Resources/quick_guide.pdf.