Quick Guide to Legislative Drafting

Office of the Legislative Counsel, U.S. House of Representatives

Key drafting questions to consider

- What is the problem to be solved?
- What is the scope of the policy—To whom or what does it apply?
- Administration— Who will be responsible for carrying out the policy?
- Enforcement—What if the policy is not followed?
- Timing—When should the policy take effect?
- How does the policy relate to existing law?

General template for organizing a bill

The Office of the Legislative Counsel generally tries to organize a bill, and provisions within a bill, according to the template below. We do not always follow this template, but it is often our starting point when we think about how to put together a draft.

- General rule: State the main message.
- Exceptions: Describe the persons or things to which the main message does not apply.
- Special rules: Describe the persons or things to which the main message applies in a different way or for which there is a different message.
- Transitional rules.
- Other provisions.
- Definitions.
- Effective date (if different from date of enactment).
- Authorization of appropriations (if appropriate—see below).

Amending statutes

A. Deciding whether a bill should be freestanding or amendatory

Many considerations go into deciding whether a bill should be freestanding or should amend existing law. They include the following:

- Is there an existing statute pertaining to the agencies, persons, or subject matter involved?
- If there is such a statute, is the new policy temporary or permanent? It may be better to avoid cluttering up the existing statute with temporary provisions, despite the related content.
- Would it be helpful for the definitions, enforcement provisions, rules of construction, or other general provisions of any such statute to apply in the case of the new policy?

B. Distinguishing material "outside the quotes" from material "inside the quotes"

Material that is being added to an existing statute is shown in quotation marks. As a shorthand, drafters often speak of freestanding material (whether an entire bill or a freestanding portion of a bill that also amends existing law) as being "outside the quotes" and the material being added as being "inside the quotes". Even if all of the substantive provisions of a bill are inside the quotes, it will still have technical provisions that are freestanding, most notably amendatory instructions that indicate where in the existing statute the new material is to be placed.

When an amendatory provision becomes law, any new material being added will become part of the existing statute. Accordingly, it must be written as if it is in that statute. For example, references inside the quotes to "this Act" are to the statute being amended, not the new bill. Similarly, references inside the quotes to "section 5" are to section 5 of the statute being amended. Also, remember that all of the definitions, enforcement provisions, rules of construction, and other general provisions that apply to the portion of the statute where the new material is being placed will apply to that new material.

Referring to units within a statute

The section is the basic unit of organization of a statute. The terminology for referring to units within a section has become highly standardized, as follows:

Sec. ___.

(a) (Subsection)

(1) (Paragraph)

(A) (Subparagraph)

(i) (Clause)

(I) (Subclause)

In larger statutes, sections may be organized into higher-level units. The terminology for such units varies from statute to statute, but the following terms are often used (from the highest level to the level immediately above a section): title I, subtitle A, chapter 1, subchapter A, part I, subpart 1.

Referring to other law

A. Positive versus non-positive law titles of the U.S. Code

The laws Congress passes are numbered by date of enactment and included in the Statutes at Large in that order. The Office of the Law Revision Counsel of the U.S. House of Representatives then arranges most of them by subject matter in the U.S. Code. When material from a statute is included in the Code, the Code becomes evidence of that statutory provision. The underlying statute remains in force, however, and it can be used to rebut the Code where the two differ. (In legal terms, the Code provision is said to be prima facie evidence of the law.) From time to time, Congress enacts titles of the Code into positive law and repeals the underlying statutes. These titles of the Code are themselves the law and cannot be rebutted. (In legal terms, they are said to be legal evidence of the law.) One can quickly see the status of a title by looking at the first page after the title page of any volume of the Code or on the Office of the Law Revision Counsel's website at http://uscode.house.gov.

Here is the practical implication of this difference for drafting purposes:

- If the provision of the Code you are citing or amending has been enacted into positive law, cite or amend the Code provision. For example: "section 32901 of title 49, United States Code,".
- If it has not, cite or amend the underlying statute, generally by its short title, and give the Code cite parenthetically as an aid to the reader. For example: "section 5 of the Federal Trade Commission Act (15 U.S.C. 45)".

The Office of the Legislative Counsel maintains a corpus of Statute Compilations of public laws that either do not appear in the U.S. Code or have been classified to a title of the U.S. Code that has not been enacted into positive law. Select Statute Compilations are available on the GovInfo website of the Government Publishing Office at https://www.govinfo.gov/app/collection/comps.

B. Provisions that do not appear in the U.S. Code

Sometimes the Office of the Law Revision Counsel declines to include in the Code certain provisions that have not been enacted into positive law as part of the Code. This may be because the provisions are temporary, narrow in scope, obsolete, or executed. A parenthetical to aid the reader in such cases can include the public law number or Statutes at Large citation, or both. For example: "section 701 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (Public Law 111–80)"; "section 101 of the Water Resources Development Act of 1996 (110 Stat. 3662)".

A provision that is not formally placed within a section of the Code may nonetheless be included as a "note" after related matter that is part of a Code section or in an appendix to a title of the Code. In such cases, the parenthetical citations look substantially similar to those of provisions that have their own Code sections. For example: "section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note)"; "section 2 of the Classified Information Procedures Act (18 U.S.C. App.)".

Three important drafting conventions

A. The terms "means" and "includes"

The basic distinction between these two terms is that "means" is exclusive while "includes" is not. If a definition says that "the term 'X' means A, B, and C", then X means *only* A, B, and C and cannot also mean D or E. If a definition says that "the term 'X' includes A, B, and C", then X must include A, B, and C, but it may also include D or E, or both. Thus, the phrase "includes, but is not limited to" is redundant. In fact, using it in some places out of an abundance of caution could cause a limitation to be read into places where it is not used.

B. The terms "shall" and "may"

The term "shall" means that an action is required; the term "may" means that it is permitted but not required. While this might seem obvious, a common misconception concerns the phrase "may not", which is mandatory and is the preferred language for denying a right, power, or privilege (e.g., "The Secretary may not accept an application after April 1, 2011."). "Shall not" perhaps sounds stronger and is usually construed to have the same meaning, but it is subject to some (rather arcane) interpretations that are best avoided.

C. Use of the singular preferred

In general, provisions should be drafted in the singular to avoid the ambiguity that plural constructions can create. Take, for example, this provision: "Drivers may not run red lights.". It is ambiguous as to whether there is any violation unless *multiple* drivers run *multiple* red lights. This problem can be avoided by rewriting the provision as follows: "A driver may not run a red light.".

Section 1 of title 1, United States Code, provides that in determining the meaning of any statute, unless the context indicates otherwise, singular terms include the plural and plural terms include the singular. In the simple example above, this rule of construction would eliminate the ambiguity by instructing that the reader substitute "driver" for "drivers" and "red light" for "red lights". But it is preferable for a provision to be clear on its face, and the rule of construction also works in the other direction to foreclose any argument (however tenuous) that the redrafted provision applies to only one driver.

Use of particular legislative provisions

A. Purposes and findings provisions

The Office of the Legislative Counsel discourages the use of a statement of purpose that merely summarizes the specific matters covered by a bill. At a minimum, such a statement is redundant if the operative text of the bill already states exactly what is required, permitted, or prohibited. More importantly, any differences between such a statement and the operative text may be construed in ways that are difficult to anticipate. There may be cases, however, where a statement of the objective of a particularly complex provision may be useful in clarifying Congress's intent behind the provision.

Findings provisions are also generally unnecessary. In some instances, though, they may be helpful in establishing Congress's power to regulate a certain activity (e.g., showing how an activity affects interstate commerce).

B. "Authorization of appropriations" provisions

In order to maintain the delineation between the jurisdiction of the authorizing committees and the Appropriations Committee, House Rule XXI creates a point of order against unauthorized appropriations in general appropriations bills. An appropriation in such a bill is out of order unless the expenditure is authorized by existing law. Note, however, that if the point of order is not raised or is waived and the bill is enacted, the appropriation will be valid.

Language requiring or permitting government action carries an implicit authorization for an unlimited amount of money to be appropriated for that purpose. The reason for including an "authorization of appropriations" provision is to limit the authorization to the amount or fiscal years stated. Accordingly, a provision that authorizes the appropriation of "such sums as may be necessary", without specifying the years for which appropriations are authorized, is superfluous and should not be used.