

OLC Guidelines for Preparation of Legislative Proposals for the Fiscal Year 2013 DoD Legislative Program

I. TIMELINE AND REVIEW PROCESS FOR DOD LEGISLATIVE PROGRAM:

As noted in the Deputy Secretary of Defense Call Memo, all legislative proposals for the FY 2013 legislative cycle must be submitted to the Office of Legislative Counsel (OLC) by August 8, 2011. Any proposal submitted after this date will be considered late and subject to the process set forth in the memo on the disposition of late submissions. The full timeline for the FY 2013 DoD Legislative Program is set forth in the accompanying document captioned "Timeline for FY 2013 DoD Legislative Program."

Each proposal submitted by the military departments, the combatant commands and other components outside of the Office of the Secretary of Defense (OSD) will be specifically reviewed by the OSD component with the responsibility for the issue involved to ensure the proposal aligns with OSD priorities. OSD components will have a set period of time in which to review and render an opinion on each proposal. A non-OSD proposal will not move forward without the affirmative support of the relevant OSD component, so it is in the best interest of non-OSD components to work with the relevant OSD component prior to submission of a proposal to OLC. Lastly, following Departmental coordination and before proposals go to either the Office of Management and Budget (OMB) or the Legislative Review Panel (LRP), the Assistant Secretary of Defense (Legislative Affairs) will review all submitted proposals to ensure consistency with OSD and Departmental priorities.

Please note that any authorization provision that has traditionally been included in either the National Defense Authorization Act (NDAA) "shell" or the Military Construction "shell" – including a request for multiyear procurement authority, a request for new use of unobligated funds, and a request to extend the use of funds beyond the current fiscal year – must be submitted to the OLC as a regular legislative proposal by the above date. Any such provision submitted only as part of the "shell" (which will not be submitted to OLC until several months after the above deadline) will be subject to the process for the disposition of proposals that are submitted late. However, this requirement does not apply to the recurring, core provisions of either shell — those that either authorize appropriations for regular Department of Defense accounts or prescribe military personnel strengths.

Lastly, the LRP will enforce firm deadlines (both for submission of proposals and for budget information) to ensure that only proposals submitted in response to actual emergencies or unforeseeable needs are accepted late. A sponsoring component's failure to identify an issue or a needed extension of expiring authority is neither an actual emergency nor an unforeseeable need.

II. REQUIRED ELEMENTS OF A PROPOSAL:

A sponsoring component must ensure that the proposal includes all of the required elements prior to its submission to OLC.

The first section of the proposal should set forth the proposed legislative language. This language

should be drafted to achieve the desired policy objective in clear and concise language. The proposed language should include a descriptive title of what the proposal substantively accomplishes (e.g., “TWO-YEAR EXTENSION OF ABC PROGRAM”, not “AMENDMENT OF XYZ ACT”) at the beginning of that section. In drafting the legislative language, use previous NDAAAs as enacted into law as a reference on how to draft a potential amendment to an existing law and review the accompanying “Office of Legislative Counsel Guidance for Drafting Legislative Text for Proposals for the Annual NDAA” document.

The second section of the proposal is the section-by-section analysis. This section should summarize what the proposal would accomplish; explain the problem the proposal is designed to solve; explain, if not obvious, why a legislative solution is needed; provide a description of the proposed changes to address the problem; and explain the consequences of these changes. If the proposal amends an existing law, this section should briefly describe the current law before it describes how the proposal would change that law. In this section, a component should eschew jargon and program-specific language and spell out every acronym used in the first instance. Write this section so that it would be understandable by a layman not familiar with the proposal or the policy background affected by the proposal. The section should be drafted to persuade the reader of the need for the proposed change. This analysis should include any information from sections four and five (below) that the sponsoring component believes would be of use to Congress (since sections four and five will not be included in the proposal as transmitted to Congress).

The third section is the budget implications section. Each proposal must have a budget table as outlined more fully in Section III below. Please note that all budgetary implications of the proposal must be identified and included in the proposal. If a proposal has no budgetary implications, the sponsoring component must explain why that is so. If the proposal had been submitted to the Unified Legislation and Budgeting (ULB) process, the component also should include a ULB Proposal Number; otherwise, the proposal should state this is not applicable.

The fourth section is the Departmental priorities section. The component must identify which Departmental priority the proposal is intended to address. Additionally, the component must prioritize each proposal relative to all of the other proposals submitted by that component (i.e., 1 of 15, 5 of 15, 15 of 15, etc.). Lastly, the component should identify whether the proposal is a “must have” proposal (i.e., it must be enacted in the FY13 cycle). If helpful, a sponsoring component may consider placing its proposals into four categories — proposals which (a) must be enacted this cycle, (b) would be helpful if enacted this cycle, (c) would be helpful but do not address immediate needs, or (d) would be helpful additions, but are not realistic in the current cycle.

The fifth section provides the justification for resubmitted proposals. If a proposal was previously submitted to the OLC process for a prior NDAA cycle, the component should identify the cycle(s) in which the proposal was previously submitted and the proposal number (available on the OLC Internet system) from the most recent cycle in which the proposal was submitted. In addition, the component must identify the outcome when the proposal was previously submitted and any barriers that were encountered (internal DoD non-concurrence, OMB disapproval or deferral, Congressional opposition, Committee jurisdiction issue, Congressional staff questions, etc.). To ensure that the component has addressed these barriers, the component should identify any

changes in the current version of the proposal from the proposal most recently submitted and how those changes are expected to overcome any barriers previously encountered. Finally, the component should provide a justification for the resubmission, including, if the proposal was previously submitted to Congress, why Congress could be expected to enact the proposal in this legislative cycle. If a proposal has been submitted three or more times previously and has not been enacted, the presumption will be that the proposal will likely not be enacted, and therefore should not be transmitted to the Congress.

The sixth section should provide contact information for the proposal. Each proposal should list the name and contact information for the sponsoring component subject matter expert (SME), as well as the name and contact information for the person who will be the point of contact for OMB (if different). The proposal should also state the name and contact information for the component or OSD/OGC attorney who reviewed and approved the proposal prior to its submission to OLC. Finally, the proposal should list the name and contact information for the component internal comptroller/budget point of contact—not an individual from the Office of the Under Secretary of Defense (Comptroller)—who provided the budget information for the proposal.

The last section shows the changes the proposal would make to existing law. If the legislative proposal would change the text of an existing statute, show how the text of the statute would be changed if the proposal were 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 are shown as struck through (~~old~~) while new language is shown underlined (new). There are two exceptions. First, if the proposal will add a complete new section to title 10, U.S.C. (or another law), it is not necessary to repeat 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.

III. DETERMINATION OF BUDGET IMPLICATIONS FOR EVERY PROPOSAL:

In furtherance of the Efficiencies Initiative established last year by the Secretary of Defense, and in light of the current budget environment, a legislative proposal should be submitted only if the component considers it to be necessary to the operation of the Department and the highest and best use for the Department's scarce resources. Each proposal will be reviewed to ensure that it aligns with the component's and the Department's efficiency plans.

For the Department to maintain control of future costs, the sponsoring component must submit all of its legislative proposals on time and expressly address all of the budget implications, including specific costs and savings, for each proposal it submits. The sponsoring component should work closely with the Office of the Under Secretary of Defense (Comptroller), even before it formally submits its proposals to OLC, to ensure that each proposal contains complete and accurate budgetary information.

The sponsoring component must address the budget implications of a proposal, whether or not the proposal actually has budgetary implications. If a proposal has no budgetary impact, the proposal should so state, along with the specific rationale for that determination. On the other hand, if a proposal has a budgetary impact, the sponsoring component must identify the specific funding

costs and source of the funding to accompany the proposal (including appropriation, budget activity, and line item).

Because only the Office of the Under Secretary of Defense (Comptroller) can determine whether a proposal ultimately has budgetary implications, the sponsoring component must include a budget table with each proposal. The budget table must include an explanation of how the component proposes to fund the proposal (including appropriation, budget activity, and line item).

Components should also be aware that, if a proposal has budgetary implications, OMB, with very few exceptions, will not clear the proposal unless it is consistent with the President's FY 2013 budget. Components should include five-year funding information for each proposal.

Additionally, if a proposal is identified by the sponsor or by USD(Comptroller) (USD(C)) as having budget implications, the budget information must be reflected in the component's FY 2013-FY 2017 Integrated Program and Budget submission to USD(C).

The USD(C) will assess the Pay-As-You-Go (or PAYGO) effects and budget implications of each legislative proposal. USD(C) will work with the sponsoring component comptrollers to determine whether a given proposal is funded in the President's budget. Revisions and modifications of required budgetary information for every proposal, including revisions to budget tables and budget implications language, must be completed by September 8, 2011 for review by the Office of the Under Secretary for Defense (Comptroller). Any proposal or revised budgetary information submitted after that date will not be submitted to the LRP for possible inclusion in the FY 2013 Legislative Program unless USD(C) has already assessed the proposal's budget implications.

Each proposal should set forth the following budgetary impact elements:

- The account from which the sponsoring component would fund the specific costs for the proposal, including the appropriation, budget activity, and line item from which the proposal would be funded (note that components should identify the exact cost of the proposal, not simply the total amount of the relevant line item).
- A five-year projection (FY 2013-FY 2017), with year-by-year costs or savings, for the entire Department of Defense, with a breakdown by military department where applicable, including confirmation that each military department will fund the specific costs for the proposal.
- A five-year projection (FY 2013-FY 2017), with year-by-year estimates, of the specific number of personnel (both military and civilian) who would be affected by the proposal.
- The cost methodology used to calculate the above figures, including, as appropriate, an explanation of why a proposal that would increase spending authority would not generate an increased topline.
- The name, email address and telephone number for the military department or component internal comptroller/budget point of contact who provided the budget information.
- The Unified Legislation and Budgeting (ULB) proposal number, if applicable.

If one of the military departments submits a proposal that, as proposed, would apply only to that military department, the proposal may be expanded to apply to another military department only if the other military department provides the information specified above.

IV. PROPOSALS THAT HAVE BEEN SUBMITTED PREVIOUSLY:

A sponsoring component should provide a detailed justification for any proposal that is being resubmitted from an earlier legislative cycle, including the fiscal year(s) for which the proposal was submitted, the proposal number for at least the most recent prior submission, and a description of any changes the component has made to the proposal.

If the proposal as previously submitted was not approved by either DoD or OMB, the sponsoring component should describe in detail the changes made to the most recently submitted version of the proposal in response to the previous non-concurrences and any discussions with the non-concurring parties that have mitigated the prior concerns.

Congress has informed DoD that they do not want to receive the same proposals that they have rejected over and over. Therefore, if the proposal was previously submitted to Congress, but not adopted by it, the sponsoring component should articulate a convincing legislative strategy explaining what has changed – specifically including how the proposal has been altered, what issues Congress raised in objection to the proposal, and why Congress could be expected to enact the proposal in this legislative cycle. If a proposal has been submitted three or more times previously and has not been enacted, the presumption will be that the proposal will likely not be enacted, and therefore should not be transmitted to the Congress.

If a sponsoring component makes any changes to a proposal that was previously cleared by OMB, the component needs to provide a description of, and rationale for, the changes.

All previously submitted proposals will be sent to the appropriate Legislative Affairs Team Chief to review, to identify whether the information in the resubmission justification is consistent with the feedback they have received from Congress, and to provide a view on how the Congress will likely respond to this resubmission. If the information is consistent and the Team Chief indicates the proposal has a good likelihood of success, then the proposal may proceed to full Departmental coordination. If, however, the information is inconsistent or the Team Chief indicates that the proposal has a low likelihood of success, the proposal will be returned to the sponsoring component for revisions and/or to reevaluate whether it is an identified Departmental need.

As the submission deadline is earlier than the anticipated completion of Congressional action on the FY12 NDAA, components should submit placeholders for any FY12 Administration-cleared proposals that remain Departmental priorities, even if those proposals were included in the bills passed by the House of Representatives and/or the Senate. When a component submits a placeholder proposal, it should include the required justification for a resubmitted proposal and note whether the proposal was adopted by the House and/or Senate. If a proposal later is enacted into law, it will be removed from the FY 13 Legislative Program.

V. GENERAL LEGISLATIVE DRAFTING GUIDELINES:

(for specific submission requirements, see separate Proposal Checklist)

- Each proposal needs to be aligned with the President's agenda and the Department's priorities. To this end, the sponsoring component should list the priority (or priorities) that the proposal addresses and also explain in two to three sentences how the proposal furthers the priority or priorities.
- The legislative language of a proposal should be drafted for general application with broad authority to act. A proposal may not propose a limitation on the Secretary of Defense's authority to manage DoD, nor may it propose the creation of a new reporting requirement for DoD or extension of an expiring reporting requirement.
- As part of the Department's continuing initiative to streamline and promote efficiencies in the congressional reporting requirement process, components should continue to review existing reporting requirements and submit legislative proposals that would repeal out-of-date reporting requirements, combine similar existing requirements, allow a more efficient preparation of existing reports, or otherwise reduce the administrative burden on the Department of congressionally mandated reporting requirements.
- DoD components should review all of the existing laws they regularly utilize and submit legislative proposals to extend any laws they wish to extend if existing authority would expire on or before December 31, 2012.
- Legislation is to be used sparingly when required to meet specific requirements or goals and, then, only after all other avenues (including administrative remedies) have proven unsuccessful. If a legal determination is made that a proposal includes unnecessary legislation, such a proposal will be returned to the respective sponsor with a request for further explanation of why it should be included in this year's DoD Legislative Program.
- A section-by-section analysis must follow the legislative language and be written in a style that would be understandable and persuasive to a layman. In many instances, a poorly written analysis loaded with technical language and acronyms will prevent a proposal from clearing DoD or OMB coordination. Each analysis needs to be clear, concise, and convincing. At a minimum, it should set out – in as much detail as is necessary – the factual and legal problems that require the legislative change, describe the proposed changes, and explain the beneficial consequences of these changes.
- As stated above, each proposal needs to address expressly any and all budget implications, including new and recurring costs and savings. An assertion that a proposal will not cost more than last year does not absolve the need to provide all budgetary information. USD(C) will work with the comptroller of the sponsoring component to address the budgetary information required for each proposal.
- The sponsoring component for each proposal must certify that the component's own general counsel has reviewed and approved, and the agency head has cleared, each proposal. Please

note that this is not an attorney from the Office of Legislative Counsel, but the component's own counsel.

- Each sponsoring component must include every element of the Checklist. OLC will return to the sponsoring component any proposal that fails to meet these requirements.
- Before a sponsoring component submits its legislative proposals to OLC, the component should consider reviewing any proposals that involve similar issues to help streamline the coordination process not only within DoD, but also with OMB.
- If a sponsoring component submits to OLC a placeholder proposal pending action on a provision in the FY 2012 NDAA, the sponsoring component shall identify it as a placeholder in its initial submission. If the placeholder proposal is a FY 2012 proposal that has been transmitted to Congress, the component should submit to OLC the version of the proposal transmitted to Congress (as posted on the OLC Internet system). Following the passage of the FY 2012 NDAA, a sponsor may submit changes to its proposal in response to provisions included in the NDAA or withdraw its proposal.
- Pursuant to Executive Order 13175 (November 6, 2000), agencies may not transmit legislation to Congress that has "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes" unless the agency satisfies certain requirements set forth in section 3 of the executive order. OMB will not provide the Department with final clearance to transmit any proposal to Congress until the Department provides this certification. Therefore, a sponsoring component must review each of its proposals and inform OLC – at the time of submission to OLC – whether the requirements of Executive Order 13175 apply to any of them.

VI. COORDINATION REQUIREMENT; RESOLUTION OF UNRESOLVED DIFFERENCES:

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 and fully-coordinated DoD position. Accordingly, sponsors should monitor comments posted regarding their proposals and address any concerns raised.

If participants in the DoD Legislation Program are unable through the coordination process to resolve differences regarding a proposal, OLC may ask the differing components to set forth their respective positions in writing. These position papers (which must be signed by the agency head) should be concise, persuasive, and limited to one page. The sponsoring component should rebut any objections that have been raised.

If, after exhausting all options for resolution, the proposal remains in dispute, the proposal may be slated for review at the next standing 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 a 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. Sponsoring components should be prepared for that situation to occur. Further information is available in the "Disposition of Late Proposals; Legislative Review Panel" document.