



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Plain Language in Regulatory Drafting

Committee on Regulation

Proposed Recommendation | December 14, 2017

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Council members and Conference members (with sources shown in the margin).

1 For decades, agencies have worked to make regulatory requirements more
2 comprehensible to regulatory stakeholders and the public at large, including by using “plain
3 language” or “plain writing.”¹ Clearly drafting and explaining regulations facilitates the core
4 administrative law goals of public participation, efficient compliance, judicial review, and the
5 protection of rights. Numerous statutory and executive requirements direct agencies to draft
6 rules and guidance plainly.

Plain Language Legal Requirements

7 The Plain Writing Act of 2010 (PWA)² and Executive Order 13,563³ require agencies to
8 use plain language in various public-facing documents.⁴ Plain writing, as defined by the PWA,
9 is “writing that is clear, concise, well-organized, and follows other best practices appropriate to

Commented [CMA1]: Proposed amendment from Jeffrey Lubbers.

¹ These terms carry the same meaning and are used interchangeably here.

² Pub. L. No. 111-274, 124 Stat. 2861 (2010) (codified at 5 U.S.C. § 301 note).

³ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁴ Executive guidance issued prior to the PWA's enactment also directs agencies to use plain language. Executive Order 12,866 provides that “[e]ach agency shall draft its regulations to be simple and easy to understand.” Exec. Order No. 12,866 § 2(b), 58 Fed. Reg. 51,735, 51,737 (Oct. 4, 1993). President Clinton's 1998 Plain Language Memorandum further requires agencies to “use plain language in all new documents, other than regulations, that explain how to obtain a benefit or service, or how to comply with a requirement [the agency] administer[s] or enforce[s].” as well as “all proposed and final rulemaking documents published in the Federal Register.” Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 10, 1998).



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10 the subject or field and intended audience.”⁵ The Plain Language Action and Information
11 Network (PLAIN)⁶ further explains that “[w]ritten material is in plain language if your audience
12 can find what they need, understand what they find, and use what they find to meet their needs.”⁷
13 As such, writing in plain language does not mean abandoning complexity or nuance, nor does it
14 mean omitting technical terms.⁸ For the purposes of this recommendation, writing that is “plain”
15 conveys the intended meaning in a way that the intended audience can easily understand.

16 The PWA requires agencies to use plain language in all “covered documents,” which are:
17 documents necessary “for obtaining any Federal Government benefit or service or filing taxes;”
18 documents that “provide information about any Federal Government benefit or service,” such as
19 pamphlets; and documents that provide recommendations on explain “how to comply with a
20 requirement the Federal Government administers or enforces,” such as guidance documents.⁹
21 Although the PWA does not cover regulations, Executive Order 13,563 requires them to be
22 “accessible, consistent, written in plain language, and easy to understand.”¹⁰ The Office of
23 Management and Budget (OMB) interprets the PWA to apply to “rulemaking preambles,”¹¹
24 because a “regulation,” as exempted by the PWA, is a “rule[] carrying the force of law,”¹² but a
25 preamble explains a rule’s basis and purpose¹³ and is not binding.

Commented [CMA2]: Proposed amendment from Carol Ann Siciliano.

⁵ 5 U.S.C. § 301 note sec. 3(3).

⁶ PLAIN grew out of early, informal agency efforts to share plain writing tools and techniques, and has served as a hub for such resources since its establishment during the Clinton Administration. *About Us*, PLAIN LANGUAGE ACTION & INFORMATION NETWORK, <https://plainlanguage.gov/about/>.

⁷ *What is Plain Language?*, PLAIN LANGUAGE ACTION & INFORMATION NETWORK, <https://plainlanguage.gov/about/definitions/>.

⁸ For guidance on writing plainly without compromising nuance or avoiding important technical terms, consult the *Federal Plain Language Guidelines*, a resource compiled by PLAIN, which both the PWA and executive guidance direct agencies to use. PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. May 2011), <http://www.plainlanguage.gov/guidelines/>.

⁹ 5 U.S.C. § 301 note sec. 3(2)(A).

¹⁰ Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

¹¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEM. M-11-15, FINAL GUIDANCE ON IMPLEMENTING THE PLAIN WRITING ACT OF 2010 5 (2011).

¹² See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

¹³ 5 U.S.C. § 553(c).



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26 The PWA further directs agencies to: designate “senior officials to oversee . . . agency
27 implementation”; communicate PWA requirements to employees and train them in plain writing;
28 maintain a “plain writing section of the agency’s website”; and issue annual compliance
29 reports.¹⁴ Finally, the Act precludes judicial review of agencies’ compliance with its terms.¹⁵

Agency Plain Language Practices

30 The PWA formalized and expanded a decades-long internal administrative effort to
31 promote plain language in rules and guidance documents.¹⁶ For instance, many agencies have
32 provided trainings and other resources on plain writing since the 1970s¹⁷—a practice codified by
33 the Act.¹⁸ Some agencies make their trainings and related resources publicly available.
34 Trainings may cover the PWA’s requirements and plain writing techniques, including the use of
35 organization and formatting to guide readers through a document; the use of bullet points, lists,
36 and other visual aids; and the use of simple rather than complex vocabulary, if/where doing so
37 will not alter the intended meaning. Additionally, trainings may focus on meeting the needs of
38 the agency’s various audiences, such as regulated small businesses.

39 Agencies must also designate officials to oversee compliance with the Act’s
40 requirements, such as by delivering trainings.¹⁹ Agencies may designate plain language officials
41 in a number of different kinds of offices, such as media, executive correspondence, or public
42 outreach. These officials can provide a valuable coordination function when the agency is

¹⁴ *Id.* § 301 note sec. 4(a).

¹⁵ *Id.* § 301 note sec. 6.

¹⁶ See Cynthia Farina, Mary J. Newhart, & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1367–79 (2015).

¹⁷ Blake Emerson & Cheryl Blake, Plain Language in Regulatory Drafting 33 (Dec. 8, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/plain-language-regulatory-drafting-final-report>.

¹⁸ 5 U.S.C § 301 note sec. 4(a)(1)(A), 4(a)(1)(C).

¹⁹ *Id.* § 301 note sec. 4(a).



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43 communicating with the public.²⁰ In some agencies, plain language officials may be well
44 positioned to support agency staff during—not just after—the drafting process.

45 Rule and guidance drafting processes may directly incorporate other efforts to promote
46 plain writing. Agencies' internal drafting manuals, which provide style and formatting
47 guidelines, often encompass plain writing techniques. Agencies also have guidelines specifying
48 how offices within the agency should coordinate when drafting rules or guidance. These
49 practices have important implications for how agencies implement plain writing, though
50 divergent approaches may be equally successful. For example, one agency's practice is to assign
51 each office involved in drafting the responsibility for reviewing documents based on its
52 expertise; this can include reviewing documents for plain language, in addition to reviewing
53 them for technical sufficiency. In this agency, edits or comments on a document marked as
54 within an office's assigned responsibilities must be either accepted or resolved in consultation
55 with that office. Thus, a regulatory attorney may flag text that could be interpreted in multiple
56 ways as an issue of both plainness and legal ambiguity. Similarly, program staff, economists,
57 and engineers may be responsible for ensuring that text involving their areas of expertise is not
58 only accurate, but plain to relevant audiences. Other agencies may not assign such formal
59 responsibilities to particular offices; rather, the program office originating a rule or guidance may
60 be in charge of reviewing the whole of the document and working with other participating
61 offices to ensure text is plainly written.

62 Each of the above practices structures how an agency drafts **both** rules and guidance, **and**
63 **eachboth of which** may inform an agency's audiences of regulatory requirements or benefits.²¹
64 For instance, a final rule may target an audience of legal professionals and industry experts who
65 expect to see certain terms of art, whereas a guidance document may walk a small business
66 through the process of filing financial forms. Though it is appropriate to tailor guidance to a
67 specialist audience, sometimes tailoring documents to particular specialist audiences runs the risk

²⁰ Emerson & Blake, *supra* note 16, at 32–33.

²¹ Some envision regulatory documents situated along a “continuum” ranging from “complicated” documents like the rule itself to simpler documents that digest the material for non-specialist audiences. Complicated documents can be written plainly, but may require greater resource investment.



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68 of obscuring or glossing over important information for other audiences. In certain
69 circumstances, some commentators have raised concerns that guidance may omit salient
70 information, leaving non-specialist parties at a disadvantage compared to experts.²² Crafting
71 guidance carefully can ensure it is fully explanatory while remaining comprehensible—though
72 this may come at the cost of brevity.²³

73 Finally, though agencies have worked to implement plain writing for rules and guidance
74 both prior to and since the PWA’s enactment, challenges remain. Inter- and intra-agency
75 coordination in drafting is inherently difficult. Additionally, departing from language that
76 external stakeholders expect to see, or that has required significant negotiation, may be costly.
77 And, due to ever-present resource constraints, agencies must prioritize investing in plain writing
78 **whenwhere** audiences will most benefit.

* * *

79 This Recommendation identifies tools and techniques agencies have successfully used to
80 facilitate plain language drafting in regulatory documents. Additionally, this recommendation
81 proposes best practices for agencies’ internal drafting processes, makes suggestions to maximize
82 the value of trainings and related resources, and notes special considerations for drafting
83 rulemaking preambles and guidance documents.

RECOMMENDATION

Plain Writing Practices in General

- 84 1. Agencies should follow the plain language best practices and writing techniques
85 documented in the *Federal Plain Language Guidelines*.

²² Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L. J. 189, 193 (2017).

²³ For a closer examination of guidance practices, see Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Dec. 1, 2017) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-guidance-final-report>.



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Agency Internal Drafting Processes

- 86 2. Agencies should consider directing one or more offices involved in drafting rules and
87 guidance to review them for plain language.

Agency Plain Language Officials, Trainings, and Related Resources

- 88 3. To improve the accessibility of rules and guidance, agency drafting staff should consider
89 soliciting guidance or input from senior officials responsible for overseeing an agency's
90 compliance with the Plain Writing Act (PWA).
- 91 4. When delivering trainings on plain writing techniques and the requirements of the PWA
92 and related executive guidance, agencies should ensure appropriate focus on how plain
93 language promotes the core administrative law goals of public participation, efficient
94 compliance, judicial review, and the protection of rights. Agencies should additionally
95 consider offering trainings to their technical experts to help them understand their role in
96 the regulatory process and how they can draft technical text plainly for both specialist and
97 non-specialist audiences.
- 98 5. In their PWA compliance reports, agencies should consider highlighting rulemaking
99 preambles and regulatory guidance that exemplify plain language best practices.

Plain Drafting in Regulatory Documents

- 100 6. To support plain regulatory drafting, internal agency rulemaking guidelines should
101 include:
- 102 a. A requirement that rule and guidance drafters write regulatory documents in terms
103 that the relevant audience can understand.
- 104 b. Information on plain language techniques and reference materials that the agency
105 considers most relevant to its rulemaking practice. ~~Such techniques include:~~
106 ~~omitting excess words;~~ using active voice; headings and other formatting
107 techniques to organize documents; bullet points, lists, and other visual aids;
108 ~~omitting excess words;~~ and ~~replacing complex vocabulary with examples of simple~~



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109 words ~~by, among other things, providing examples of substitutions that would be~~
110 ~~appropriate that can easily replace more complex vocabulary.~~

Commented [CA3]: Proposed amendment from Council.

- 111 c. Examples of how the agency's regulatory documents have implemented these
112 techniques.
- 113 d. In addition to accounting for the needs of each relevant audience in any given
114 document, at a minimum:
- 115 i. The preambles to proposed rules should include a summary of the rule that
116 non-specialists and the general public can understand. Such summaries may
117 be those already required by the *Federal Register* or applicable executive
118 guidance. Other subparts of the preamble should include language that is
119 plain for specialist audiences ~~if~~ where it is not practicable to describe the
120 rule's purpose, reasoning, or requirements without legal or technical
121 language, although these subparts may benefit from brief introductory
122 summaries directed at non-specialists.
 - 123 ii. The preambles and text of final rules should be written in language that
124 reviewing courts and attorneys inside and outside the agency can easily
125 understand.
- 126 7. Agencies should consider including in notices of proposed rulemaking a request for
127 comments on whether the regulation's purposes and requirements are clear and
128 understandable. Agencies should also consider specifying topics or questions on which
129 the agency would most benefit from feedback from non-specialist stakeholders and the
130 general public.

Plain Drafting in Guidance Documents

- 131 8. ~~Agencies should issue~~ When drafting regulatory guidance, ~~agencies should tailored the~~
132 ~~guidance~~ to the informational needs and level of expertise of the intended audiences.
133 Audiences that are particularly likely to benefit from tailored guidance include: regulated
134 small business; regulatory beneficiaries, e.g., benefit recipients, consumers, and protected
135 classes; and private compliance offices, e.g., human resources departments. For audiences



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- 136 that may find complex technical and legal details inaccessible, plain language summaries,
137 Q&As, or related formats may be especially helpful.
- 138 9. When drafting guidance, agencies should strive to balance brevity, usefulness, and
139 completeness. One way to help strike this balance is for guidance documents to include
140 citations, hyperlinks, or other references or points of contact enabling readers to easily
141 locate underlying regulatory or statutory requirements.