



## Plain Language in Regulatory Drafting

### Committee on Regulation

#### Proposed Recommendation | December 14, 2017

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.”<sup>1</sup> 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)<sup>2</sup> and Executive Order 13,563<sup>3</sup> require agencies to  
8 use plain language in various public-facing documents. Plain writing, as defined by the PWA, is  
9 “writing that is clear, concise, well-organized, and follows other best practices appropriate to the  
10 subject or field and intended audience.”<sup>4</sup> The Plain Language Action and Information Network  
11 (PLAIN)<sup>5</sup> further explains that “[w]ritten material is in plain language if your audience can find  
12 what they need, understand what they find, and use what they find to meet their needs.”<sup>6</sup> As  
13 such, writing in plain language does not mean abandoning complexity or nuance, nor does it

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<sup>1</sup> These terms carry the same meaning and are used interchangeably here.

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

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

<sup>4</sup> 5 U.S.C. § 301 note sec. 3(3).

<sup>5</sup> 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/>.

<sup>6</sup> *What is Plain Language?*, PLAIN LANGUAGE ACTION & INFORMATION NETWORK, <https://plainlanguage.gov/about/definitions/>.



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14 mean omitting technical terms.<sup>7</sup> 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 explain “how to comply with a requirement the Federal  
20 Government administers or enforces,” such as guidance documents.<sup>8</sup> Although the PWA does  
21 not cover regulations, Executive Order 13,563 requires them to be “accessible, consistent,  
22 written in plain language, and easy to understand.”<sup>9</sup> The Office of Management and Budget  
23 (OMB) interprets the PWA to apply to “rulemaking preambles,”<sup>10</sup> because a “regulation,” as  
24 exempted by the PWA, is a “rule[] carrying the force of law,”<sup>11</sup> but a preamble explains a rule’s  
25 basis and purpose<sup>12</sup> and is not binding.

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.<sup>13</sup> Finally, the Act precludes judicial review of agencies’ compliance with its terms.<sup>14</sup>

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<sup>7</sup> 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/>.

<sup>8</sup> 5 U.S.C. § 301 note sec. 3(2)(A).

<sup>9</sup> Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

<sup>10</sup> 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).

<sup>11</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>12</sup> 5 U.S.C. § 553(c).

<sup>13</sup> *Id.* § 301 note sec. 4(a).

<sup>14</sup> *Id.* § 301 note sec. 6.



### 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.<sup>15</sup> For instance, many agencies have  
32 provided trainings and other resources on plain writing since the 1970s<sup>16</sup>—a practice codified by  
33 the Act.<sup>17</sup> 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 bullets, lists, and  
36 other visual aids; and the use of simple rather than complex vocabulary, where doing so will not  
37 alter the intended meaning. Additionally, trainings may focus on meeting the needs of the  
38 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.<sup>18</sup> 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  
43 communicating with the public.<sup>19</sup> 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

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<sup>15</sup> 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).

<sup>16</sup> 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>.

<sup>17</sup> 5 U.S.C § 301 note sec. 4(a)(1)(A), 4(a)(1)(C).

<sup>18</sup> *Id.* § 301 note sec. 4(a).

<sup>19</sup> Emerson & Blake, *supra* note 16, at 32–33.



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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 each may inform an agency’s audiences of regulatory requirements or benefits.<sup>20</sup> For instance, a  
64 final rule may target an audience of legal professionals and industry experts who expect to see  
65 certain terms of art, whereas a guidance document may walk a small business through the  
66 process of filing financial forms. Though it is appropriate to tailor guidance to a specialist  
67 audience, sometimes tailoring documents to particular specialist audiences runs the risk of  
68 obscuring or glossing over important information for other audiences. In certain circumstances,  
69 some commentators have raised concerns that guidance may omit salient information, leaving  
70 non-specialist parties at a disadvantage compared to experts.<sup>21</sup> Crafting guidance carefully can  
71 ensure it is fully explanatory while remaining comprehensible—though this may come at the cost  
72 of brevity.<sup>22</sup>

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<sup>20</sup> 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.

<sup>21</sup> Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L. J. 189, 193 (2017).

<sup>22</sup> 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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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 where audiences will most benefit.

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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*.

#### **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).



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- 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: active  
106 voice; headings and other formatting techniques to organize documents; bullets,  
107 lists, and other visual aids; omitting excess words; and examples of simple words  
108 that can easily replace more complex vocabulary.
  - 109 c. Examples of how the agency's regulatory documents have implemented these  
110 techniques.
  - 111 d. In addition to accounting for the needs of each relevant audience in any given  
112 document, at a minimum:
    - 113 i. The preambles to proposed rules should include a summary of the rule that  
114 non-specialists and the general public can understand. Such summaries may  
115 be those already required by the *Federal Register* or applicable executive  
116 guidance. Other subparts of the preamble should include language that is  
117 plain for specialist audiences where it is not practicable to describe the



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- 118 rule's purpose, reasoning, or requirements without legal or technical  
119 language, although these subparts may benefit from brief introductory  
120 summaries directed at non-specialists.
- 121 ii. The preambles and text of final rules should be written in language that  
122 reviewing courts and attorneys inside and outside the agency can easily  
123 understand.
- 124 7. Agencies should consider including in notices of proposed rulemaking a request for  
125 comments on whether the regulation's purposes and requirements are clear and  
126 understandable. Agencies should also consider specifying topics or questions on which  
127 the agency would most benefit from feedback from non-specialist stakeholders and the  
128 general public.

### **Plain Drafting in Guidance Documents**

- 129 8. Agencies should issue regulatory guidance tailored to the informational needs and level of  
130 expertise of the intended audiences. Audiences that are particularly likely to benefit from  
131 tailored guidance include: regulated small business; regulatory beneficiaries, e.g., benefit  
132 recipients, consumers, and protected classes; and private compliance offices, e.g., human  
133 resources departments. For audiences that may find complex technical and legal details  
134 inaccessible, plain language summaries, Q&As, or related formats may be especially  
135 helpful.
- 136 9. When drafting guidance, agencies should strive to balance brevity, usefulness, and  
137 completeness. One way to help strike this balance is for guidance documents to include  
138 citations, hyperlinks, or other references or points of contact enabling readers to easily  
139 locate underlying regulatory or statutory requirements.