



Plain Language in Regulatory Drafting

Committee on Regulation

Proposed Recommendation for Committee | October 4, 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.”¹ Clearly drafting and explaining regulations facilitates the core
4 administrative law goals of public participation, efficient regulatory compliance, the protection
5 of individual rights, and effective judicial review. Numerous statutory and executive
6 requirements direct agencies to draft 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. 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.”⁴ The Plain Language Action and Information Network
11 (PLAIN)⁵ 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.”⁶ As
13 such, writing in plain language does not mean abandoning complexity or nuance, nor does it

¹ These terms carry the same meaning, and will be used interchangeably here.

² Pub. L. 111-274, 124 Stat. 2861 (2010) (codified at 5 U.S.C. § 301 note).

³ Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁴ 5 U.S.C. § 301 note sec. 3(3).

⁵ 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. Plain Language Action & Information Network, *About Us*, <http://www.plainlanguage.gov/site/about.cfm>.

⁶ Plain Language Action & Information Network, *What is Plain Language?*, available at <http://www.plainlanguage.gov/whatisPL/index.cfm>.



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14 mean omitting technical terms.⁷ For the purposes of this recommendation, writing that is “plain”
15 conveys the intended meaning in a way 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.⁸ 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.”⁹ More specific obligations come from the
23 Office of Management and Budget (OMB), which interprets the PWA to apply to “rulemaking
24 preambles,”¹⁰ because a “regulation,” as exempted by the PWA, is a “rule[] carrying the force of
25 law,”¹¹ but a preamble explains a rule’s basis and purpose¹² 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.¹³ Finally, the Act precludes judicial review of agencies’ compliance with its terms.¹⁴

⁷ For detailed guidance on how to achieve plainness 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), available at <http://www.plainlanguage.gov/howto/guidelines/bigdoc/fullbigdoc.pdf>.

⁸ 5 U.S.C. § 301 note sec. 3 (2).

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

¹⁰ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEM. M-11-15, FINAL GUIDANCE ON IMPLEMENTING THE PLAIN WRITING ACT OF 2010 (2011).

¹¹ See *United States v. Mead Corp.*, 533 U.S. 218, 226–7 (2001).

¹² 5 U.S.C. § 553 (c).

¹³ 5 U.S.C. § 301 note sec. 4(a).

¹⁴ *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.¹⁵ For instance, many agencies have
32 provided trainings and other resources on plain writing since the 1970s¹⁶—a practice codified by
33 the Act.¹⁷ 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.¹⁸ These plain language officials are often situated
41 in agencies’ media or public outreach offices, and rule and guidance drafters frequently
42 coordinate with these offices when communicating agency action to the public.¹⁹ These existing
43 relationships, combined with the functions mandated by the PWA, position plain language
44 officials to support agency staff during—not just after—the drafting process.

45 Other efforts to promote plain writing are incorporated directly into rule and guidance
46 drafting processes. 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 plain writing is implemented, though divergent

¹⁵ 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, 1367–1379 (2015).

¹⁶ Blake Emerson & Cheryl Blake, Plain Language in Regulatory Drafting 33 (Sept. 6, 2017), available at <https://www.acus.gov/report/plain-language-regulatory-drafting-draft-report>.

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

¹⁸ *Id.* § 301 note sec. 4(a).

¹⁹ Emerson & Blake, *supra* note 16, at 32–33.



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50 approaches may be equally successful. For example, one agency’s practice is to assign each
51 office involved in drafting the responsibility for reviewing documents based on its expertise; this
52 can include reviewing documents for plain language, in addition to reviewing them for technical
53 sufficiency. In this agency, edits or comments on a document marked as within an office’s
54 assigned responsibilities must be either accepted or resolved in consultation with that office.
55 Thus, a regulatory attorney may flag text that could be interpreted in multiple ways as an issue of
56 both plainness and legal ambiguity. Similarly, program staff, economists, and engineers may be
57 responsible for ensuring that text involving their areas of expertise is not only accurate, but plain
58 to relevant audiences. In other agencies, offices may not be assigned such formal
59 responsibilities, and the program office originating a rule or guidance may be in charge of
60 reviewing the whole of the document and working with other participating offices to ensure text
61 is plainly written.

62 Each of the above practices structures how an agency drafts both rules and guidance,
63 which may be used differently to inform an agency’s audiences of regulatory requirements or
64 benefits.²⁰ For instance, a final rule may be targeted at an audience of legal professionals and
65 industry experts who expect certain terms of art to be used, whereas a guidance document may
66 walk a small business through the process of filing financial forms. In the guidance context,
67 tailoring documents to particular audiences runs the risk of obscuring or glossing over important
68 information. Some commentators have raised concerns that guidance may omit salient
69 information, leaving non-specialist parties at a disadvantage compared to experts.²¹ Crafting
70 guidance carefully can ensure it is fully explanatory while remaining comprehensible—though
71 this may come at the cost of brevity.²²

²⁰ 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. Note, as discussed above, no documents should gloss over complex information just because it may be more challenging to draft plainly.

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

²² For a closer examination of guidance practices, see Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Sept. 18, 2017), available at <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf>.



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

* * *

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

RECOMMENDATION

Plain Writing Practices in General

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

Agency Internal Drafting Processes

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

Agency Plain Language Officials, Trainings, and Related Resources

- 87 3. To improve the accessibility of rules and guidance, agency drafting staff should consider
88 soliciting input from the agency's communications and public outreach staff, particularly
89 those designated as senior officials responsible for overseeing an agency's compliance
90 with the Plain Writing Act (PWA).



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- 91 4. In addition to delivering trainings on plain writing techniques and the requirements of the
92 PWA and related executive guidance, agencies should consider making available trainings
93 and resources that focus on:
- 94 a. how plain language promotes the core administrative law goals of public
95 participation, efficient compliance, judicial review, and the protection of rights;
96 and
- 97 b. drafting processes, priorities, and techniques aimed at agency technical experts
98 involved in drafting rules or guidance who may not have significant exposure to
99 writing for non-specialist audiences.
- 100 5. In their PWA compliance reports, agencies should consider highlighting rulemaking
101 preambles and regulatory guidance that exemplify plain language best practices.

Plain Drafting in Regulatory Documents

- 102 6. To support plain regulatory drafting, internal agency rulemaking guidelines should
103 include:
- 104 a. A requirement that regulatory documents be written in terms that the relevant
105 audience can understand.
- 106 b. Information on plain language techniques and resources that the agency considers
107 most relevant to its rulemaking practice. Such techniques include: headings and
108 other formatting techniques to organize documents; bullets, lists, and other visual
109 aids; and examples of simple words that can easily replace more complex
110 vocabulary.
- 111 c. Examples of how these techniques have been implemented in the agency's
112 regulatory documents.



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113 d. A discussion of the primary plain language audience for each component of a
114 proposed and final rule designed to assist drafters in tailoring information to
115 audience needs. In addition to accounting for the needs of each relevant audience
116 in any given document, at a minimum:

117 i. The preambles to proposed rules should include a summary that non-
118 specialists and the general public can understand. Such summaries may be
119 those already required by the Federal Register or applicable executive
120 guidance. Other subparts of the preamble should include language that is
121 plain for expert audiences where it is not practicable to describe the rule's
122 purpose, reasoning, or requirements without legal or technical language,
123 although these subparts may benefit from brief introductory summaries
124 directed at non-specialists.

125 ii. The preambles and text of final rules should be written in language that
126 reviewing courts and attorneys inside and outside the agency can easily
127 understand.

128 7. Agencies should consider including in notices of proposed rulemaking a request for
129 comments on whether the regulation's purposes and requirements are clear and
130 understandable. Agencies should also consider specifying topics or questions on which
131 the agency would most benefit from feedback from non-specialist stakeholders and the
132 general public.

Plain Drafting in Guidance Documents

133 8. Agencies should issue regulatory guidance tailored to the informational needs and level of
134 expertise of the intended audiences. Audiences that are particularly likely to benefit from
135 tailored guidance include: regulated small business; regulatory beneficiaries, e.g., benefit
136 recipients, consumers, and protected classes; and private compliance offices, e.g. human
137 resources departments. For audiences that may find complex technical and legal details



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138 inaccessible, plain language summaries, Q&As, or related formats may be especially
139 helpful.

140 9. When drafting guidance, agencies should strive to balance plainness, usefulness, and
141 completeness. One way to help strike this balance is for guidance documents to include
142 citations, hyperlinks, or other references enabling readers to easily locate underlying
143 regulatory or statutory requirements. Where appropriate, readers should be encouraged to
144 seek the advice of agency staff, counsel, or other relevant experts to clarify requirements
145 of the guidance or underlying regulations or statutes.