



Administrative Conference Recommendation 2017-3

Plain Language in Regulatory Drafting

Adopted December 14, 2017

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

Plain Language Legal Requirements

The Plain Writing Act of 2010 (PWA)² and Executive Order 13,563³ require agencies to use plain language in various public-facing documents.⁴ Plain writing, as defined by the PWA, is “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience.”⁵ The Plain Language Action and Information Network

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).

⁵ 5 U.S.C. § 301 note sec. 3(3).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

Agency Plain Language Practices

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

Agencies must also designate officials to oversee compliance with the Act’s requirements, such as by delivering trainings.¹⁹ Agencies may designate plain language officials in a number of different kinds of offices, such as media, executive correspondence, or public 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 secs. 4(a)(1)(A), 4(a)(1)(C).

¹⁹ *Id.* § 301 note sec. 4(a).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

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

²⁰ Emerson & Blake, *supra* note 17, at 32–33.

²¹ Some envision rulemaking and guidance documents as situated along a “continuum” ranging from more “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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

* * *

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

RECOMMENDATION

Plain Writing Practices in General

1. Agencies should follow the plain language best practices and writing techniques 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>.



Agency Internal Drafting Processes

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

Agency Plain Language Officials, Trainings, and Related Resources

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

Plain Drafting in Rulemaking Documents

6. To support plain drafting, internal agency rulemaking guidelines should include:
 - a. A requirement that rule drafters write documents in terms that the relevant audience can understand.
 - b. Information on plain language techniques and reference materials that the agency considers most relevant to its rulemaking practice. Such techniques include omitting excess words; using active voice, headings and other formatting techniques, such as bullet points, lists, Q&As, and other visual aids, to organize documents; and replacing complex vocabulary with simple words by, among other things, providing examples of substitutions that would be appropriate.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

Plain Drafting in Guidance Documents

8. When drafting guidance documents, agencies should tailor the guidance to the informational needs and level of expertise of the intended audiences. Audiences that are particularly likely to benefit from tailored guidance include: regulated small business; regulatory beneficiaries, e.g., benefit recipients, consumers, and protected classes; and private compliance offices, e.g., human resources departments. For audiences that may find complex technical and legal details inaccessible, plain language summaries, Q&As, or related formats may be especially helpful.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

9. When drafting guidance documents, agencies should strive to balance brevity, usefulness, and completeness. One way to help strike this balance is for guidance documents to include citations, hyperlinks, or other references or points of contact enabling readers to easily locate underlying regulatory or statutory requirements.