Administrative Conference of the United States

PLAIN LANGUAGE IN REGULATORY DRAFTING

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Blake Emerson

Research Fellow

Administrative Conference of the United States

Cheryl Blake

Attorney Advisor

Administrative Conference of the United States

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Blake Emerson and Cheryl Blake

I. Introduction

This report examines the purposes and practices of "plain language" or "plain writing" in the regulatory drafting process.[1] The Plain Writing Act of 2010 (PWA)[2] and Executive Order 13,563[3] require agencies to use plain language in various public-facing documents. In addition, the *Federal Plain Language Guidelines* provides official standards for the mechanics of plain writing.[4] This statutory, executive, and administrative framework formalizes decades of internal governmental efforts to make regulatory requirements more comprehensible to regulatory stakeholders and the public at large.[5]

Existing resources generally focus on plain language techniques, rather than on the ways agencies incorporate plain language considerations into their policymaking procedure. Situating plain language techniques in this broader process can help to disentangle the multiple public interests and audiences that plain writing aims to serve. Studying the way agencies draft, finalize, and explain their rules should also clarify the connections between plain language practices and core principles of administrative law, such as public participation, the rule of law, efficiency, and the protection of rights. The better agencies can clarify regulatory purposes and requirements for the relevant audience, the easier it will be for interested parties to participate in rulemaking, for reviewing courts to ensure agencies act within the law, for regulated parties to understand their obligations, and for beneficiaries to vindicate their rights.

This report therefore explores agencies' application of plain language principles in the policymaking process. This process extends from the drafting of proposed rules to the issuance of various regulatory guidance documents, such as interpretive rules or Question-and-Answer pages on agencies' websites. Our goal is to show how agencies' policymaking process can better incorporate plain language principles and utilize and benefit from plain writing techniques. In particular, we aim to:

- clarify the scope of agencies' plain language obligations;
- distinguish the multiple public interests that plain language advances;
- differentiate the various audiences for whom regulatory language can be tailored;

[1] These terms will be used interchangeably in this report. They have a different meaning than "plain meaning," or what a regulation's text unambiguously requires. See discussion *infra* at p. 16.
[2] Pub. L. 111-274, 124 Stat. 2861 (2010) (codified at 5 U.S.C. § 301 note).
[3] Exec. Order 13,563, 3 C.F.R. 2011 Comp., p. 215 (2012).
[4] PLAIN LANGUAGE ACTION & INFORMATION NETWORK, *Federal Plain Language Guidelines* (Rev. ed. May 2011), *available at* http://www.plainlanguage.gov/howto/guidelines/bigdoc/fullbigdoc.pdf (accessed Aug. 8, 2017) [hereinafter Federal Plain Language Guidelines].
[5] See *infra* at pp. 6–7.

- identify the types of documents that are suited to advance these interests and address these audiences;
- describe internal procedures that can promote plain drafting;
- diagnose challenges to plain language implementation; and
- make recommendations to improve plain language performance.

In this examination of plain language objectives and procedures, we have relied on interviews with staff from seven administrative agencies, as well as background research on the history and purpose of plain language policies. Our conclusions are informed by public officials' actual understanding of and experience with plain language requirements.

We find that plain language can advance core administrative law values. By clearly stating regulatory purposes and requirements, agencies can promote the rule of law, regulatory effectiveness, the protection of rights, and public participation in administrative policymaking. Each of these objectives relates to different primary audiences, such as reviewing courts, regulated parties, regulatory beneficiaries, and the general public. For example, regulatory effectiveness can best be achieved by using language that is plain for regulated entities, particularly small businesses that may struggle with technical complexity. Different documentary formats are well-tailored to speak to each of these audiences. Public participation, for instance, can be advanced through the use of plain language in regulatory preambles and explanatory documents for particular audiences. Internal administrative procedures can improve plain language performance by raising the salience of plain language concerns in the drafting process, distinguishing the plain language objectives that need to be served, and identifying regulatory documents that will effectively convey information to the relevant audiences.

II. Background

1. General Principles

The need for plain language in regulatory drafting has been clear since the very early days of administrative government.[6] Regulation often involves highly technical subjects requiring expert knowledge and experience.[7] Congress delegates authority to administrative

[6] G.W.F. HEGEL, LECTURES ON NATURAL RIGHT AND POLITICAL SCIENCE: THE FIRST PHILOSOPHY OF RIGHT 269 (trans., ed. Peter C. Hodgson 2012, [1817-19]) ("Alienated from the people, officials become, by reason of their skill, themselves the object of the people's fear; even the way they talk strikes the ears of citizens as gibberish . . . . They see only the consequences of their efforts to secure their rights, but not the course and manner of the proceedings. Officials must therefore accustom themselves to a popular approach, to popular language, and seek to overcome the difficulties this occasions them.")

[7] FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 151 (1930) ("Compelled to grapple with a world more and more dominated by technological forces, government must have at its disposal the resources of training and capacity equipped to understand and to deal with the complicated issues to which these technological forces give rise.") MAX WEBER, 1 ECONOMY AND SOCIETY 225 (Guenther Roth & Claus Wittich eds. 1963) ("Bureaucratic administration means fundamentally domination through knowledge. This is the feature of it which it makes specifically rational. This consists on the one hand in technical knowledge which, by itself, is sufficient to ensure it a position of extraordinary power. But in addition to this, bureaucratic organizations, or the holders of power who

agencies in large part because they can bring specialized understanding and constant attention to bear on complex social and economic problems.[8] But the expertise of administrators can undermine regulatory goals if it is not properly translated into an accessible vocabulary and format.[9] If regulations are written in a way that is difficult to understand, they may be less efficacious, may conflict with legal norms, and may thwart effective public participation.

There are multiple benefits to the use of plain language. It can promote statutory fidelity and effective judicial review, since the basis on which an agency acts must be "clearly disclosed" to determine if it has acted lawfully.[10] It can promote efficient compliance by ensuring that regulatory requirements are known and thus more likely to be observed. It can protect rights by making beneficiaries aware of their entitlements and notifying regulated parties of their obligations.[11] Particularly for less sophisticated parties, plain language may be essential to ensure they adequately understand their rights and obligations.

Plain language can also promote the legitimacy of regulation by disclosing its purpose: "The administrative process will best be vindicated by clarity in its exercise."[12] Democratic principles require that the reasons for regulating are understandable by those they bind or otherwise affect.[13] Even if an agency's explanations for its decisions are comprehensible to "specialists," they may be "unacceptable if they are indecipherable to the public."[14] If the

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make use of them, have the tendency to increase their power still further by the knowledge growing out of experience in the service. For they acquire through the conduct of office a special knowledge of facts and have available a store of documentary material peculiar to themselves").

[8] S. Doc. No. 8, 77th Cong., 1st Sess. (1941) *reprinted as* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 15 (1941) (recognizing "[t]he need of bringing to bear upon difficult social and economic questions the attention of those who have time and facilities to become and remain continuously informed about them"); WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 936 (5th ed. 2014) ("There are sound policy reasons why Congress regularly opts for administrative processes to complement both statutory and judicial decisionmaking. When addressing scientific or technical subjects . . . neither Congress nor the federal courts can acquire the same *expertise* as civil servants trained in these areas. Moreover, from an *efficiency* standpoint, Congress lacks the time to resolve innumerable first-order implementation questions . . . .").

[9] Jane Mansbridge et al., *A systemic approach to deliberative democracy*, in DELIBERATIVE SYSTEMS 1,15 (John Parkinson & Jane Mansbridge, eds. 2012) ("[W]hen otherwise competent experts are not adept at explaining the reasons for their decisions to non-experts, the system as a whole requires some agents with the capacity to translate expert conclusions into recommendations that citizens can understand.").

[10] S.E.C. v. Chenery Corp., 318 U.S. 80, 94 (1943). *See also* Recinos de Leon v. Gonzales, 400 F.3d 1185, 1194 (9th Cir. 2005) (remand to Board of Immigration Appeals where Board had affirmed Immigration Judge's "indecipherable explanation" of decision to deny application for asylum).

[11] *E.g.*, Affum v. United States, 566 F.3d. 1150, 1164 (D.C. Cir. 2009) ("The agency's confused and poorly drafted do not appear to give . . . notice" of regulatory requirements).

[12] Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941).

[13] AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 144 (2004) ("The reasons decision-makers give should be accessible. . . . The justification, if it is to be mutual, is irrelevant if those to whom it is addressed cannot understand its essential content.")

[14] Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 996 (9th Cir. 2004) (finding that Bureau of Land Management's Environmental Impact Statement (EIS) failed "hard look" review under the National Environmental Policy Act, where there was "scant information" about certain environmental effects, and regulations of the Council on Environmental Quality required EIS's to be "written in plain language . . . so that decisionmakers and the public can readily understand them." 40 C.F.R. 1502.8 (2016)).

grounds for a regulation are obvious, interested parties will be better able to evaluate, support, or contest them.

2. Statutory Requirements

a. *The Administrative Procedure Act (APA)*

Plain language advances the general purposes of the Administrative Procedure Act of 1946 (APA).[15] The Report of the Senate Judiciary Committee stated that the Act was "designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected."[16] The "notice of proposed rulemaking" must, according the Report, "be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."[17] This notice requirement not only advances due process values, but also enables "interested persons" to make effective use of their "opportunity to participate in the rule making through submission of written data, views, or arguments."[18] Final rules must then be published in the Federal Register with a "concise general statement of their basis and purpose" that enables readers to comprehend their rationale.[19]

In enacting the APA, Congress contemplated a rulemaking procedure that would both notify private parties of their obligations and facilitate public involvement in the formulation of the rule. Rulemaking cannot adequately perform these functions if the purposes and requirements of the proposed rules are unintelligible or can only be understood at unreasonable cost.

b. *The Plain Writing Act (PWA)*

The PWA places more specific plain language obligations on administrative agencies.[20] The codified purpose of the PWA is "to improve the effectiveness and accountability of Federal agencies to the public by promoting clear government communication that the public can understand and use."[21] Congress therefore affirmed two specific goals of plain language: to make regulation more efficient in achieving statutory purposes and more responsive to the people it binds and otherwise affects.

To achieve these goals, the PWA requires that agencies use "plain writing in every covered document."[22] Covered documents include letters, publications, notices, and instructions that are "necessary for obtaining any Federal Government benefit or service or filing taxes," or

[15] 5 U.S.C. §§ 551–57 (2012).
[16] S. Rep. No. 79-752 at 193 (1945)
[17] 5 U.S.C. § 553(b); S. Rep. No. 79-752 at 200 (1945).
[18] *Id.* § 553(c).
[19] *Id.*
[20] Pub. L. 111-274, 124 Stat. 2861 (codified at 5 U.S.C. § 301 note).
[21] 5 U.S.C. § 301 note sec. 2.
[22] *Id.* § 301 note sec. 4 (b).

that "provide information about any Federal Government benefit or service," or that explain how to comply with federal regulatory requirements.[23]

The PWA has several provisions that implement its broad requirement to use plain writing in administrative documents. Agency's must: 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.[24] However, the Act precludes judicial review of agencies' compliance with its terms.[25]

Though the PWA explicitly excludes any "regulation" from its scope,[26] the Act applies to all other documents related to the regulation that are directed to the public. Guidance documents—including enforcement guidance published in the Federal Register, official manuals directed to the public, or less formal documents published on agencies' websites, such as answers to frequently-asked-questions (FAQs) or question-and-answer pages (Q&As)—are generally covered under the plain meaning of "publication[s]" in "paper or electronic form."[27] More specifically, such guidance documents are covered to the extent that they "explain[] to the public how to comply with a requirement the Federal Government administers or enforces."[28]

The Office of Management and Budget, which Congress explicitly authorized to issue guidance on implementing the PWA,[29] has determined that the Act also applies to "rulemaking preambles."[30] Though this interpretation is not free from doubt, it is a fairly persuasive construction of the Act.[31] A rulemaking preamble is both a "publication" and a "notice," as it must be published in the Federal Register, and serves as notice to affected parties of the proposed and final rule.[32] And it provides "information" about regulatory benefits and services.[33] A rulemaking preamble is arguably not a "regulation," however, since a regulation is a "rule[] carrying the force of law."[34] A rulemaking preamble explains the "basis and purpose" of a final rule,[35] but it does not purport to bind the public in the same way as the requirements of the rule itself.

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[23] *Id.* § 301 note sec. 3 (2).
[24] *Id.* § 301 note sec. 4 (a).
[25] *Id.* § 301 note sec. 6.
[26] *Id.* § 301 note sec. 3 (2)(C).
[27] *Id.* § 301 note sec. 3(2)(B).
[28] *Id.* § 301 note sec. 3 (2)(A)(iii).
[29] *Id.* § 301 note sec. 4 (C)(1).
[30] Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Final Guidance on Implementing the Plain Writing Act of 2010 (April 13, 2011) [hereinafter Plain Writing Act Guidance].
[31] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (describing standards for deference to non-binding agency documents).
[32] 5 U.S.C. § 301 note sec. 3 (2)(B).
[33] *Id.* § 301 note sec. 3(2)(A)(iii); 1 C.F.R. § 18.12(a) (2016) ("Each agency submitting a proposed or final rule shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal").
[34] *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (using "regulations" and "rules carrying the force of law" as synonyms).
[35] 5 U.S.C. § 553 (c).

The structure of the PWA also supports the OMB's interpretation. Section 3 (2)(B)'s broad coverage of "publication[s]" suggests that the exclusion of "regulation[s]" in Section 3 (2)(C) be read narrowly.[36] Constructing "regulation" to include rulemaking preambles would not give full effect to the Act's coverage of "publication[s]."

The purpose of the Act likewise supports coverage of rulemaking preambles. The PWA's codified purpose is "to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use."[37] Preambles are required by regulation to "inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal."[38] The PWA's objective of improving public understanding thus aligns with rulemaking preambles' function of informing non-experts. For this reason, plainly written preambles are likely to serve the PWA's interests in accountability and effectiveness. Federal regulation is likely to be more *accountable* when rulemaking preambles are written in plain language, since non-experts can then better assess and comment on the goals and requirements of the regulation. Federal regulation is likely to more *effective* when rulemaking preambles are written in plain language, because this increases non-experts' comprehension of rules and so decreases compliance costs. The policies of the PWA are therefore advanced by constructing it to cover rulemaking preambles.

3. Administrative Guidance and Executive Orders

a. *History of Administrative Efforts to Promote Plain Language*

The Plain Writing Act codified a decades-long internal administrative effort to promote plain language in regulatory documents.[39] In 1968, ACUS issued a Recommendation to create a Consumer Bulletin that would "extract and paraphrase in popular terms the substance of Federal agency action of significant interest to consumers."[40] The Administrative Committee of the Federal Register followed suit in 1976 with a rule requiring that final and proposed rules include a preamble that informs those who are "not expert."[41] In 1978, the Council on Environmental Quality required that Environmental Impact Statements under the National Environmental Protection Act be written "in plain language . . . so that decision-makers and the public can readily understand them."[42] President Carter's Executive Order 12,044, which lay the groundwork for regulatory review by the Office of Management and Budget, likewise provided

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[36] *See* Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 100 (1992), *quoting* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) ("We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (internal citations and quotations omitted) (overruled on other grounds) *and* United States v. Menasche, 348 U.S. 528, 539-39 (1955) (a court must "give effect, if possible, to every word and clause of a statute.") (internal quotations and citations omitted).

[37] 5 U.S.C. § 301 note sec. 2.

[38] 1 C.F.R. §18.12(a) (2016).

[39] *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).

[40] Administrative Conference of the United States, Recommendation No. 68-4, *Consumer Bulletin*, Par.1 (Dec. 11, 1968), *available at* http://www.acus.gov/sites/default/files/documents/68-4.no-FR.pdf.

[41] Clarity of Rulemaking Documents in the Federal Register, 41 Fed. Reg. 56,623 (Dec. 29, 1967) (codified at 1 C.F.R. §18.12 (2016)).

[42] 43 Fed. Reg. 55,994, 55,995 (Nov. 1978) (codified at 40 C.F.R. §1502.8 (2016)).

that "[r]egulations shall be as clear and simple as possible."[43] Administrative officials during the Carter Administration also began coordinating plain language efforts, convening inter-agency meetings to share resources and conduct trainings.[44] This initially informal process formed the basis for the Plain Language Action and Information Network (PLAIN), a group of federal employees which issues plain language resources. Concerns with plain language gained renewed attention under Vice President Gore's Reinventing Government initiative.[45]

b. *Executive Orders and Memoranda Currently in Force*

Current executive orders apply plain language requirements to regulations, even though the PWA does not. President Clinton's Executive Order 12,866 provides that "[e]ach agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."[46] It also requires changes made during regulatory review to be "[i]denf[ied] for the public, in a complete, clear and simple manner."[47] President Clinton's 1993 Plain Language Memorandum 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 you administer or enforce," as well as "all proposed and final rulemaking documents published in the Federal Register."[48]

President Obama's 2011 Executive Order 13,563, which supplements the regulatory review process established by Executive Order 12,866, requires that regulations be "accessible, consistent, written in plain language, and easy to understand."[49]

The Obama Administration's "Final Guidance on Implementing the Plain Writing Act of 2010" likewise emphasized that plain language "was indispensable to achieve the[] goals" of "transparency, public participation, and collaboration," as well as public understanding of benefits and services, efficient compliance, accomplishment of public purposes, and "the rule of law."[50] The Guidance clarifies PWA requirements such as designating "Senior Officials for Plain Writing," creating plain language web pages, offering trainings, issuing compliance reports, and establishing incentives and goals to improve measure plain language performance.[51] As noted earlier, the Guidance also clarifies that plain language requirements apply to regulatory preambles, though rule text remains outside the scope of the PWA. The Guidance also suggests that agencies "engage and collaborate with the public" to "implement plain writing and [meet]

[43] Exec. Order. 12,044, 3 C.F.R. 152 (1979).
[44] Telephone Interview with Agency #6 (May 15, 2017).
[45] Farina et al. *supra* note 39, at 1374–5.
[46] Exec. Order No. 12,866 §2(b), 3 C.F.R. 638, 640 (1993).
[47] *Id.* §6(a)(3)(E)(ii), 3 C.F.R. at 646.
[48] Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 10, 1998).
[49] Exec. Order No. 13,563 (Jan. 18, 2011)
[50] Plain Writing Act Guidance, *supra* note 30, at 1.
[51] *Id.* at 2.

the requirements of" the PWA.[52] It recommends that agencies consult with PLAIN, and follow its Federal Plain Language Guidelines.[53]

A subsequent memorandum from the Office of Information and Regulatory Affairs (OIRA) draws an explicit link between the Executive Order's plain language requirements and public participation: "Public participation cannot occur if the requirements of rules are unduly complex and if members of the public are unable to obtain a clear sense of the content of those requirements."[54] To further such effective public participation, the Memorandum requires that "regulatory preambles for lengthy or complex rules (both proposed and final) . . . include straightforward executive summaries. These summaries should separately describe major provisions and policy choices."[55]

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Promoting plain language in regulation advances core administrative law values: the protection of rights, the efficient performance of public purposes, and public participation in administrative policymaking. The PWA requires all administrative agencies to use plain language in publicly available documents, including guidance and rulemaking preambles, but exempts rules with the force of law from its requirements. Executive Orders 12,866 and 13,563, and their accompanying guidance and memoranda, require agencies in executive departments to write regulations in plain language, and to include plain language "executive summaries" in their rulemaking preambles to promote public participation.

III. Study Findings

1. Study methodology

To understand the purposes of plain language in regulatory drafting, and the procedures that can promote it, ACUS in-house researchers first examined scholarly literature, legal and administrative requirements, and publicly available agency documents concerning plain language. This background research informed semi-structured interviews with seven federal agencies.[56] The purpose of these interviews was to disentangle the various meanings of plain language, the goals that plain language is thought to serve, and to determine how agencies pursue these goals in practice. The study findings presented rely on these interviews to: (1) distinguish two different meanings of plain language; (2) explain the public interest plain language serves; (3) identify the regulatory audiences that these interests primarily serve; (4) identify the documents that best serve plain language for each public interest; (5) identify agency procedures

[52] *Id.* at 3. The Guidance distinguishes regulations from rulemaking preambles, and further states that "long-standing policies," including Executive Order 12866, "require regulations to be written in a manner that is 'simple and easy to understand.'" *Id.* at 5.
[53] *Id.*; Federal Plain Language Guidelines, *supra* note 4.
[54] Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs. Clarifying Regulatory Requirements: Executive Summaries (Jan. 4, 2012).
[55] *Id.*
[56] To encourage candid responses, the authors agreed not to identify interviewees or their agencies.

that govern drafting of regulatory preambles, guidance, and other regulatory documents; and (6) identify factors that pose a challenge for plain regulatory drafting.

2. The Meanings of Plain Language

At the outset, one might ask: What language counts as "plain"? The PWA defines plain writing as "writing that is clear, concise, well organized, and follows other best practices appropriate to the subject matter in question."[57] This definition raises more granular questions, however: what exactly must be "clear," and to whom?

Two meanings of plain language emerged from the background research and were confirmed during interviews. First, and perhaps more conventionally, plain language means *plain requirements*. That is, the obligation to write a document in plain language means that whatever rules it imposes must be easily understandable to their intended audience. One agency official explained this meaning of plain language succinctly: "To be as clear and direct to the public as possible in letting them know the actual requirements of our regulations."[58]

Second, plain language means *plain purposes*. Not only must the rules the agency imposed be clearly indicated, but the reasons the agency has imposed such rules must be clearly explained. As one agency official put it: "be very clear about why you're doing what you're doing."[59]

It is important to distinguish these two meanings of plain language, because they do not further the same public interests in the same way. The PWA and executive guidance recognize the following public interests in plain language regulatory drafting: effectiveness, accountability, transparency, public participation, and the rule of law.[60] The interest in effectiveness will be advanced primarily by plain requirements, which ensure that the rules can be known and observed at low cost. The interests in accountability, public participation, and transparency, by contrast, will require the plain statement of purposes as well, since these interests all aim at exposing policy judgments to public appraisal.

Distinguishing plain requirements from plain purposes is also important because they matter for different kinds of audiences. Plain requirements will matter most to regulated parties, and particularly small business entities, who need to understand their obligations without undue cost. Plain purposes will matter greatly to reviewing courts, which must assess an agency's reasoning to determine if the agency's authority has been lawfully exercised.[61] Plain purposes will also matter to regulated entities, public interest organizations, and members of the general

[57] 5 U.S.C. § 301 note sec. 3(3).
[58] Telephone Interview with Agency #2 (Apr. 17, 2017).
[59] Telephone Interview with Agency #4 (May 2, 2017).
[60] 5 U.S.C. § 301 note sec. 2; Plain Writing Act Guidance, *supra* note 30, at 1.
[61] 5 U.S.C. §§ 553, 706; Jerry L. Mashaw, *Small Things Like Reasons Are Put in A Jar*, 70 FORDHAM L.J. 23 (2001) ("The modest suggestion in section 553 of the APA that agencies must file a 'concise statement of the basis and purpose' of a regulation has developed into the requirement of a comprehensive articulation of factual bases, methodological assumptions, and statutory authority that justifies any exercise of rulemaking.")

public who want to understand, engage with, and possibly challenge, in whole or in part, the agency's policy judgments.

Finally, distinguishing these two meanings of plain language is important because they are often advanced by different regulatory documents. Plain requirements are usually expressed in regulatory text, Q&As, and other audience specific guidance documents. Plain purposes are usually expressed in rulemaking preambles, executive summaries, and press releases.

Clarifying the meaning of plain language in this way should therefore help agencies to analyze different dimension of their plain language obligations, and assign different plain language functions to different kinds of documents.

3. The Public Interests in Plain Language

This section analyzes the public interests that are advanced by plain language in more detail. The interests considered are those either specified by statute or executive action or conveyed in interviews.

a. *Public Participation*

Multiple agency officials understood plain language norms as furthering the public interest in public participation in administrative rulemaking. As explained above, public participation aligns most naturally with plain purposes, rather than plain requirements. It is "very important to be clear about the purpose, so that you get the [appropriate] level of commentary from interested parties, and so that you get responsive comments."[62] Another believed that "if the public doesn't understand the what and the why very clearly, they will not be able to have meaningful access to the process. If we are making a change, we try to very plainly explain why we are making those changes."[63] Clear explanations of policy changes will help to ensure that "regulations will be tested by exposure to diverse public comment."[64]

Agencies did not understand the interest in public participation merely as a burden upon the agency's decision-making process, but as a way of improving regulatory output. "If people understand what we're saying in the preamble and in the proposed regulation, this will improve the overall quality of the public comments. The better the public understands the agency's proposal and what's behind it, the more it can assist the agency, for example, by suggesting improvements to its information or assumptions."[65] Public accountability can therefore enhance the epistemic virtues of administration, and not merely the acceptance of regulatory norms by the public.

Though public participation will be enhanced through plain language in every regulatory document, certain documents are particularly helpful in promoting meaningful public comment. The preamble to the proposed rule published in the Federal Register, as well as separately

[62] Telephone Interview with Agency #7 (May 31, 2017).
[63] Telephone Interview with Agency #6 (May 4, 2017).
[64] Small Refiner Lead Phase-Down Task Force v. Environmental Protection Agency, 705 F.2d 506, 547 (D.C. Cir. 1983).
[65] Telephone Interview with Agency #3 (Apr. 18, 2017).

published outlines directed to particular audiences, are particularly helpful in ensuring that a wide spectrum of stakeholders can understand and meaningfully engage with the rule.

Consumer Financial Protection Bureau—Mortgage Disclosure Regulations.

Consider, for example, the Consumer Financial Protection Bureau (CFPB)'s issuance of mortgage disclosure regulations. Congress directed the Bureau to "propose for public comment rules and model disclosures that combine the disclosures required under the Truth and Lending Act and [the Real Estate Settlement Procedures Act of 1974] into a single integrated disclosure for mortgage loan transactions . . . ."[66] In its Summary of the Proposed Rule, the Bureau explained the purpose of the rule in clear terms:

> For more than 30 years, Federal law has required lenders to provide two different disclosure forms to consumers applying for a mortgage. . . . The information on these forms is overlapping and the language is inconsistent. Not surprisingly, consumers find the forms confusing. It is also not surprising that lenders and settlement agents find the forms burdensome to provide and explain. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act) directs the Bureau to combine the forms. To accomplish this, the Bureau has engaged in extensive consumer and industry research and outreach for more than a year. Based on this input, the Bureau is now proposing a rule with new, combined forms.[67]

This summary provided a plain language explanation of the legal authority and policy reason for the rule. But the full proposal was over one-thousand, double-spaced pages in length, making it difficult for many stakeholders to comprehend in full.

Still, there is evidence that the "extensive consumer and industry outreach" the Bureau conducted beforehand made this complex proposal more accessible. Prior to issuing its Notice of Proposed Rulemaking, the CFPB provided a 42-page "Outline of Proposals Under Consideration and Alternatives Considered," which informed the discussion at a Small Business Review Panel.[68] There, the Bureau considered changing the definition of a "finance charge" from the current "some fees in, some fees out" approach to cover almost all charges.[69] The Small Business Review Panel accorded with other commenters in arguing that the Bureau had not yet adequately considered how this definitional change would impose other state and federal regulatory requirements on certain loans. Some small-business commenters claimed they would be discouraged from making such loans because of the "stigma they carry."[70]

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[66] 12 U.S.C. § 5532(f)(2012).
[67] Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 77 Fed. Reg. 51,115, 51,116.
[68] CONSUMER FINANCIAL PROTECTION BUREAU, *SBREFA, Small Providers, and Mortgage Disclosure* (Feb. 21, 2012) *available* at https://www.consumerfinance.gov/about-us/blog/sbrefa-small-providers-and-mortgage-disclosure/ (last accessed Aug. 17, 2017).
[69] 78 Fed. Reg. 79,774–79,776 (Dec. 31, 2013).
[70] FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON THE CFPB'S PROPOSALS UNDER CONSIDERATION FOR INTEGRATION OF TILA AND RESPA MORTGAGE DISCLOSURE REQUIREMENTS 25 (April 23, 2012), *available to access from* https://www.consumerfinance.gov/about-us/blog/sbrefa-small-providers-and-mortgage-disclosure/.

In response to these and other comments, the CFPB decided to abandon the proposed definitional change.[71] In the comment period overall, the Bureau received over 2,800 comments, ranging from large trade associations to individual commenters, which influenced the final rule.[72] By complementing its detailed Federal Register notice with an elaborate stakeholder engagement process that broke down its requirements into plain language documents, the CFPB enabled fine-grained public consideration of the terms of the rule.

Department of Education—Grantmaking Applications and Policy.

Using plain language explanations to actively solicit public input early on in policymaking can also be helpful in activities that differ from typical administrative regulations, such a grantmaking. For example, the Department of Education provides a "non-technical summary of the Department's discretionary grants process and the statutes and regulations that govern it."[73] In this context, private parties are not participating in the policymaking process, but rather applying for grants relating to early childhood, elementary, secondary, and post-secondary education. This grantmaking process often involves stakeholders, such as parents, with acute interest in and practical knowledge of the educational process, who nonetheless may struggle with technical legal or policy language. While the grantmaking guide is primarily geared to assist potential applicants in applying for grants, it includes a discussion of policymaking participation:

> *Is there anything I can do to help shape regulations and funding priorities?*
>
> Yes. The public has the opportunity to comment on proposed regulations and funding priorities. Usually, before the Department publishes final regulations and final funding priorities, it issues a *Notice of Proposed Rulemaking (NPRM)* or a notice of proposed priorities, requirements, definitions, or selection criteria (NPP).[74]

Department of Education grantmaking rules typically include plain language features that aim to increase the quality of public participation. First, such rules may include a list of targeted questions on which the Department is seeking input. This helps to direct potential commenters' attention towards salient and perhaps unsettled questions of policy. Second, such rules may include questions regarding the plain language quality of the proposed regulation. Feedback in response to these questions helps to ensure that the final regulations are written in clear terms.

For example, in November 2015, the Department issued a notice of proposed rulemaking that would require grantees to openly license material created with grants from the department.[75] The proposal includes a bulleted list of "specific issues for public comment," such as, "What experience do you have implementing requirements of open licensing policy with other federal

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[71] 78 Fed, Reg. 79,778.
[72] 78 Fed. Reg. 79,745–79,746 (Dec. 31, 2013).
[73] U.S. DEP'T OF EDUC., *Grantmaking at ED: Answers to Your Questions About the Discretionary Grants Process* iii (2015), *available at* https://www2.ed.gov/fund/grant/about/grantmaking/grantmaking.pdf (accessed Aug. 9, 2017).
[74] *Id.* at 11.
[75] U.S. Dep't of Educ., Opening Licensing Requirement for Direct Grant Programs, 80 Fed. Reg. 67,672 (Nov. 3, 2015).

agencies? Please share your experiences with these different approaches, including lessons learned and recommendations that might be related to this document."[76] This plain language question—addressing potential commenters directly, as "you," rather than in the passive voice—asked for first person experience with the program that non-specialist commenters might be particularly well-suited to offer. The Department received several comments concerning experience with other open licensing policy programs, and altered the final rule to address the issue of grants that are jointly funded by the Department and another Federal agency.[77]

> The NPRM also invited comments on the plain language quality of the proposal itself:
>
> Executive Order 12,866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.
>
> The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:
>
> - Are the requirements in the proposed regulations clearly stated?
> - Do the proposed regulations contain technical terms or other wording that interferes with its clarity?
> - Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
> - Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? . . .
> - Could the description of the proposed programs in the supplementary information section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
> - What else could we do to make the proposed regulations easier to understand?[78]

This request yielded a comment on the nature of the legal rights implicated by the rule. The Department acknowledged that "the explanation in the preamble of the NPRM could have been clearer," and amended the proposal to clarify its application to copyright and open licensing law.[79] The Department's particularly strong efforts to implement plain language in regulatory drafting has thus yielded concrete changes in the notice-and-comment process and in regulatory text.

Federal Aviation Administration and Federal Highway Administration— General Rulemaking Procedures.

Agencies can also promote public participation in policymaking by describing their rulemaking process in plain language, and requiring that regulatory documents be written in

[76] *Id.* at 67,673.
[77] U.S. Dep't of Educ., Open Licensing Requirements for Direct Grant Programs, 82 Fed. Reg. 7,376, 7,390 (Mar. 20, 2017).
[78] 80 Fed. Reg. 67,672, 67,676 (Nov. 3, 2015).
[79] U.S. Dep't of Educ., Open Licensing Requirement for Competitive Grant Programs, 82 Fed. Reg. 7,376, 7,380 (Mar. 30, 2017).

plain language. The Federal Highway Administration's Rulemaking Manual provides that both notices of proposed rulemaking and final rules be written in plain language.[80]

The Federal Aviation Administration (FAA) responded to President Clinton's 1998 memorandum on plain language by proposing to "revise and clarify its rulemaking procedures by putting them into plain language and by removing redundant and outdated materials."[81] The final rule adopted plain language best practices:

> We shortened sections, paragraphs, and sentences, and where possible used simple words to speed up reading and improve understanding. We put our section headings in the form of questions to help direct the readers to specific material they are interested in. We used personal pronouns to reduce passive voice and draw readers into the writing.[82]

For example, the agency's general rulemaking provisions previously included a section on "Participation of interested persons in rulemaking procedures."[83] The revised section is called, "How may I participate in FAA's rulemaking process?"[84] Such minor changes in phrasing can encourage public involvement by indicating that participation is more than an abstract possibility, but rather something that the reader herself may do.

b. *The Rule of Law (Judicial Review)*

A closely related public interest is the rule of law. This section will focus primarily on the rule of law as enforced by judicial review, though the norm can take many other institutional forms. The APA requires that most rules go through notice and comment procedures, and requires a reviewing court to set aside agency action that is "arbitrary" or "capricious."[85] The courts have interpreted these requirements to mandate that agencies offer a reasoned explanation of their decision that responds to all relevant comments.[86] Administrative explanations must be accessible to generalist judges who may lack in-depth familiarity with the subject matter in question.[87]

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[80] *See, e.g.*, FED. HIGHWAY ADMIN., Rulemaking Manual 25, 57 (July 2001), *available at* https://www.transportation.gov/sites/dot.gov/files/docs/FHWARulemaking%20Manual.pdf ("The NPRM must be drafted in plain language"; "The final rule must be drafted in plain language").
[81] Dep't of Transp., Fed. Aviation Admin., General Rulemaking Procedures, Proposed Rule, 64 Fed. Reg. 69,856 (Dec. 14, 1999).
[82] Dep't of Transp., Fed. Aviation Admin., General Rulemaking Procedures, Final Rule, 65 Fed. Reg. 50,850 (August 21, 2000).
[83] 14 C.F.R. 11.31 (1999).
[84] 14 C.F.R. 11.39 (2017).
[85] 5 U.S.C. §§553, 706.
[86] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 401, 416 (1971) ("[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977) ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered. The agencies have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures.").
[87] Telephone Interview with Agency #3 (Apr. 18, 2017). Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1341 (1981) ("The use of formal procedures

By facilitating public participation, a plain statement of purposes is likely to increase agency success on review. One official found that "we can defend regulations better when we've developed the record and made the regulation clear and understandable to the public."[88] Another recognized that "if regulations just aren't understandable, or they can be misconstrued, you are a lot more vulnerable legally."[89] Still, many, if not most, rules and guidance documents face low litigation risk, and are likely not written to serve a judicial audience. For particularly complex or contentious topics, rulewriters may well be much more attentive to the possibility of judicial review.

The Article III Audience.

Reviewing courts generally recognize the complexity of regulatory problems, and forgive certain lapses in linguistic clarity. A court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[90] But an agency's failure to explain its action in understandable terms can trigger judicial skepticism: "the agency must . . . articulate a satisfactory explanation for its action."[91] It must "cogently explain why it has exercised its discretion in a given manner."[92] A court must be able to "discern in [an agency's] action the policy it is now pursuing."[93] If it cannot tell "what those policies are," the agency's findings of fact or interpretations of law are unlikely to be sustained.[94] Regulatory drafting that plainly communicates the agency's intentions and reasoning is therefore an important component of success on review. Article III judges are "generalists" who usually lack agencies' subject-matter "expertise" and facility with the technical discourse peculiar to their field.[95] Judges are usually not "engineers, computer modelers, economists, or statisticians," though the records they review often "require this expertise—and more."[96] Agencies must therefore "organize[] and digest" the evidence and arguments they rely on so that courts can identify these without having to "scour the four corners of the record."[97]

On judicial review, where the audience is the reviewing court, the most important plain language documents are the regulatory preamble and the regulatory text itself. One official believed that "it is quite difficult to have plain language in the regulation itself. . . . One of the problems is that regulation isn't prose. It's not in regular English. Part of plain language is using simple grammatical structures. In a regulation you have clauses, connect one paragraph to

in the existing system of review as a quality control mechanism is arguably attributable to its reliance upon generalist judges who are ill-equipped to deal with technical issues . . . .").

[88] Telephone Interview with Agency #3 (Apr. 18, 2017).

[89] Telephone Interview with Agency #6 (May 4, 2017).

[90] Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974).

[91] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[92] *Id.* at 48.

[93] Atchison v. Wichita Bd. of Trade, 412 U.S. 800, 805–6 (1973).

[94] *Id.*

[95] Northwestern Pipeline Corp. v. Federal Energy Regulatory Comm., 863 F.2d 73, 78 (D.C. Cir. 1988).

[96] Sierra Club v. Costle, 657 U.S. F.2d. 298, 410 (D.C. Cir. 1981).

[97] Ethyl Corp v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J. and McGowan, J., concurring).

others, etc. So it . . . operates according to its own rules. I don't think of regulation as being plain language at all."[98]

This is undoubtedly true if the agency thinks about plainness in terms of language that an ordinary member of the public can understand. In many fields, ordinary people will have great difficulty reading the Code of Federal Regulations and quickly determining their obligations without professional legal advice. But "plainness" in the context of judicial review should not primarily mean simplification for the average citizen-reader and avoidance of legal terms of art. For example, plain language guides often suggest using "you" instead of using specific terms like "applicant" or "employer."[99] But this approach can be confusing where a regulation has multiple addressees and audiences. Given these sorts of problems, "precision" in the regulatory text is usually of greater importance than the general accessibility of the language.[100] Nevertheless, legal precision and technical precision are not the same thing. Agencies must explain the complex subject-matter they deal with in a way that a judge familiar with general principles of administrative law, rather than a scientific field, will be able to understand and evaluate.

Plain Language Practices in Assembling the Rulemaking Docket.

Plain language in the context of judicial review can also be facilitated by effectively discriminating between materials that must be included in the rule itself, and those that can be dealt with in accompanying documents. An agency's rulemaking procedure often includes numerous ancillary materials such as reports on technological feasibility, the economics of the industry in question, memos from staff scientists, and public comments and responses to those comments. Including all of this material in the final rule may overwhelm the court and impede understanding of the agencies' reasoning and evidentiary support. Thus, some of this material is best relegated to supporting documents. When it comes to public comments, for example,

> we have to respond to all significant comments. As a practical matter, we pretty much respond to everything. Then the question is: do we put the comments and our responses in the rule, or in a supporting document? One approach is to include in the preamble only those comments and agency responses that are directly relevant to how the agency got from the proposal to the final rule. Responses to the rest of the public comments would be included in a separate document in the record. Sometimes on our bigger rules, there is quite a large volume of comments. One typical model in that situation is to put the major comments and our high-level responses in the preamble, and then include separate documents in the record for the rest of our more detailed responses to comments.[101]

[98] Telephone Interview with Agency #1 (Apr. 10, 2017).

[99] Federal Plain Language Guidelines, *supra* note 4, at 30. The Plain Language Guidelines attempts to address this problem by recommending that agencies define "you" in each context. *Id.* But this may increase rather than decrease confusion, if the reader must find the relevant definition of "you" for each provision.

[100] Telephone Interview with Agency #4 (May 2, 2017).

[101] Telephone Interview with Agency #3 (Apr. 18, 2017).

This kind of discernment will make the reasoning supporting the final rule more plain, because the truly salient issues will have been separated from those that were of less significance.

Judicial Enforcement of Specific Plain Language Obligations.

Though final rules are geared towards a relatively sophisticated legal audience, agencies must take care to observe any broader plain language obligations that may be enforced against them when courts review their actions. For example, Environmental Impact Statements under the National Environmental Policy Act (NEPA) are required by regulation to be "written in plain language . . . so that decisionmakers and the public can readily understand them."[102] In one instance, the Ninth Circuit enforced this obligation against the Bureau of Land Management, where the Bureau had relied on "generalized conclusory statements" from "agency specialists" to conclude that the cumulative environmental effects of timber cutting would not be significant. In holding that the BLM's Environmental Assessment (EA) was insufficient, the court observed: "Even accepting BLM's representation that 'specialists' can understand the information in these EAs, the documents are unacceptable if they are indecipherable to the public."[103]

Multiple other regulations impose plain language obligations, either pursuant to NEPA,[104] or for other purposes.[105] Agencies are generally obliged to conform to their own regulations.[106] Of course, many such regulations are unlikely to arise in judicial challenges to agency action. But such regulations can nonetheless further more general rule of law obligations by making the rules easier for agency personnel and external stakeholders to understand and to follow. This "internal administrative law that guides the conduct of administrators" is an important complement to the more sporadic legal control available through the judicial forum.[107]

Plain Language and Regulatory Ambiguity.

Plain regulatory drafting may also be relevant to judicial review of agencies' interpretations of their own regulations. These interpretations are "controlling unless plainly

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[102] 40 C.F.R. 1502.8 (2016).
[103] Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 996 (9th Cir. 2004).
[104] *E.g.*, 10 C.F.R. 51.70 (2017) (National Regulatory Commission provides that a "draft environmental impact statement will be concise, clear and analytic, will be written in plain language with appropriate graphics, will state how alternatives considered in it and decisions based on it will or will not achieve the requirements of . . . NEPA"); 7 C.F.R. 520.3 (2017) (Department of Agriculture requires that "environmental documents" issued by the Agricultural Resource Service be "written in plain language" to "comply with the provisions of NEPA"). 40 C.F.R. § 6.203(3) (Environmental Protection Agency provides that "NEPA documents will use plain language to the extent possible").
[105] *E.g.*, 45 C.F.R. §155(c) (2016) (HHS requires that "information on [health care Exchanges under the Affordable Care Act] must be provided to applicants and enrollees in plain language . . . .); 42 C.F.R. §435.907 (2016) (HHS provides that Medicaid eligibility requirements, available Medicaid services, and rights and responsibilities of Medicaid applicants and beneficiaries "must be provided [by State Medicaid agencies] in plain language . . ."); 36 CFR § 1250.28 (2016) (the National Archives and Records Administration obliges itself to "use plain language in all written communications" with Freedom of Information Act requesters); 7 C.F.R. §400.701 (2017) (Department of Agriculture requires that its Risk Management Agency determine that an insurance policies and plans be "written in plain language in accordance with the Plain Writing Act" before submitting them to the Board of the Federal Crop Insurance Corporation for review).
[106] United States *ex rel* Accardi v. Shaughessy 347 U.S. 260, 267–68 (1954)
[107] JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 15 (1983).

erroneous or inconsistent with the regulation."[108] An interpretation is plainly erroneous if an "alternative reading is compelled by the regulation's plain language."[109] "Plain language," in this sense, is not totally synonymous with the use of "plain language" or "plain writing" for the purposes of this report. A "regulation's plain language" refers to the ordinary English usage, or the "literal sense," of the words used.[110] This literal meaning may in some cases be presented in such an intricate or convoluted manner that it does not qualify as "plain writing" in the sense of the PWA. Nevertheless, when a regulatory provision is drafted using plain writing in the sense of the PWA, its literal meaning should be more obvious. The scope of discretion the agency has carved out for itself will be more exactly defined. This will decrease the risk that agency officials will interpret the regulation in a way that departs from the regulation's text or purpose, or from a reviewing court's reading of the same. Whether the agency wants to craft detailed regulatory requirements that leave little room for discretion, or rather broad standards that can be interpreted in multiple ways, plain regulatory drafting will support the agency's effort to achieve the level of regulatory precision that it wants.

Using plain language therefore does not necessarily mean avoiding all ambiguous terms. A rule may use accessible plain language terms that have some general, common sense meaning, but such non-technical terms may impede the precise statement of regulatory requirements.[111] For example, Department of Labor regulations state that an "an employee whose primary duty is selling financial products does not qualify for the administrative exemption" from the Fair Labor Standards Act's minimum wage and maximum hour requirements.[112] The Supreme Court has described this language as "ambiguous," and the agency has interpreted it in contradictory ways over a short span of time.[113] But the provision is written in relatively clear and understandable language: it is a short sentence using words that are simple words to anyone passingly familiar with the financial services industry. Indeed, giving terms like "primary duty" and "financial products" more precise definitions might make the regulatory text more confusing, either by lengthening the relevant clauses, or requiring a reader to consult cross-referenced sections to comprehend its meaning.

The avoidance of ambiguity usually qualifies as a plain language practice in relation to relatively sophisticated legal and technical audiences. One agency official stated the primary

[108] Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotations omitted). The late Justice Scalia and scholars such as John Manning have criticized the incentives created by *Auer*, and argued that it conflicts with the separation of powers. *See* John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96, COLUM. L. REV. 612 (1996). For a defense of *Auer* deference, see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017).

[109] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[110] Ohio Dep't of Medicaid v. Price, 2017 U.S. App. LEXIS 13274, *48 (6th Cir 2017).

[111] *See generally* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 83 YALE L. J. 65 (1983).

[112] 29 C.F.R. 541.203(b) (2017). The provision reads in full: "Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *Id.*

[113] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208, 1205 (2015).

reason a regulation should be written in plain language is that "you don't want it to be ambiguous."[114] Where there is a "highly technical issue" and the rule is ambiguous, agencies may have to deal "dueling experts" who offer different interpretations of the rule.[115] In the absence of more precise interpretive guidance, regulatory ambiguity may lead to variation and conflict in the application of regulations by agency examiners and adjudicators, courts, and private parties, undermining the rule of law interest in equal and consistent treatment.

Some agencies might nonetheless write some regulatory provisions in an ambiguous way to increase their discretion in the future.[116] Such regulatory ambiguity can further legitimate interests, allowing the agency to change course relatively quickly when the facts or balance of relevant policy considerations changes.[117] But strong countervailing interests favor precision: a detailed technical requirement will often decrease enforcement costs by providing enforcement officers and adjudicators with exact measures of compliance, and by reducing the opportunity for litigation challenging the application of a vague term to facts of a particular case.[118]

There is no generic answer to whether the rule of law interest in plain language will be served by a greater or lesser degree of ambiguity in regulatory text. The rule of law requires both that requirements be readily understandable and that they be precise enough to guarantee equal treatment and avoid the risk of arbitrariness. These requirements often cut in different directions, and are especially difficult to balance in the complex, technical fields that agencies regulate. The incentive structure in which agencies operate is equally conflicted. Agencies have reason to write regulatory text in an ambiguous manner, since their interpretations of an ambiguous rule will ordinarily receive great deference from reviewing courts.[119] But if an agency wants its current regulations to bind the future conduct of its officials, it will avoid relying on open-ended standards that admit of varying interpretations. As officials weigh the desirable level of regulatory precision, plain language analysis can reinforce the rule of law by ensuring that drafting officials keep their audiences' comprehension at the forefront of their deliberations.

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[114] Telephone Interview with Agency #1 (Apr. 10, 2017).

[115] Telephone Interview with Agency #2 (Apr. 17, 2017).

[116] Decker v. Northwest Envtl. Def. Ctr., 185 L. Ed. 2d 447, 466, 568 U.S. 597, 620 (2013) (Scalia, J., ("[W]hen an agency interprets its own rules . . . the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a "flexibility" that will enable "clarification" with retroactive effect."). *See also* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. J. 1, 11–12 (1996).

[117] Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring a Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 803 (2001) ("Particularly in a society that has come to believe standards are a better instrument of regulation than detailed command-and-control rules, even an ideal level of rulemaking will generate an enormous range of issues on which interpretation and policy analysis will be required.").

[118] Diver, *supra* note 111, at 72.

[119] Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995) ("As long as the agency has used broad, ambiguous language in its legislative rules, it need have little fear of judicial rejection of its policy statements or interpretive rules. It can issue or amend its real rules, i.e., its interpretive rules and policy statements, quickly and inexpensively without following any statutorily described procedures.")

c. *Effectiveness (Compliance)*

The public interest in "effectiveness" could carry multiple meanings. Here we will focus on compliance with the regulation, rather than whether the regulatory scheme is "effective" in the sense of being wise as a matter of policy or whether it is the most efficacious scheme out of multiple alternatives for executing particular policy goals.

Plain requirements are essential to promote efficient compliance. Several agencies understood this to be the primary purpose of plain language in general: "the purpose is to enhance compliance. You tell someone . . . to use the right form, etc."[120] Particularly for agencies that process vast numbers of submissions from the public, it is particularly important to reduce the likelihood that the public will misunderstand the requirements imposed by the agency. "Most people are trying to do the right thing. . . . It's less time and effort for our organization to deal with people who are doing it right."[121] Agencies whose regulations can be understood at low cost will spend "less money on training, [and] less money on enforcement."[122]

Securities and Exchange Commission—Plain Language for Crowdfunders.

These concerns are especially salient with regards to regulations that affect individuals and small businesses. Many agencies deal with stakeholders of various sizes and sophistication, from large and well-resourced firms to "mom and pop" establishments. In these cases, the plain language interest in effectiveness can be advanced by tailoring specific documents for different audiences. For example, in 2016 the Securities and Exchange Commission (SEC) finalized a regulation which implemented an exemption from the registration requirements of the Securities Act for crowdfunding transactions.[123] Commissioners and Commission staff understood that the primary audience for this regulation would be small business and personal investors rather than the sophisticated, repeat players. As published in the Commission's Release, the Introduction provides a strong plain language summary of the basis and purpose of the regulation:

> Crowdfunding is a relatively new and evolving method of using the Internet to raise capital to support a wide range of ideas and ventures. An entity or individual raising funds through crowdfunding typically seeks small individual contributions from a large number of people. Individuals interested in the crowdfunding campaign – members of the 'crowd' – may share information about the project, cause, idea, or business with each other and the use information to decide whether to fund the campaign based on the collective "wisdom of the crowd." The Jumpstart Our Business Startup Act . . . establishes a regulatory structure for startups and small businesses to raise capital through securities offerings using the Internet through crowdfunding.[124]

After establishing the statutory framework, and describing notice-and-comment proceedings in which the Commission received over 485 comments, the Commission offers a

[120] Telephone Interview with Agency #5 (May 3, 2017).
[121] *Id.*
[122] Telephone Interview with Agency #2 (Apr. 17, 2017).
[123] 80 Fed. Reg. 71,388 (November 16, 2016).
[124] *Id.*

one-page summary of the rules governing the exemption, including the maximum amount that can be raised through crowdfunding, limits on crowdfunding investments by individuals, disclosure provisions, and registration requirements for crowdfunding intermediaries and platforms.[125] The rule also includes various illustrative charts, showing, for example, the investment limits for borrowers with varying net worth and annual income.[126] But, as is the case with many regulations, the regulatory text itself is scattered across eight different parts of title 17 of the Code of Federal Regulations. To help security issuers relying on the crowdfunding exemption to comply with the rule's requirements, the Commission provided an optional plain language "Question and Answer Format" that walks issuers through the information they need to provide in their offering statements.[127] The Commission stated in the preamble to its Final Rule that: "A number of commenters noted that an optional format such as this would be less burdensome for small issuers while still providing the Commission and investors with the required information. We believe that this option may help to facilitate compliance and ease burdens . . . by providing a mechanism by which issuers can easily confirm that they have provided all the required information."[128]

Internal Revenue Service—Publications and the Challenge of "Simplexity".

Another example of the plain language interest in effectiveness comes from the Internal Revenue Service (IRS). IRS Regulations that interpret the tax code are often highly technical and directed toward specialist tax attorneys. In the field of revenue collection, in particular, precise rules that reduce opportunities for unintended tax avoidance are crucial. But these complex explanations are often difficult for stakeholders to understand. The Internal Revenue Service therefore issues "Publications" for audiences of varying sophistication. As the IRS explained in its Plain Writing Act Compliance report:

> Plain language for the general public is different from plain language for tax/legal professionals . . . . The target audience for the IRS Publications, Your Rights as a Tax Payer, is the general public because the content focuses on individual tax payers. Conversely, the target audience for the IRS publications, Understanding Employee Plans Examination Process, is tax/legal professionals because the content provides guidance to employee plan administrators. The IRS tailors the language in every type of communication to the subject expertise of the primary target audience.[129]

As with all plain language drafting, the balance between understandable terms and accuracy must always be observed. Particularly in areas like taxation, where the underlying law and regulations are complex and difficult for non-experts to grasp, plain language translations may obscure ambiguities or leave out exceptions that may benefit or disadvantage regulatory

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[125] *Id.* at 71,379–80.
[126] *Id.* at 71,394.
[127] SECURITIES AND EXCHANGE COMMISSION, Form C Under the Securities Act of 1933, *available at* https://www.sec.gov/files/formc.pdf.
[128] 80 Fed. Reg. 71, 423 (Nov. 16, 2015).
[129] INTERNAL REVENUE SERVICE, *Plain Writing Act Compliance Report*, Publication 5206 (June 2016), *available at* https://www.irs.gov/pub/irs-pdf/p5206.pdf [hereinafter IRS PWA Compliance Report].

stakeholders. Professors Joshua D. Blank and Leigh Osofsky refer to this problem as "simplexity," which "occurs when the government presents clear and simple explanations of the law without highlighting its underlying complexity or reducing this complexity through formal legal changes."[130] The plain language interest in effectiveness will only be advanced to the extent that such simplifications increase overall compliance with the law itself.

d. *The Protection of Rights*

Though the protection of rights is not included amongst the public interests recognized by the PWA and executive guidance, some agencies stressed its relation to plain language norms. Particularly where agencies' enforcement powers are buttressed by provisions for private enforcement, regulations and guidance that clarify private rights will make their exercise less costly. One official thus stated that a primary function of plain language was to "empower our charging parties, affected people, so that they understand what their rights are."[131] By drafting regulations and accompanying documents in terms that regulatory beneficiaries can understand, agencies enable these stakeholders to better understand, and defend, the full extent of their statutory rights.

Consumer Financial Protection Bureau—Consumer Facing Documents.

CFPB has "adopted plain language as a core principle for all consumer facing content."[132] The Bureau generally "considers whether . . . technical or specialized documents will impact consumers' behavior or understanding of their rights under the federal consumer financial laws. When they will impact behavior or understanding, the Bureau generally publishes plain language summaries of the documents and makes them widely available (typically on the agency's website)."[133]

For example, the "Your Home Loan Toolkit" supplements the requirements of the Know Before You Owe Mortgage Disclosure Rule, discussed above, with a plain language discussion of the loan estimate and closing disclosure forms covered by the Rule.[134] This guidance helps to ensure that consumers will comprehend and act in light of their financial rights and obligations.

Just as plain language can empower beneficiaries, plain language can protect the rights of regulated parties by ensuring that they are adequately and unambiguously notified of their legal obligations. "[R]egulations must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[135] Although courts will rarely determine that regulations are so confusing or ambiguous as to be void for vagueness, the due process interest in

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[130] Joshua D. Blank and Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L. J. 189, 193 (2017).
[131] Telephone Interview with Agency #1 (Apr. 10, 2017).
[132] CONSUMER FINANCIAL PROTECTION BUREAU, *Plain Writing Act Compliance Report* (July 2017), *available at* http://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf (accessed Aug. 9, 2017).
[133] *Id.* at 6.
[134] CONSUMER FINANCIAL PROTECTION BUREAU, *Your home loan toolkit: A step-by-step guide* (August 2015 ed.), *available at* http://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf (accessed Aug. 9, 2017).
[135] Lloyd C. Lockrem v. United States, 609 F.2d 940, 943 (9th Cir. 1979).

informing private parties of regulatory requirements will nevertheless be advanced by making regulatory terms as clear as possible. Where criminal or civil penalties are at issue, courts may be unwilling to rely on "what the agency intended but did not adequately express."[136] Plain language thus protects the rights both of regulated parties and the beneficiaries of regulatory schemes.

Equal Employment Opportunity Commission—The Regulatory Continuum and the Wellness Rule.

One agency official developed the idea of a regulatory "continuum" ranging from "complicated" documents like the rule itself to simpler documents that digest the material for non-specialist audiences.[137] This approach allows the agency to tailor regulatory language for persons of varying sophistication, and balance regulatory precision with public comprehension. Take for example the Equal Employment Opportunity Commission (EEOC)'s rule on employers' "wellness programs."[138] The rule dealt with complex legal and policy issues related to employee health programs, which are governed by the Health Insurance Portability and Accountability Act of 1996, as amended by the Affordable Care Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act.[139] In particular, the rule sought to ensure that employee health programs involving disability-related inquiries or medical examinations do not discriminate against persons with disabilities.[140] Toward that end, the rule requires that covered employee health programs "be reasonably designed to promote health or prevent disease," be "voluntary," and observe limitations on financial incentives to participate.[141] Each of these requirements has detailed specifications. Because the rule was tailored to achieve legal clarity and inter-agency agreement in a challenging but important policy setting, its requirements might be somewhat difficult for an employee or small business to understand.

As is its usual practice in issuing new rules or enforcement guidance, the Commission issued accompanying documents for less technically sophisticated audiences. A "Small Business Fact Sheet" provides succinct discussion of the reason for the rule and its provisions.[142] For example, in explaining the meaning of "Voluntary," the Fact Sheet says:

> An employee's participation in a wellness program that includes disability-related inquiries or medical examination must be voluntary. In order for participation to be considered voluntary, an employer:
>
> - May not require participation;

[136] Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649 (5th Cir. 1976).
[137] Telephone Interview with Agency #1 (Apr. 10, 2017).
[138] 81 Fed. Reg. 31,126 (May 17, 2016) (remanded for reconsideration without vacatur in AARP v. United States EEOC, 2017 U.S. Dist. LEXIS 133650 (D.D.C. Aug. 22, 2017)).
[139] A separate rule deals with the Genetic Information Non-Discrimination Act specifically.
[140] 81 Fed. Reg. 31,126 (May 17, 2016).
[141] 81 Fed. Reg. 31,139.
[142] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Small Business Fact Sheet: Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act*, *available at* https://www.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm (accessed Aug. 4, 2017).

- May not deny access to health insurance or benefits to an employee who does not participate;
- May not retaliate against, interfere with, coerce, intimate, or threaten any employee who does not participate, or fails to achieve certain health outcomes;
- Must provide a notice that explains the medical information that will be obtained, how it will be used, who will receive it, and the restrictions on disclosure; and
- Must comply with the incentive limits described in the rule.[143]

The succinct Q&A also covers several questions about the purpose and policy of the wellness rule in greater detail, such as: "What is a wellness program"; "How does this rule relate to the wellness program rules under HIPAA and the Affordable Care Act"; and "What are some examples of wellness programs that meet the 'reasonably designed' standard?"[144]

By including such plain language documents in a continuum of regulatory materials, EEOC clarifies the rights of both employers and employees. Employers' right to determine the terms and conditions of employment are conditioned by a number of regulatory laws, from the Fair Labor Standards Act to the Americans with Disabilities Act. The more easily employers can understand the scope of their contractual liberties, the better these rights can be vindicated. At the same time, the restrictions and requirements that statutory law places on the employment relationship establish rights for employees, such as the right to be free from discrimination on the basis of race, color, religion, national origin, sex, or disability. But the meaning of these broad statutory terms is not obvious in every case. It has been elaborated in case law and by administrative interpretation. By plainly presenting these meanings with regard to particular subject-matters, such as wellness programs, the Commission gives beneficiaries a clear and distinct understanding of their rights.

* * *

The public interests in the rule of law, effectiveness, the protection of rights, and public participation in administrative policymaking are all advanced by plain language. But different kinds of "plainness" are associated with each of these objectives, and each targets different primary audiences, often through different kinds of documents. The rule of law, especially in the context of judicial review, can be promoted through plain language in the preambles of final rules and in the regulatory text. Effectiveness and rights-protection can be promoted through plain language in accompanying documents, such as guidance geared for particular audiences and Q&As. Public participation in administrative policymaking can be promoted through generally accessible language in proposed rules and documents prepared for meetings with specific stakeholders. By keeping the distinct interests, formats, and audiences of plain language in mind, agencies can promote core administrative law values.

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[143] *Id.*

[144] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act, available at* https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm.

The following table summarizes this discussion by aligning the distinct objectives of plain language with their primary audience and appropriate documentary formats:

Public Interest	**Primary audiences**	**Documents**
Public Participation	All external stakeholders, particularly small businesses and the general public	Proposed rule preamble Proposed rule text Summaries for specific audiences
Rule of Law	Courts and agency staff	Final rule preamble and text
Effectiveness	Beneficiaries and regulated entities	Guidance and Q&As
Protection of Rights	Beneficiaries and regulated entities	Guidance and Q&As

4. Agency Plain Language Practices

a. *The Rulewriting Process*

How plainly an agency's regulatory documents are written, and how well they advance the public's interests, depend in no small part on an agency's drafting procedures. To shed light on how agency staff review regulatory text for plainness, we asked interviewees about the rulewriting process at their agencies in general, how (if at all) plain writing fits into these processes, who (if anyone) has primary responsibility for plain language review, and what internal guidance exists to support plain drafting.

Our interviews revealed a collaborative intra-agency regulatory drafting process involving various policy divisions as well as Offices of General Counsel (OGC). Drafting processes are further guided by internal directives and manuals. While the rulewriting process is perhaps primarily designed to ensure legal sufficiency and strengthen the substantive elements of proposed rules, the procedures and guidelines involved can also ensure that several teams of

drafters review regulatory text for clarity in its stated purposes, reasoning, and requirements and accessibility to an agency's audiences.[145]

Coordinating Regulatory Drafting Within the Agency.

In the initial stages of rule-writing, policy divisions within an agency typically have primary responsibility for preparing a term sheet or other document laying out the contours of a proposed rule. In some agencies, such as the IRS (which considers their regulations an exercise in statutory interpretation, rather than novel policy-making), rules are drafted by lawyers in the first instance.[146] Most OGCs, however, will mainly be responsible for ensuring compliance with the APA and other relevant legal considerations.

Coordination among these offices was often described by interviewees as an iterative team effort rather than a rigid, regimented workflow. According to one agency, "the whole process is collaborative from day one."[147] Once a policy division begins working on a proposed rule, they "are collaborating with the General Counsel, other [policy] offices, [economists, and other experts];" each group considers whether the draft is clear and consistent (both internally within the document and with the agency's other rules and interpretations), as well as whether other divisions should be brought in.[148] This collaborative approach continues throughout the rule revision process.

Depending on the agency and the nature of the rule at issue, many divisions or offices may need to be involved, though this varies widely. Particularly in large agencies, within any one main division or office there may be a number of policy-specific sub-offices, as well as offices of engineers or economists that serve a whole division.[149] Each office and division director would review the content (whether a term sheet or, later on, draft rule) prepared by staff—which would then be further reviewed by regulatory attorneys and their superiors.[150]

One agency described a fairly distinctive approach to organizing its iterative drafting efforts. Within the agency, some offices are assigned one or more "unique areas of responsibility" (UAR) based on their expertise.[151] During the drafting process, an office reviewing a draft rule may mark a comment as being based on its UAR. The office that originated the draft rule must address such UAR comments in its revisions.[152] These UAR revisions must then be approved by the assistant secretary for the originating office or her

[145] As discussed below, coordination among offices can also pose challenges. We discuss these challenges and potential solutions to them in the sections below.
[146] Telephone Interview with Agency #5 (May 3, 2017).
[147] Telephone Interview with Agency #7 (May 31, 2017).
[148] *Id.*
[149] Telephone Interview with Agency #3 (Apr. 18, 2017).
[150] *Id.*
[151] Telephone Interview with Agency #6 (May 4, 2017).
[152] *Id.*

designee.[153] If the originating office has questions about, or disagrees with, the UAR comment, it may discuss the comment with the office that made it.[154] Additionally, the reviewing office must approve changes responsive to its UAR comments.[155] In the event disagreements between originating and reviewing offices cannot be resolved, a division of the Office of General Counsel (OGC) will adjudicate the issue.[156]

"Plain language" is considered within the UAR of this agency's OGC.[157] This gives plain writing issues prominence in the drafting process. Because plain language is within their UAR, OGC staff are obliged to consider the clarity of regulatory text during the review process, and could require reconsideration of regulatory language they deemed insufficiently clear. This approach clarifies responsibility for plain language issues and ensures they are systematically addressed and resolved.

Other agencies rely on work groups to coordinate among offices during the drafting process.[158] Under this model, a staff member from the policy office originating the rule would lead the work group, comprised of other staff in the same office as well as staff from other concerned policy offices and the OGC.[159] Staff from outside the originating policy office may be brought in at various points in the process, depending on the work group's needs. For example, some divisions may be brought in during the mid- to late stages of the process if it then becomes apparent that their technical expertise is needed; similarly, the OGC may be involved from the outset or only join the work group once a full draft is in place.[160]

Finally, either in connection with one of the above workflow models or an alternative one, agencies may perform plain language review during their internal clearance at the end of the drafting process.[161] For at least one agency, the division of regulatory attorneys responsible for

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[153] Department of Education: Discretionary Grant Clearance Checklist: Checklist for Originating Offices (on file with ACUS).
[154] Telephone Interview with Agency #6 (May 4, 2017).
[155] Department of Education: Discretionary Grant Clearance Checklist: Checklist for Originating Offices (on file with ACUS).
[156] *Id.*
[157] Telephone Interview with Agency #6 (May 4, 2017). Other offices in this agency may also review text touching on its area(s) of expertise for accuracy and clarity. Accordingly, plain language review falls under the UAR for multiple offices within the agency. Here, we focus on plainness review as tied to administrative law considerations that are wholly within the purview of the agency's OGC.
[158] The precise term used by agencies varies. For example, the FHWA Rulemaking Manual outlines the composition and duties of "rulemaking teams" that support the originating program office in developing the rule. Team members represent the viewpoint of the head(s) of their respective offices, and are responsible for working with the originating program office and rest of the rulemaking team to resolve all rulemaking issues critical to their respective offices. FED. HIGHWAY ADMIN., FHWA RULEMAKING MANUAL 8 (July 2000), *available at* https://www.transportation.gov/regulations/fhwa-rulemaking-manual.
[159] Telephone Interview with Agency #3 (Apr. 18, 2017).
[160] *Id.*
[161] Though reviewing agency clearance procedures as such is beyond the scope of this report, further examination of these procedures may be found at U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-268, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015), *available at* https://www.gao.gov/assets/670/669688.pdf.

reviewing a regulation for legal sufficiency during the final clearance process also reviews the text for accessibility to relevant audiences.[162]

Regardless of the system used, the agency officials we spoke with underscored that rule-writers should be mindful of the division of labor and responsibility among various offices—particularly so they don't duplicate effort or undermine, even if unintentionally, the main policy division's intended meaning. One interviewee at an agency's OGC described this as a balancing act. "We can change the language[, but we] generally give [the originating office] the opportunity. . . . [B]ut if we didn't understand it correctly, that needs to be fixed."[163]

Internal Plain Writing Directives.

Many agencies have internal publications detailing how staff can draft more straightforward text, though not all are directed primarily at regulatory drafting.[164] Still, much of this internal guidance goes beyond simply outlining editing techniques such as using plain words, simple sentence structure, etc. Most urged staff to think from the position of the intended audience so that the final publication is likely to fulfill the reader's needs.[165]

By and large, agency plain language guides do not address procedural matters like how various offices should coordinate the drafting process, nor do rulewriting manuals often assign a specific office or individual with responsibility for plain language review in regulatory drafting.[166] Notably, however, the Department of Transportation's Plain Language Action Plan, issued in response to Executive Order 12,866, "make[s] plain language a part of the review process for regulatory and non-regulatory documents."[167] While this directive may seem general

[162] Telephone Interview with Agency #6 (May 4, 2017).
[163] Telephone Interview with Agency #2 (Apr. 17, 2017).
[164] Earlier sections of this report discuss agency efforts to use plain language to improve the clarity and accessibility of their publications from the late 1970s onward. These efforts culminated in executive guidance (specifically, E.O. 12,866), which in turn prompted further internal agency guidance. A particularly robust example is the Department of Transportation's Plain Language Action Plan, which set forth a program of conducting trainings, providing extensive resources and guidance, and other initiatives to implement plain writing of both regulatory and non-regulatory documents. DEP'T OF TRANS., PLAIN LANGUAGE ACTION PLAN, https://www.transportation.gov/regulations/dot-plain-language-action-plan.
[165] *E.g.*, FED. COMM. COMMISSION, PLAIN LANGUAGE WORKBOOK *passim* (May 2011), https://transition.fcc.gov/cgb/PlainWritingWorkbook.pdf; SECURITIES & EXCHANGE COMMISSION, A PLAIN ENGLISH HANDBOOK 9 (Aug. 1998), https://www.sec.gov/pdf/handbook.pdf. Unsurprisingly, given its mission, the CFPB's plain language webpage underscores the agency's orientation toward the needs of consumers. CONSUMER FIN. PROTECTION BUREAU, *Plain Writing*, https://www.consumerfinance.gov/plain-writing/ (last accessed Aug. 24 2017).
[166] There are, however, more agency plain writing guidelines available online than rulemaking manuals. As such, the information gathered in our interviews tended to be more revealing about what how plain drafting fits into the overall rulewriting process. It is perhaps unsurprising that plain language guidelines are more widely available. They are, in the first instance, more likely to be useful resources for other agencies and, in compliance with the Plain Writing Act's requirement that agencies host a webpage dedicated to plain writing issues, are likely to be published online.
[167] DEP'T OF TRANS., PLAIN LANGUAGE ACTION PLAN, https://www.transportation.gov/regulations/dot-plain-language-action-plan.

in nature, the Plan as a whole prioritizes plain language as an institutional practice that should be exercised throughout the Department.[168]

In addition to overarching guidance on plain drafting and rulewriting generally, some agencies impose more specific internal requirements to implement plain drafting in the regulatory context. For example, the IRS directs each "drafting team [to] prepare a plain language summary" directed at non-expert stakeholders that:

> explains, preferably in six sentences or less, the issue addressed by the regulation, but does not summarize the regulation. The reader is someone who is not familiar with the tax law. Therefore, the drafting team should avoid references to Code sections and terms of art. The summary alerts the taxpayer to whether he or she is affected by the regulation, whether he or she needs more information, or whether he or she needs to consult a tax advisor.[169]

Directives like this may serve as useful practices for other agencies to adopt, particularly those in similarly technical or complex fields.

Regardless of what specific internal guidance agencies issue, they will still need to rely on staff experience and institutional culture. In one interviewee's experience: "Many of us at some point have worked outside the building, and think about what our rules are trying to achieve. If we make rules that no one can understand, then it's not serving [our target audiences]."[170]

Promoting "Plainness" Review During Rulewriting.

As described above, intra-agency rulewriting can be fairly elaborate from a procedural perspective, and agencies have varying approaches to organizing the process. Each approach offers different opportunities to raise the salience of drafting in plain language.

For instance, with respect to how it might advance plain drafting, the UAR system has numerous strengths which are worth reviewing here. First, this approach ensures that important plain language issues are not lost or overwritten in multiple rounds of review. The process encourages staff to be thoughtful, and prioritize meaningful changes within their area of expertise rather than making rote editing suggestions. As one interviewee stated, "perfection can be the enemy of the good."[171] Furthermore, as described during the interview, the UAR model assigns regulatory attorneys a significant, institutional role in reviewing regulatory text for plain language. The system does not make agency attorneys solely responsible for plain drafting, to the exclusion of program staff. [172] Rather, by recognizing plain language as part of regulatory

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[168] *Id.*
[169] INTERNAL REVENUE SERVICE, CHIEF COUNSEL REGULATION HANDBOOK 32.1.6.8.3 (Sept. 2011), https://www.irs.gov/irm/part32/irm_32-001-006.html.
[170] Telephone Interview with Agency #7 (May 31, 2017).
[171] Telephone Interview with Agency #6 (May 4, 2017).
[172] *Id.*

attorney's expertise, this approach not only acknowledges—but puts into practical application—the deep connection between plain language and core administrative law goals.

Indeed, many of our interviews underscored the connection between plain drafting and these core goals, including compliance, protection of rights, and public participation. As one interviewee put it, "with the APA and rulemaking, access to the public and participation are essential. If there's lack of understanding [on the part of the public], that access is barred . . . [and] people can [not] comment in a meaningful way."[173] Other agencies echoed this understanding: "if people [reading the regulation] cannot understand something, that is very harmful to the overall goals. So, we will [make a change] if we find something not to be understandable."[174]

This connection can be advanced through procedures other than the UAR model. Under the work group model, regulatory attorneys will also certainly note and seek correction of ambiguities or other drafting issues that could be problematic from a legal perspective. But without the systematic review and approval structure of the UAR model, here the office originating the rule would likely bear primary responsibility for incorporating feedback from other offices and ensuring the final rule is both accurate and written as accessibly as possible. This approach is not necessarily less advantageous than the UAR model. Much will depend on whether plain writing is prioritized in the agency's culture; if plainness is not viewed as an important part of rulewriters' work, no system will be able to compensate for the absence of institutional investment.

b. *Guidance*

Though the agency staff we interviewed reported significant investment of effort in drafting regulatory text plainly, many viewed guidance as the primary vehicle for communicating an agency's policy goals, reasoning, and regulatory requirements to the public. Our interviews shed light on how agency staff draft sub-regulatory guidance and how that guidance is communicated.

Drafting Procedures.

As an organizational matter, the process of drafting guidance differs somewhat from the rule-writing process. One agency official described the division of responsibility accordingly: "All documents published in the Federal Register go through [the regulatory] division. For guidance, they go through the Office of the Secretary. But [the regulatory] division reviews the vast majority [of guidance], and all [that are] significant."[175] Similarly, other agencies noted

[173] *Id.*
[174] *Id.*
[175] *Id.*

that, unlike regulations (or at least parts of them), guidance, publications, and forms are less often written by the OGC or other agency attorneys.[176]

While the primary responsibility for drafting guidance may differ from that in rule-writing, it seems that by and large the same offices will be involved in both processes. Once guidance is drafted, however, these offices will need to coordinate with the agency's media or communications office to share information about its regulation and guidance with relevant audiences. Again, the process is a collaborative one. As an agency attorney shared with us, "You do have to help that office when they get questions from the press, or from Congressional committees."[177]

This shift in the division of responsibility for drafting guidance compared to rule text or preambles is relatively unsurprising. Attorneys have already vetted the underlying rule for legal sufficiency and clarity, thus they need not necessarily take the lead on drafting sub-regulatory guidance. Review may still be valuable to ensure that language intended to have legal import is not made ambiguous or inaccurate; indeed, our interviews revealed that this is commonly done. Still, regulatory attorneys' expertise is not as critical at this stage, whereas the expertise of policy and communications experts in tailoring the agency's message will be more valuable.

Advantages of Guidance.

With respect to plain writing, guidance has fewer constraints (legal or otherwise) than regulatory text, offering agencies greater leeway in their drafting. Explaining how agencies view and use guidance, one agency shared the idea of a "continuum" spanning highly complex regulatory documents to fairly straightforward guidance. As this interviewee stated,

> On the one hand you have complicated things [such as rule text] that the court reads, then you have slightly less complicated things like enforcement guidance. Those are for legal audiences and investigators. And then you have things like Q&A documents. After that you have stand-alone outreach documents. Those really are for lay people.[178]

As this quote shows, perhaps the most significant advantage of guidance is the ability to effectively target different audiences. A single guidance document need not achieve as many goals as a regulation, necessarily, must. Several agencies emphasized that "it's important . . . to think about different audiences differently."[179] One explained:

> After the rulemaking process, we create small business guides. We hope these are straightforward and easily understandable. The less calls that come in, the better. On the other hand, we very much welcome calls, provide contact information, and go on speaking circuits to talk about the guides. To the extent we get feedback that

[176] Telephone Interview with Agency #5 (May 3, 2017).
[177] *Id.*
[178] Telephone Interview with Agency #1 (Apr. 10, 2017).
[179] Telephone Interview with Agency #4 (May 2, 2017).

there is an ambiguity, we put out Compliance and Disclosure Information. They come from real calls that come in.[180]

Another advantage to guidance is flexibility in formatting and organization. While this report does not focus on the use of plain language techniques, which are well-discussed elsewhere, these tools can often be used more liberally in guidance than in primary regulatory documents.[181] As one interviewee stated, "[text] doesn't exist in a vacuum. . . . [C]onsistent use of headlines, types of content displays, [etc., help] people travel from page to page."[182] To that end, agencies should continue to use, or consider implementing additional ways of using, organization and structure to help readers navigate the document and find information relevant to their needs.

c. *Supporting Plain Drafting*

Plain language principles apply throughout both rule and guidance drafting processes. Accordingly, agency practices and publications related to plain language frequently apply in both contexts. Internal written guidance has largely been covered in the foregoing section. Thus, we now turn to a discussion of how agencies have used plain language point persons, trainings, and related resources to support plain drafting.

Role of Plain Language Officials.

The Plain Writing Act requires agencies to designate "senior agency officials" to oversee agency-wide compliance with the Act by communicating its requirements to agency employees, establishing procedures to promote compliance, offering trainings, and maintaining a plain writing section on the agency's website.[183] Notably, the Act does not mandate the creation of a new office or direct that personnel be hired specially to execute these responsibilities; many agencies chose to designate employees who were already responsible for communications or public relations to serves as plain language officials under the Act.[184] Because these officials are already organizationally embedded, and have responsibility to report on the vast majority of agency publications and communications (indeed, regulatory text is a lonely exception from the Act's coverage), they serve as a natural resource for agency attorneys and policy or technical experts seeking to draft clearer rules and guidance.

[180] Telephone Interview with Agency #7 (May 31, 2017).
[181] Guidance tends not to be constrained by the inherent complexity or length of many primary regulatory texts. Additionally, such publications are generally free of Federal Register publication requirements, discussed in more detail *infra*. Indeed, only one agency official noted having seen Q&A formats, for example, in a regulation, while these are more common in guidance. Telephone Interview with Agency #2 (Apr. 17, 2017).
[182] Telephone Interview with Agency #4 (May 2, 2017).
[183] 5 U.S.C § 301 note sec. 4(a).
[184] PLAIN LANGUAGE ACTION & INFO. NETWORK, *Plain Language in Federal Agencies*, http://www.plainlanguage.gov/plLaw/fedGovt/index.cfm (last accessed Aug. 20, 2017). For example, the CFPB has designated staff in its Division of Consumer Education and Engagement to serve as plain language officials. CONSUMER FIN. PROTECTION BUREAU, CFPB PLAIN WRITING ACT COMPLIANCE REPORT 4 (July 2013).

As noted previously, agency rule-writers often coordinate with communications personnel, and in our interviews emphasized the importance of working with them to educate regulatory stakeholders about the content of proposed and final rules and guidance.[185] Though our interviews focused more on rulewriting than on post-rule activities, our background research provides further evidence of a close working relationship between agencies' policy and legal staff and the communications and outreach staff who often hold primary responsibility for promoting plain language compliance throughout the agency. For example, the IRS Plain Writing Compliance Report, 2016, urges employees to "[u]se communications professionals as plain writing subject matter experts to help other IRS professionals with product development."[186] The agency's media and publications office, which is responsible for planning, producing, or procuring all of the agency's communications, frequently advises other employees on plain writing and may assist in revisions.[187]

Staff in these offices can help rule and guidance drafters think about their audiences, and write for them, in a way that generalized, written plain language directives cannot. Because they review an array of documents and other communications directed at all of the agency's audiences, plain language officials are also well-positioned to build knowledge of the most effective ways to share information with particular groups, and carry that knowledge forward into future regulations, guidance, and other communications. Even though regulations are excluded from the PWA's coverage, plain language officials may play a role in supporting and reporting on agency efforts to draft rules plainly. For example, the Consumer Financial Protection Bureau's PWA Compliance Report (2013) includes a section on the agency's supplemental plain language summaries of regulations likely to impact consumers.[188]

Plain Language Trainings and Resources.

The Plain Writing Act requires agencies to conduct plain language trainings, although many were already in the practice of providing such trainings.[189] As discussed above, individual agencies began producing plain language guidelines and trainings as early as the mid- to late 1970s.[190] Presently, an agency's plain language official(s) are responsible for conducting trainings and producing other plain writing resources.[191]

Agencies may also make their suites of plain writing resources available to others. The Plain Language Action and Information Network (PLAIN) has served as a hub for such resources since its establishment during the Clinton administration.[192] Agencies may also host

[185] Telephone Interview with Agency #5 (May 3, 2017).
[186] IRS PWA Compliance Report, *supra* note 129, at 13.
[187] *Id.* at 12.
[188] CONSUMER FIN. PROTECTION BUREAU, CFPB PLAIN WRITING ACT COMPLIANCE REPORT 6 (July 2013).
[189] 5 U.S.C § 301 note sec. 4(a)(1)(A), 4(a)(1)(C).
[190] Telephone Interview with Agency #6 (May 15, 2017).
[191] 5 U.S.C § 301 note sec. 4(a).
[192] PLAIN LANGUAGE ACTION & INFO. NETWORK, *About Us*, http://www.plainlanguage.gov/site/about.cfm (last accessed Aug. 17, 2017).

various resources on their own websites.[193] For example, the FAA hosts a series of videos online that comprise a web-based plain writing course.[194] The videos range from roughly 5 to 10 minutes in length, and encompass agencies' legal obligations with regard to plain language, reasons why drafters should invest in plain writing, and technical examples and quizzes to practice writing more plainly.

Several agency staff members we interviewed emphasized that these trainings are not simply technical in nature; indeed, they are likely to be most valuable when they focus on the connection between plainness and administrative law goals, rather than solely technical advice. One interviewee who often conducts trainings explained, "If I point out an ambiguity, or a modifier that could be interpreted in two different ways, people generally understand that" as raising potential legal problems.[195] For that reason, training staff to draft for specific stakeholder audiences with particular regulatory goals (like efficient compliance) in mind is likely to be most valuable.

Finally, particularly for those staff whose professional training may not provide them with significant experience in writing for non-expert audiences, targeted trainings may be particularly helpful. For some professionals, such as economists and engineers who do not have significant prior experience in drafting plainly, trainings on plain language techniques may be worthwhile. For policy staff who already have plain writing skills, trainings focused on the connection between plain language and regulatory goals may help them better coordinate with regulatory attorneys and draft for audiences, including courts, that they may not otherwise prioritize.

5. Challenges

Agencies invest significant resources in drafting both regulations and guidance plainly, yet they face a number of challenges in the process. Some of these are organizational. For example, despite efforts to efficiently coordinate the drafting process, the number of offices involved and diverse goals to be achieved (some of which may be in tension with each other) present non-trivial obstacles. Other kinds of challenges include constraints presented by statutory language or the complexity of the subject matter. We describe each of these challenges in turn, relying primarily on information gathered from our interviews. While not all challenges can be completely overcome, we present recommendations in the next section to mitigate or resolve them where possible.

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[193] Some agencies host only general plain language resources on their PWA-required plain language websites, but many present both general and agency-specific resources. *See, e.g.*, NAT'L INST. HEALTH, *Plain Language: Resources*, https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liaison/clear-communication/plain-language/resources (last accessed Aug. 25, 2017); DEP'T OF AG., *Plain Writing*, https://www.usda.gov/plain-writing (last accessed Aug. 25, 2017).

[194] FED. AVIATION ADMIN., *FAA Plain Language Course: The Basics*, https://www.faa.gov/about/initiatives/plain_language/basic_course/ (last accessed Aug. 17, 2017).

[195] Telephone Interview with Agency #6 (May 15, 2017).

a. *Internal Drafting Process*

Above, we noted the procedures agencies use to coordinate drafting regulations and guidance among multiple offices and divisions. Policy and legal offices must work on drafting the rule together out of necessity, yet this coordination inherently comes at some cost of time and effort. As described in the preceding section, agencies have a number of strategies they use to foster efficient coordination that minimizes internal cost. Nevertheless, it is worth highlighting some of the specific pitfalls that may accompany such multi-layered drafting processes.

One agency interviewee noted that an agency's past practices can cause a sort of inertia. "When the rest of the regulations look [a certain way], [people will continue] to do it in that manner."[196] This can hinder new efforts to draft regulations plainly when an agency has not focused on that in the past. Agency staff, particularly lawyers, will rightly be concerned about the risk of changing established language—for reasons of fairness, reliance, and efficient compliance, as well as judicial review. Even when language is not of strictly legal importance, agencies may need to be concerned about confusion on the part of readers. As one interviewee said, "when people are used to certain [legal or other] phrasing [in a form or other document], changing it can cause confusion, even when the intent is to make it simpler."[197]

However, even when agency staff feel constrained in their drafting of rule text, there is likely to be room for flexibility in preambles or summaries that accompany the regulation. As one interviewee emphasized, these elements are important "not [because they are] required by the APA, but because having plain texts helps public understanding."[198] Preambles and summaries give drafters room to explain or expand on established language in a way that leaves settled terms of art in place, but makes their meaning more accessible.

Another aspect of internal process challenges is the need to negotiate language among offices. Each division will have legitimate concerns about what certain language might mean, how it would be interpreted by courts and the regulated community, etc. But, this negotiation is time-consuming. Moreover, once staff from various policy offices have settled on satisfactory terms for part of a rule, the transaction cost of another reviewing office stepping in and suggesting a "plainer" version may simply be too high. This problem is even more acute in interagency rulemaking, where agencies with different statutory mandates and subject-matter emphases have to reach an agreement on regulatory requirements.

Some sum up this problem as simply "having too many cooks in the kitchen." One interviewee expressed some frustration with the process, but nevertheless noted that involvement of different offices is necessary. As this official put it, when something is "drafted by committee: how simple is it going to be? It's a delicate consensus. You want to move it along as quickly as possible. If people look at it again, you don't know what they're going to say. People

[196] Telephone Interview with Agency #2 (Apr. 17, 2017).
[197] Telephone Interview with Agency #5 (May 3, 2017).
[198] Telephone Interview with Agency #2 (Apr. 17, 2017).

will make changes to their own changes. . . . [But, w]hat do you do? I don't know how you fix that. As you're drafting you have to go to litigators in the field: is this administrable?"[199]

Another agency official highlighted yet another challenge presented by agencies' internal drafting processes—timeliness. As this interviewee stated, "there's benefit and detriment to [an involved clearance process]. . . . You want a legally strong, well-written document. But you don't want to spend so much time on every word that you end up losing out on other goals: not getting regulations out in time [for example]. There's definitely a balance[e] between improving the way document is written and other goals."[200]

The challenges posed by agencies' internal drafting and clearance processes are varied, but not entirely surprising. Agencies will necessarily have to acknowledge their past practice, and coordination among multiple offices is inherently difficult. Still, the procedures agencies have used to facilitate the drafting process shed light on possible best practices, which will be discussed in greater detail in the following section.

b. *External Requirements*

In addition to the challenges posed by internal drafting and clearance processes, agencies must contend with external processes governing the publication of regulatory documents. One set of challenges relates to affirmative external requirements imposing plain language duties on agencies. For example, OIRA guidance implementing Executive Order 13,563 directs agencies to include in "regulatory preambles for lengthy or complex rules (both proposed and final) . . . [] straightforward executive summaries. These summaries should separately describe major provisions and policy choices."[201] While intended to promote public understanding of, and participation in, rules that may otherwise be too complex for non-expert stakeholders to meaningfully access without thoughtful action on an agency's part, it is not clear that this guidance has achieved its goal.

One empirical study surveyed thousands of regulatory documents and concluded that executive summaries were generally less readable—at least, according to readability software—than the remainder of a rule's preamble.[202] A primary reason these executive summaries appear to be less straightforward than intended is because drafters are attempting to communicate a significant amount of content in a limited space.[203] A straightforward summary of a rule written for the benefit of the general public would likely end up being fairly lengthy. This finding serves as a cautionary lesson for other well-intentioned proposals designed to make regulations accessible and promote public participation, including recent legislation proposing to require that agencies include in NPRMs posted on Regulations.gov a link to "a summary of not more than

[199] Telephone Interview with Agency #5 (May 3, 2017).
[200] Telephone Interview with Agency #6 (May 4, 2017).
[201] Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs. Clarifying Regulatory Requirements: Executive Summaries (Jan. 4, 2012).
[202] Farina, *supra* note 39, at 26, 31.
[203] *Id.* at 33.

100 words in length of the proposed rule, in plain language . . . ."[204] Efforts to support plain writing—and by extension transparency, public participation, and related administrative law goals—are likely to be most effective if they support agency staff in preparing supplementary regulatory information or guidance that is drafted plainly, rather than focusing only on preparing short summaries of an entire rule's content.

Another set of challenges relate to how an agency must format documents for publication in the Federal Register. Notably, Federal Register guidelines underscore the importance of plain language and urge agencies to follow best practices including writing for a specific audience, or set of audiences, as well as using techniques like the use of consistent, informative headings, lists and bullet points, and tables where relevant.[205] Still, agency staff we interviewed identified additional formatting aids that would be helpful to readers, but that do not currently meet the Federal Register's style and formatting guidelines. For example, one interviewee explained that "you can't put things in indented paragraphs, with sub-arguments and explanations. It has to be in three column [format]. Just fixing that one thing would help everyone's understanding. Indents, bold, and underline [help the reader] understand the big picture, and get to what you need."[206] There may be considerations weighing against altering the existing style guidelines. For instance, changing the three-column format may drive up costs in the print publication of the Federal Register;[207] there is also a risk that variations in formatting from agency to agency or document to document could reduce reading ease or otherwise cause confusion. Some of the print restrictions, however, may be overcome on the web-based FederalRegister.gov, which provides a single column of text and more white space; readers can also download and modify the formatting of the text to meet their needs.[208] While an in-depth examination of these concerns is beyond the scope of this report, we note this concern to acknowledge the challenge of plain drafting in light of other existing requirements.

c. *Statutory Language*

As noted at the outset of this section, some challenges are much less within the agency's control. When agencies need to rely on statutory terms or describe statutory regimes that are ambiguous or complex, the challenge of drafting plainly becomes all the more complicated. In these cases, agency staff must make sure their writing is accurate, not open to inadvertent interpretation, and yet not so detailed or precise that a reader cannot straightforwardly follow the text, or find the text that is most meaningful.[209]

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[204] S. 577, 115th Cong. § 2 (2017).
[205] OFF. OF THE FED. REGISTER, DOCUMENT DRAFTING HANDBOOK 2-12–2-13(2017), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf
[206] Telephone Interview with Agency #3 (Apr. 18, 2017).
[207] On at least two occasions the Federal Register has experimented with publishing documents in a two-column format, but the change was not made permanent. *See* 66 Fed. Reg. 16,373 (Mar. 23, 2001); 67 Fed. Reg. 34,573 (May 14, 2002).
[208] FEDERAL REGISTER, *Reader Aids*, https://www.federalregister.gov/reader-aids/using-federalregister-gov.
[209] Telephone Interview with Agency #5 (May 3, 2017).

Several examples of challenging statutory text arose in our interviews and background research. The Internal Revenue Code, for instance, may have a provision that refers to another section which in turn refers to a definition elsewhere in the statute.[210] In these cases, just explaining what the law *is* when justifying the basis of a regulation may be daunting. Our interviews highlighted the challenges agencies face in this regard. "Any time you have a technical statute, a wordy statute, incomprehensible statute, it's hard to draft a regulation that makes that simple. But we try to do that. When you do simplify, sometimes the simplification itself, it's an interpretation, . . . [but] you can't do nothing."[211]

When faced with ambiguous statutory text, agencies may need to explain that the statute is ambiguous and propose an interpretation in its rulemaking. One agency we interviewed shared that they have received comments on those points.[212] Some level of confusion may be impossible to prevent, however. Another agency explained that they occasionally receive comments urging clarifications or changes to text that is statutory. In those cases, in response to comments the agency will explain the distinction between the statute and the agency's own interpretation or policy.[213]

d. *Subject Matter Complexity*

A related, cross-cutting challenge is the complexity of the subject matter an agency regulates. After all, agencies exist in large part to bring specialized, substantive expertise to bear on problems that Congress, as a generalist body, is not well suited to addressing.[214] And, agencies are likely to be regulating to solve hard questions—not easy ones.

Unsurprisingly, the complex or technical nature of the subject matter was cited in our interviews as the primary obstacle to plain writing. As one interviewee put it, "when you're dealing with [a technical subject or industry], there are some terms you have to use in regulations. It's impossible to break those down. [In those cases,] we are focusing on being as clear and concise as we can in drafting regulation."[215] Another agency attorney grappled with this same tension, saying:

> I see people trying to find 100% precision. I understand why. But there are times when I had to step back and go: I know what I'm writing because I'm the one writing it. But what's the intelligent [lawyer in this substantive area] supposed to do with it? Or when I'm working on a technical project, how do I explain to the associate general counsel what we are doing and why? . . . [You have to] stop

[210] *See generally* TAXPAYER ADVOCATE SERVICE, 2012 ANNUAL REPORT TO CONGRESS VOL. 1, *The Complexity of the Tax Code*, *available at* http://www.taxpayeradvocate.irs.gov/2012-annual-report/downloads/most-serious-problems-tax-code-complexity.pdf.
[211] Telephone Interview with Agency #5 (May 3, 2017).
[212] Telephone Interview with Agency #7 (May 31, 2017).
[213] Telephone Interview with Agency #6 (May 15, 2017).
[214] ESKRIDGE ET AL., *supra* note 8, at 936.
[215] Telephone Interview with Agency #4 (May 2, 2017).

> thinking about the precision of rules. People are overly precise because they are trying to figure out the substance, [which is] not easy.[216]

This unavoidable tension between genuinely difficult subjects and plain writing efforts have generated criticism that routine advice—the avoidance of jargon and passive voice, short sentences, etc.—is unsuited to legally effective or technically complex subjects.[217]

However, the statements from our interviewees suggest a more nuanced approach. Agency attorneys themselves are aware of the need to see both the forest and the trees when drafting regulatory text to ensure that each section is accurate and complete, while at the same time structuring the overall document to explain and guide readers through its subsidiary parts.

As noted in preceding sections, what is plain depends in part on the audience, and the vast majority of rules will have more than one. A provision with many technical terms may be sufficiently "plain" for sophisticated regulated audiences and their attorneys. Generalist judges and non-expert commenters, though, will likely need more straightforward summaries of complex regulations to understand its purpose and requirements. Many preambles already include one or more summaries of the overall rule. Undoubtedly, many rules contain additional summaries or capstone paragraphs introducing each section. Drafters may be well served by devoting their plain drafting efforts to these sections, rather than focusing on the rule's most technical or legal text that resists simplification.[218]

IV. Recommendations

Our review of seven agencies' plain language practices demonstrates their serious efforts to write and communicate regulatory requirements in a clear and accessible manner. Nevertheless, agency staff recognize a variety of obstacles to plain regulatory drafting. Some have developed innovative strategies to address these challenges. The recommendations below endorse some of these strategies, and suggest others that are likely to improve plain language performance. In general, agencies should endeavor to distinguish the multiple objectives that plain language advances, the audiences those objectives target, and the documents that are likely to reach those audiences.

The focus of these recommendations is on the procedural aspects of plainly drafting regulations and guidance, including the use of plain writing techniques where relevant. This procedural emphasis highlights the connection between plain language practices and core administrative law values, namely, public participation, the rule of law, effectiveness, and the protection of rights. Appropriate use of language that is plain for the relevant audience should advance each of these interests. Where our interviews revealed important considerations or best

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[216] Telephone Interview with Agency #5 (May 3, 2017).

[217] *See generally* Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51 (1994–95), *available at* http://www.plainlanguage.gov/whypl/arguments_in_favor/critics.pdf

[218] This is not to suggest that technical or legal sections of a rule that are complex should be written poorly, or that drafters should not be attentive to making them as straightforward as reasonably possible. But because different audiences have different needs, viewing different sections of the rule as geared toward these different audiences will likely lead to the greatest return on effort invested.

practices related to other aspects of plain language, such as meaningful public participation in rulemaking, we have sought to capture those as well.

Plain Writing Practices in General

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

Agency Internal Drafting Processes

2. Agencies should consider ways to incorporate plain language review into their existing regulatory and guidance drafting procedures. Raising the salience of plain language in these drafting processes is important because presenting regulatory purposes, reasoning, and requirements in a clear, accessible manner advances core administrative law goals. In particular, agencies should consider whether to designate one office involved in regulatory drafting to be responsible for reviewing documents for plain language compliance.

Plain Language Officials, Trainings, and Related Resources

3. Regulatory text is not covered by the Plain Writing Act, and thus does not strictly fall under the purview of agencies' plain language officials designated to oversee compliance. According to the OMB's Implementing Guidance, however, regulatory preambles are covered by the PWA, and therefore fall within plain language officials' responsibility. Because these officials typically hold positions in the agency related to communications and public outreach, rule writers should consider soliciting input from these individuals.
4. Agencies have developed numerous plain language trainings and related resources, including publications and videos. In addition to communicating the requirements of the Plain Writing Act and related executive guidance, and teaching fundamental plain writing techniques, agencies should consider producing trainings and resources devoted to:
    a. how plain language promotes the core administrative law goals of public participation, efficient compliance, judicial review, and the protection of rights; and,
    b. drafting processes, priorities, and techniques aimed at agency engineers, economists, and other technical experts involved in drafting rules or guidance who may not have significant exposure to writing for non-expert audiences.
5. Agencies should cover rulemaking preambles and regulatory guidance in their PWA compliance reports.

Plain Drafting in Regulatory Documents

6. Many agencies have internal requirements and manuals specifying how staff should write regulatory preambles and text. Such internal rules are most likely to effectuate plain drafting if they include guidelines providing:
    a. information on plain language techniques that the agency considers most relevant to its rulemaking practice.
    b. instructions for implementing plain language in NPRMs, such as:
        i. specifying those topics or questions on which the agency would most benefit from feedback from the general public and other non-specialist stakeholders.
        ii. requesting comments on whether the regulatory purposes and requirements are clear and understandable.
    c. a discussion of the primary plain language audience for each component of a proposed and final rule. While agencies must be attentive to each relevant audience in any given document, at a minimum:
        i. the preambles to proposed rules should include a summary that the general public and non-specialists can understand. Other subparts of the preamble may include language that is plain for sophisticated audiences where it is not feasible to describe the rule's purpose, reasoning, or requirements without legal or technical language, although these subparts may benefit from brief introductory summaries.
        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.

Plain Drafting in Guidance Documents

7. Agencies should issue regulatory guidance in the form of plain language summaries, Q&As, or other accessible formats for audiences that may find complex technical and legal details of regulations inaccessible, such as: regulated small business; regulatory beneficiaries, e.g., benefit recipients, consumers, protected classes; and private compliance offices, e.g. human resources departments.
8. Guidance written in plain language is essential to help less sophisticated parties understand their regulatory rights and obligations, but such guidance may not fully capture the complexity of underlying regulations or statutes and therefore leaves less sophisticated parties at a disadvantage compared to those who are more sophisticated. Therefore, when issuing plain language guidance, it may be appropriate for agencies to notify stakeholders that the guidance is not a substitute for the regulation, and that they should seek expert advice if they are not able to understand the regulation's requirements.