

# KEEPING IT SIMPLE

## MAKING REGULATORS WRITE IN PLAIN LANGUAGE

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by Vern McKinley

**AT A 1 JUNE 1998 NEWS CONFERENCE**, President Bill Clinton and Vice President Al Gore announced their plans for implementing a system of plain language for the writing of government regulations. The objective of plain language is to make regulations clearer and easier for the average person to understand. The President and Vice President directed executive departments and agencies to have all proposed and final rule-makings published in the Federal Register in plain language beginning 1 January 1999. Furthermore, they asked each agency to consider rewriting existing regulations in plain language when they have the opportunity and resources to do so.

Although the goal of this plan is laudable and the potential exists to reduce the regulatory burden, substantial federal agency resources should not be committed to a plain language rewrite of the current Code of Federal Regulations. An incremental rewrite of regulations that does not surreptitiously expand government power would at least do no harm and could lift some of the regulatory burden. But a massive rewrite could introduce substantive changes of regulations as well as distract political energy and attention from the need to actually eliminate costly regulations that restrict the freedom of individuals and enterprises.

### **PLAIN LANGUAGE—THE BASICS AND BENEFITS**

The plain language mandate is one of many in a series of recent regulatory and legislative process reforms. Those reforms focus on the manner in which regulations are developed and implemented. However, they do little to reduce the actual regulatory burden by eliminating legislative and regulatory mandates.

Credit for the current interest in plain language reform goes to Vice President Gore's National Partnership for Reinventing Government (Reinventing Government) initiative. That initiative is credited with eliminating thousands of pages of regulations, publishing customer service standards, reducing the number of positions within the federal government, and creating a government, as the goal of the initiative states, "that works better, costs less, and delivers results Americans care about."

At the 1 June 1998 press conference, Clinton and Gore set forth four relatively simple principles to follow in rewriting regulations into plain language, or plain English as it is sometimes called:

- Use common, everyday words, except for necessary technical terms.
- Use "you" and other pronouns.
- Use the active voice.
- Use short sentences.

Gore summarized these principles in a speech in August, 1998: "Short is better than long, active is better than passive, everyday terms are better than technical terms, and the sky will not fall if you decide to use a pronoun."

The general public might expect that it is second nature for most public servants to express themselves clearly. However, one culprit to blame for the current incomprehensible state of many regulations is the legal profession. As Richard Wydick observes in his book *Plain English for Lawyers*:

We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is (1) wordy, (2) unclear, (3) pompous, and (4) dull.

In his book, Wydick also recounts a four-century old remedy for such behavior that might still be a useful punishment for today's regulation writers:

In 1596, an English chancellor decided to make an example of a particularly prolix document filed in his court. The chancellor first ordered a hole cut through the center of the document, all 120 pages of it. Then he ordered that the person who wrote it should have his head stuffed through the hole, and the unfortunate fellow was led around to be exhibited to all those attending court at Westminster hall.

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A number of other countries have already implemented plain language in a variety of areas. In Canada, a writing consultant worked with the Alberta Department of Agriculture to revise a number of its forms. The consultant methodically reviewed the form's development—she contacted every staff member who used it, produced it and even those who printed it. According to a summary article by Professor Joseph Kimble in the 1996-97 edition of the *Scribes Journal of Legal Writing*, over a three year period the rewrites cut the error rate on these government forms in half. Because follow up calls to clarify information on the forms were no longer necessary, processing times dropped dramatically. These improvements saved staff time and millions of dollars in annual expenses.

The British postal service rewrote a number of its documents and British Telecom rewrote its phone bills in plain language. Those changes reduced error rates, complaints and reprocessing inquiries. In Australia, the Law Reform Commission of the province of Victoria redesigned its court documents such as court summons, and redrafted its Takeovers Code in plain language. The revision of court documents allowed the government to reassign two dozen employees and the new Takeovers Code is approximately half the length of the old one. That means readers can review it in one-half to one-third of the time required for the original version.

It seems logical that the benefits produced by plain language reforms in other countries would be realized when such reforms are adopted by American regulators. At their press conference, the President and Vice President noted the benefits from implementing plain language regulations: "By using plain language, we send a clear message about what Government is doing, what it requires, and what services it offers. Plain language saves the government and the private sector time, effort, and money." In August 1998, Gore elaborated on these themes in a subsequent speech: "Plain speaking helps to create understanding. Understanding helps to create trust. And trust in the promise of self-government is essential if we are going to redeem the promise of our representative democracy and make sure that we build a bright future."

Professor Kimble cites a number of studies that highlight that advantage of plain language. He also argues that plain language will save litigation costs caused by poor legal drafting that leads to ambiguous laws and regulations. For example, he cites a rewrite of the FCC's regulations for CB radios as evidence that plain language reduces litigation. He notes that in the twenty years since that rewrite, there has not been a single court case that resulted from the ambiguity of these plain language regulations. Finally, he argues plain language will reduce the disrespect for lawyers and the law that results from documents written in legalese.

#### A BRIEF HISTORY OF PLAIN LANGUAGE

Proving once again the maxim that truly new ideas are rare in Washington, writing regulations in plain language is not a new concept. As far back as the late 1970s, putting regulations in plain language was a high-profile issue. President Jimmy

Carter issued Executive Order (EO) 12044 on 23 March 1978 that noted that regulations "shall be as simple and clear as possible" and that each agency should assure that each significant regulation is "written in plain English and is understandable to those who must comply with it." In February 1981, the Reagan Administration revoked EO 12044 and replaced it with EO 12291 that focused on weighing the costs and benefits of regulatory action.

Quoting President Carter's plain English dictum, the Federal Communication Commission (FCC) rewrote its regulations on CB radios in plain language (47 C.F.R. Part 95). The FCC published a proposed rule in July 1977 and finalized the rule in April 1978. The preamble to the rewrite of the FCC regulation notes that the old rules "sound as if they were written only for lawyers and engineers to read."

The rewrite of the CB regulations moved from the old "lawyers' style" format to a question and answer format that is relatively common for plain language regulations. As noted in Table 1, the rewrite of the CB regulations moved away from headings like "Eligibility for station license," "Filing of applications," "Limitations on antenna structures," and "Authorized frequencies," and moved to headings like "Am I eligible to get a CB license?" "How do I apply for a CB license?" "How high can I put my antenna?" and "On what channels may I operate?" When writing or rewriting regulations, agency staff presumably should put themselves in the shoes of someone subject to the regulations and generate questions that person would be most likely to ask. Since the intended audience for CB regulations is the relatively nontechnical user, those regulations were particularly well suited to a rewrite in plain language. Joseph Kimble, in his article "Plain English: A Charter for Clear Writing" in the *Thomas M. Cooley Law Review*, notes that after its rewrite of the CB regulations, the FCC "was able to reassign five employees who had done nothing but answer questions."

#### BACK TO PLAIN LANGUAGE

Reinventing Government now includes plain language among its programs and the June 1998 press conference with the President and Vice President highlighted this effort. The initiative has also adopted a logo for the plain language movement—a turkey with a red slash emblazoned with the credo "No Gobbledygook"—and periodically presents an award to federal employees who rewrite regulations in plain language. For example, in June 1998, Gore presented the first of the "No Gobbledygook" awards to an employee of the Occupational Safety and Health Administration for rewriting a regulation on the use of dip tanks. In August 1998, he presented the second such award to two employees of the Bureau of Land Management for rewriting a regulation on geothermal power. The third such award, presented in September 1998, went to two General Services Administration employees who reduced a 194-word rule on government travel down to 45 words.

Other than to note the reduced length of these regulations, it is obviously too soon to quantify the results of these rewrites

Table 1

CB Radio Regulations—Sample Headings: Before and After

Before Proposed Rewrite	After Proposed Rewrite
95.401-Basis and purpose	95.401-What is the Citizens Band (CB) Radio Service?
95.411-Eligibility for station license	95.411-Am I eligible to get a CB license?
95.417-Filing of applications	95.413-How do I apply for a CB license?
95.429-License term	95.427-How long is my license valid?
95.431-Types of operation authorized	95.429-What kind of operation does my CB license allow?
95.433-Transfer of license prohibited	95.433-Can I transfer my CB license to another person?
95.437-Limitations on antenna structures	95.457-How high can I put my antenna?
95.455-Authorized frequencies	95.455-On what channels may I operate?
95.463-Emergency and assistance to motorist use	95.471-How do I use my CB station in an emergency or to assist a traveler?
95.469-Duration of transmissions	95.479-Do I have to limit the length of my communications?
95.475-Dispatch points and remote control	95.485-Can I operate my CB station by remote control?

Source: FCC Proposed Rulemaking (42 F.R. 37304-July 20, 1977).

into plain language. But Table 2 does set forth some examples of a number of agency regulations, before and after their rewrite in plain language, including some that received the No Gobbledygook award.

**IS IT WORTH THE EFFORT?**

The notion that regulations should be written in plain language certainly has appeal. There is simply no justification for creating a regulatory system that relies on regulations written in language that is only comprehensible by attorneys. As a result, people subject to regulations must employ attorneys to translate the regulations for them. But, it is also necessary to ask whether the justifications for plain language regulations are valid, if there are drawbacks to this reform and whether the benefits of reform are being oversold.

For example, proponents of plain language argue that because regulatory language becomes clearer and more precise, plain language reduces litigation costs. One example of this cited earlier is the FCC’s regulations for CB radios.

However, this example is not entirely persuasive. Few people would be willing to commit the time and resources required to bring suit against the FCC over operation of their CB radio. It is similarly unlikely that the FCC would expend the resources to bring suit against a small time CB radio operator. Furthermore, most federal litigation in the regulatory sphere focuses on issues other than the ambiguous nature or lack of clarity of regulatory language. Rather it usually focuses on the power of a regulatory agency to limit or allow certain activities. It may also focus on the allocation of powers in a regulatory state among administrative agencies and the executive, legislative and judicial branches. To the extent that litigation focuses on language, the issue is generally not whether a regulation is in plain language. For example, under the Americans with Disabilities Act, employers must make “reasonable” accommodations for certain workers. The term “reasonable” is indeed subject to interpretation, not because it does not have a clear meaning, but because there is a substantive policy disagreement over what is reasonable.

Table 2

Regulations in Plain English—Before and After

Environmental Protection Agency

Regulation on hazardous waste

Before Plain Language:

**Exemption for listed hazardous waste containing low concentrations of hazardous constituents and managed in landfills and monofills**

(a) Any hazardous waste listed under this subpart, any mixture of such a listed waste with a solid waste, or any waste derived from the treatment, storage or disposal of such a listed waste is exempt from regulation as a hazardous waste under parts 262-266 and 270 of this chapter if it meets the requirements in 261.37(b) and (d) (including the requirement that all hazardous constituents present in the waste be at or below the levels listed in appendix XI to this part and that the waste be disposed in a landfill or monofill, but not a land application unit). To maintain the exemption, the waste must satisfy the conditions in 261.37(e). Any such waste which also meets the requirements of 263.37(f) is also exempt from the requirements of part 268 of this chapter.

Source: Environmental Protection Agency, New Directions—A Report on Regulatory Reinvention, May 1997.

Occupation Safety and Hazards Administration

Regulation on Dip Tanks

Before Plain Language:

29 C.F.R. 1910.94(d)(1) General.

(i) This paragraph applies to all operations involving the immersion of materials in liquids, or in the vapors of such liquids, for the purpose of cleaning or altering the surface or adding to or imparting a finish thereto or changing the character of the materials, and their subsequent removal from the liquid or vapor, draining or drying. These operations include washing, electroplating, anodizing, pickling, quenching, dyeing, dipping, tanning, dressing, bleaching, degreasing, alkaline cleaning, stripping, rinsing, digesting, and other similar operations.

Source: The White House-Office of the Vice President, "Vice President Gore Presents First Award for Federal Writing in Plain Language," June 30, 1998.

Environmental Protection Agency

Regulation on hazardous waste

After Plain Language:

**What waste is eligible for this exemption?**

- (a) Three types of waste are eligible for exemption from the requirements in parts 262-266 and 270 of this chapter.
  - (1) Any hazardous waste listed in this subpart.
  - (2) Any mixture of such a listed waste with a solid waste.
  - (3) Any waste derived from treating, storing or disposing of a listed waste.
- (b) To be exempt, the waste must meet the requirements in 261.37(b) and (d).
- (c) To remain exempt, the waste must meet the requirements in 261.37(e).
- (d) If the waste also meets the requirements of 261.37(f), it also is exempt from the requirements of part 268 of this chapter.

Occupation Safety and Hazards Admin.

Regulation on Dip Tanks

After Plain Language:

29 C.F.R. 1910.122

- (a) When does this rule apply? This rule applies if you use a dip tank that contains a liquid other than water or a dip tank that generates a vapor. It applies if you use the tank or vapor to
  - (1) Clean;
  - (2) Coat;
  - (3) Alter the surface of; or
  - (4) Change the character of an object.

Table 2 cont'd

Regulations in Plain English—Before and After

General Services Administration

Federal Travel Regulations

Before Plain Language:

301-2.5(b) Indirect route or interrupted travel

When a person for his/her own convenience travels by an indirect route or interrupts travel by a direct route, the extra expenses shall be borne by him/her. Reimbursement for expenses shall be based only on such charges as would have been incurred by a usually traveled route. An employee may not use contract airline/rail passenger service provided under contract with the General Services Administration (see part 301-15, subpart B, of this chapter) for that portion of travel by an indirect route which is for personal convenience. Additionally, an employee may not use a U.S. government Transportation Request (GTR) (see section 301-10.2 of this chapter) or a contractor-issued charge card (see part 301-1, subpart C, of this chapter) for procurement of commercial carrier transportation services for that portion of travel by an indirect route which is for personal convenience. An employee may, however, use contract airline/rail passenger service, as well as a GTR or contractor-issued charge card, for portions of travel that are authorized to be performed at Government expense. (See section 301-11.5(a) of this chapter regarding reimbursement claims for travel that involves an indirect route.)

Source: The White House-Office of the Vice President, "Vice President Gore Presents Third Plain Language Award," September 24, 1998.

General Services Administration

Federal Travel Regulations

After Plain Language:

301.10.8 Indirect route or interrupted travel

What is my liability if, for personal convenience, I travel or use an indirect route?

If you travel on government business by anything other than the most direct, least cost route available, you must pay for the added costs so the taxpayers don't.

It is also true that the public has a degree of disrespect for lawyers and the law. Surveys of public opinion on the honesty and ethics of lawyers rate them quite low compared to other occupations, although they do still rank above car salesmen and congressmen. This lack of respect has grown over the last two decades. However, it is difficult to believe that rewriting federal regulations into plain language will materially alter this trend.

There is also some concern that agencies may use a rewrite of regulations in plain language as a subterfuge to change the meaning of these regulations. The Administrative Procedure Act, which governs the promulgation of regulations, requires publication of a notice of a proposed rule making in the *Federal Register*. That notice must include a statement of the

nature of the rule making, a reference to relevant legal authority and the terms or substance of the subjects involved.

Publication of this notice gives interested persons an opportunity to comment on proposed changes to regulations. It also requires a delay in effectiveness of regulations until thirty days after publication. However, for "good cause" an agency can forego the usual notice procedures and can also make the regulation effective immediately. Agencies should not use the good cause exception to forego notice and comment in the case of plain language rewrites. This will assure that interested parties have the opportunity to review the meaning of regulations and comment on any substantive changes within the required notice and comment period.

Past federal efforts to require plain language regulations, for

example during the Carter Administration, ultimately had little impact. Will Gore's high-profile effort suffer the same fate? In response to such concerns, Annetta Cheek of the Reinventing Government initiative notes that the "Carter Executive Order was not in plain language." That statement has some merit. EO 12044 was four pages long, but the references to writing clear regulations in plain English were contained in three very brief and vague sentences dispersed throughout the document.

In contrast, the materials released at the Clinton administration's June 1998 press conference were much briefer and set forth clear and straightforward principles to follow in writing regulations in plain language. Cheek also notes that since the time of the Carter EO "there's lots of use of plain language" and "at least a few statistics showing how it's cheaper all around to use clear language." Only time will tell whether these benefits will carry over to the cause of writing federal regulations in plain language. The only clear winners in the effort so far are the many consultants who have provided training for the various government agencies interested in the plain language initiative.

#### CONCLUSION

Plain language reforms should follow the admonition of the Hippocratic Oath: first, do no harm. If plain language reforms avoid reshaping the meaning of regulations and expanding their scope, they will at least meet this criterion. For regulations that directly affect individuals, such as the FCC's CB regulations, plain language rewrites can lift at least some of the burden of complying with those mandates. For regulations

applicable to businesses, plain language rewrites could reduce reliance on attorneys to interpret regulations, allowing businesses to redirect financial resources to more productive purposes.

However, it is quite another matter to argue that substantial federal agency resources should be applied to a plain language rewrite of the entire Code of Federal Regulations. It would be far better for advocates of reform to focus their energies on the substance of regulations, rather than being distracted by a reform that will keep intact the current, costly regulatory regime. A goal of Reinventing Government has been to reduce the number of positions within the federal government. It would be ironic if the initiative's effort to rewrite regulations in plain language stood in the way of reaching that goal.

#### SUGGESTED READINGS

- Joseph Kimble, "Writing for Dollars, Writing to Please," *The Scribes Journal of Legal Writing*, Vol. 6 (1996-97) 1-38.
- Joseph Kimble, "Answering the Critics of Plain Language," *The Scribes Journal of Legal Writing*, Vol. 5 (1994-95) 51-85.
- Joseph Kimble, "Plain English: A Charter for Clear Writing," *Thomas M. Cooley Law Review*, Vol. 9, Number 1 (1992) 1-58.
- Richard C. Wydick, *Plain English for Lawyers*, Carolina Academic Press, 1994.