The Plain Regulations Act, HR 3786

By Annetta Cheek

On January 18, Congressman Bruce Braley (D–Iowa) introduced the Plain Regulations Act. The Act would require federal agencies to use plain language in all new and substantially revised proposed and final regulations. In determining what plain language is, agencies would follow guidance issued by the director of the Office of Management and Budget under the Plain Writing Act of 2010.[1]

Congressman Braley also introduced the Plain Writing Act, which became law with strong bipartisan support. The original draft of that Act had covered regulations, but the provision was deleted during the legislative process because of opposition from several sources.

The same criticisms are certain to resurface now under the Plain Regulations Act. Let's examine them.

Criticism 1: A law requiring regulations to be written in plain language would be used to slow down or derail the regulatory process by those who oppose government's role in regulating.

Currently, many poorly written regulations languish on policymakers' desks awaiting an explanation. Then they are further delayed at the Office of Management and Budget while OMB examiners ask for explanations or clarification from the agency.

So rather than delaying regulations, the Plain Regulations Act will probably speed up the regulatory process because plain-language regulations are easier to review. Since the structure and language are clearer, it's easier to tell whether the underlying reasoning is sound and whether the regulation is both complete and accurate. The same characteristics that make a plain-language regulation easier for the regulated community to read and comprehend make it easier for the reviewers as well.

Besides, someone intent on delaying a regulation has other, more powerful tools to use, such as demanding additional analyses under the Paperwork Reduction Act, Executive Order 12866, and the Regulatory Flexibility Act.[2] Demands for additional economic analysis under one of these authorities are a much more effective delaying tactic.

And if regulations are delayed for lack of clarity, the remedy will be straightforward, unlike in cases of delay for other reasons. Remedying the unclear language will normally take much less time than performing additional economic analyses and will result in a superior product that causes fewer problems for everyone.

Criticism 2: It's impossible to measure compliance with the plain-language requirement. Measurement will further tie up the regulatory process.

There are three simple ways to check a regulation for clarity: (1) use software to spot obvious flaws, (2) use a checklist to catch problems with organization and flow, and (3) have a colleague review the edited product.

Readily available software that's part of most word-processing programs, or more sophisticated free-standing programs such as Stylewriter or Visible Thread, will identify fundamental problems like sentence length and passive voice. The Federal Plain Language Guidelines[3] or other document checklists[4] are handy tools for reviewing other issues. And a final review by a fresh pair of eyes should already be part of writing any rule.

The gold standard for testing a document's clarity is to test the draft with a sample of the public affected by the regulations. While that won't usually be possible with regulations, comments on the regulations.gov website will serve as a good substitute. Giving the public the right to demand clarity

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Finally, there is a simple moral imperative: citizens have a right to be able to understand the regulations that govern their lives, and the government has a corresponding duty to write those regulations in plain language.

HR 3786 deserves the same bipartisan support—in Congress and among the public—that the Plain Writing Act received. It should become law. ∎

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Dr. Annetta Cheek, an anthropologist, spent 25 years in the federal government, focusing on regulations. She spent four years as Vice President Gore's plain-language expert. She was the chair of the federal interagency plain-language group from its founding in 1995 until she retired in 2007 and is now the chair of the nonprofit Center for Plain Language, a federally tax-exempt corporation.

should result in more comments on whether draft regulations meet that goal. And with the ready availability of simple and cheap online surveying software such as Survey Monkey, it's possible to conduct some simple tests of regulatory language.

Finally, long-term public reaction to the regulation will show whether it communicates clearly. Does the agency get fewer questions about the regulations? Is the compliance rate higher? Are required forms filled out more completely and correctly? In the 1980s, when the FCC wrote the first plain-language regulation (on citizens band radios), the number of calls to the agency declined significantly. The agency was able to reassign all five staff members who had been answering questions from the public.

Criticism 3: Plain language is imprecise.

Much of what plain language proposes has nothing to do with precision. "In the event of default on the part of the buyer" is no more precise than "if the buyer defaults." Long, complicated sentences crammed with clauses and conditions don't make a complicated idea clearer. Proponents have demonstrated time and again that the verbose, convoluted traditional style of legal writing is unnecessary. You can see many examples on the plainlanguage.gov website.[5]

While there are no simple alternatives for terms like "good cause" and "reasonable doubt," terms of art are a tiny part of any legal document—less than 3 percent in one study that was published in this column.[6] The rest can be written in plain language, and even technical terms can often be translated into plain language with just a few extra words.

If anything, plain language is more precise than old-style legalese because it lays bare all the confusion and uncertainty that legalese tends to hide.[7] Anyone who has had experience writing in plain language knows that to be true.

Criticism 4: It's too hard to write regulations in plain language.

We hear this complaint from executive-branch attorneys who have spent their careers writing in the traditional federal bureaucratic style.

It is hard to write in plain language, without question. Explaining complex legal and technical provisions clearly is a challenge—whether it's in the traditional cumbersome style or in plain language. But since several plain-language regulations have already been codified,[8] evidently at least some federal attorneys can cope with the challenge.

What's more, while writing plainly may be hard work, it's not as hard as deciphering unclear language. Spending time at the drafting stage to ensure that regulations are clear saves more people more time and money and helps avoid litigation over the meaning of a regulation. So it's likely that the up-front costs of writing in plain language will be repaid many times over by the savings, not only to the regulated community but also to the agencies themselves. In a forthcoming book, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law*, Joseph Kimble summarizes 50 studies demonstrating the extraordinary benefits—including time and money saved—from communicating in plain language. Everybody wins.

FOOTNOTES

1. 5 USC 301 note (Westlaw current through Jan. 3, 2012); for the OMB guidance, see <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf>. All websites cited in this article were accessed March 19, 2012.
2. 5 USC 601 *et seq.* (Westlaw current through Jan. 3, 2012).
3. Federal Plain Language Guidelines <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/TOC.cfm>.
4. Document Checklist for Plain Language <http://www.plainlanguage.gov/howto/quickreference/checklist.cfm>.
5. Before-and-After Comparisons <http://www.plainlanguage.gov/examples/before_after/index.cfm>; see also Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J Legal Writing 25 (2008–2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Lessons%20in%20Drafting.pdf.
6. Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 Mich BJ 1136 (1985).
7. See Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J Legal Writing 1, 2 (1996–1997), available at <http://www.plainlanguagenetwork.org/kimble/dollars.htm>.
8. Table of Plain Language Regulations <http://www.plainlanguage.gov/usingPL/government/regstable.cfm>.