

Don't Stop Now: An Open Letter to the SEC

By Joseph Kimble

In January 1997, the Securities and Exchange Commission issued a proposed rule that would require plain English in certain parts of prospectuses—the front and back cover pages, the summary, and the risk-factors section. At the same time, the SEC issued the draft text of *A Plain English Handbook: How to Create Clear SEC Documents*.

Both the rule and the Handbook include many before-and-after examples. In addition, the SEC and several companies have worked together on two pilot programs that produced a number of documents written in plain English. (See the Plain Language columns for December 1996 and May 1997.) So much for the argument that some matters are too complex for plain English.

The proposed rule appears at 62 *Federal Register* 3152. The rule and the Handbook are also online at <http://www.sec.gov/news/plaineng.htm> (no period after htm).

Jonathan G. Katz
Secretary, Securities &
Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-6009

Dear Mr. Katz:

I write to strongly support the SEC's proposed rule to require plain English in prospectuses (File No. S7-3-97).

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. The Committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

First, a word about my background. I have taught legal writing for 13 years at Thomas Cooley Law School. Before that, I was a practicing lawyer. I am the managing editor of *The Scribes Journal of Legal Writing* and the editor of the "Plain Language" column in the *Michigan Bar Journal*. I have written extensively on legal writing and plain language. So I'm familiar with these issues.

Now, the SEC's proposed rule and *Plain English Handbook* do an excellent job of setting out the theory and practice of plain English. The rule disposes of the typical criticisms of plain English, and it sets out well-accepted principles for clear writing. The Handbook shows in more detail how to apply those principles. Both the rule and the Handbook contain many before-and-after examples of how disclosure documents can be improved.

Also, you have rightly taken a flexible approach to plain English. As the Handbook says (page 24), "we are presenting guidelines, not hard and fast rules you must always follow." Of course a writer may occasionally have a good reason for using the passive voice. Of course not every sentence has to have fewer than 25 words (especially if it ends with a list). Of course a technical term may be unavoidable at times (although the writer can still explain what it means). But the need for some flexibility does not begin to justify the current state of writing in prospectuses.

I urge the SEC: please, please do not be dissuaded by the lawyers. They always raise the same arguments. And for anyone who has fairly reviewed the plain-English literature, those arguments do not hold water. We have answered them again and again.

First, the argument that plain English is not precise enough for complex material. I have dealt with this argument, and so has the SEC in its proposed rule. In one demonstration project after another—in-

cluding the SEC's own pilot programs—we have shown that legal documents can be written in much plainer language without any loss of precision. I'll bet that the SEC got hardly any comments that its pilot-program plain-English documents were imprecise or inaccurate. That's proof that it can be done and that traditional documents are full of needless complexity.

If anything, plain English is more precise than traditional legal writing because plain English lays bare the ambiguities and uncertainties that traditional writing—with all its convoluted language and unnecessary detail—tends to hide. In every project that I have worked on, we have found that the original document was not nearly as precise as everyone had thought. So plain English improves not just the style of the document, but the substance as well.

Second, the argument that plain English is impossible because of the need to use technical terms. But true technical terms or terms of art are a tiny part of most legal documents—maybe one or two percent of the words. The rest can be written in plain English. And again, even technical terms can usually be explained for consumers.

Third, the argument that plain English is subjective. The truth is that all law is more or less subjective because law depends on language, and language will always involve uncertainty at the margins. What is *reasonable doubt*? What is *good cause*? Does *highway* include the shoulder and the traffic signs? Trying to define everything—as legal documents are inclined to do—is often self-defeating; it complicates the document and still leaves uncertainty.

Beyond that, the history of plain-English requirements shows that they are not too subjective for effective compliance. Nine states now have statutes that require plain English in consumer documents. On the whole, those statutes are pretty consistent with the elements of plain English in the

SEC's proposed rule. And by all accounts, those statutes have been successful.

I have a letter from the regulatory officer who reviews contracts for compliance in New Jersey. She writes:

The New Jersey Plain Language Law has proved to be extremely effective, and the review system is working well. After some initial unease, all segments of the legal profession, the legal publishing industry, other large suppliers of contracts, and individual businesses have cooperated fully. . . . Contrary to fears, no disruptions of business or major problems arose in any industry because of the new consumer-contract standards.

After 14 years in New Jersey, there have been exactly four lawsuits over noncompliance with the plain-language statute. The Minnesota statute has also been in place for 14 years. In Minnesota, there has not been a single lawsuit.

Finally, the argument that compliance should be voluntary. That would be nice, but it probably won't happen. As the proposed rule points out, the SEC has been trying for 30 years to get issuers to improve their prospectuses. Nothing changes. And unless the SEC follows through with its rule, I doubt that anything will change.

I'll end on a personal note. I have been involved in this effort for a long time. I have written that plain language is probably the most important law-reform issue that faces our profession. Even after four centuries of criticism, most legal writing remains too long, too dense, and too arcane. It's time to move lawyers off dead center. They owe it to the public to finally stand back, look at the evidence, learn the techniques, and stop copying the old forms. Otherwise, we'll continue to pay the enormous social costs of poor writing in business and government and law.

The SEC is doing the right thing. Don't stop now.

Sincerely,



Joseph Kimble
Professor

INTEREST RATES FOR MONEY JUDGMENTS

FOR COMPLAINTS FILED BEFORE JUNE 1, 1980

[See MCL 600.6013(2) & (3)]

- **Judgments Based on a Written Instrument**

If a written instrument has an interest rate over 6% per year, the rate specified (if legal when the instrument was signed) in the instrument shall be charged from the date of filing the complaint until date of satisfaction of judgment.

However, the interest rate after the date judgment is entered shall not exceed:

- 1) 7% per year compounded annually for any period of time between date judgment is entered and date of satisfaction of judgment which elapses before June 1, 1980.
- 2) 13% per year compounded annually for any period of time between date judgment is entered and date of satisfaction of judgment which elapses after May 31, 1980.

- **Other Money Judgments**

From date of complaint to June 1, 1980—6% per year simple interest. On or after June 1, 1980 to date of satisfaction—12% per year compounded annually.

FOR COMPLAINTS FILED ON OR AFTER JUNE 1, 1980 BUT BEFORE JANUARY 1, 1987

[MCL 600.6013(4)]

- **Judgments Based on a Written Instrument**

12% per year compounded annually unless instrument had a higher legal rate. However, after the date judgment is entered, the rate shall not exceed 13% per year compounded annually.

- **Other Money Judgments**

12% per year compounded annually from date of filing complaint to the date of satisfaction of the judgment.

FOR COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987

[MCL 600.6013(5) & (6)]

- **Judgments Based on a Written Instrument**

12% per year compounded annually unless instrument had a higher legal rate. However, after the date judgment is entered, the rate shall not exceed 13% per year compounded annually.

- **Other Money Judgments**

Interest rate shown below calculated at six-month intervals from the date of filing the complaint compounded annually.

Effective Date	Average Certified by State Treasurer	Statutory 1%	Interest Rate
January 1, 1987	6.66%	1%	7.66%
July 1, 1987	7.50%	1%	8.50%
January 1, 1988	8.39%	1%	9.39%
July 1, 1988	8.21%	1%	9.21%
January 1, 1989	9.005%	1%	10.005%
July 1, 1989	9.105%	1%	10.105%
January 1, 1990	8.015%	1%	9.015%
July 1, 1990	8.535%	1%	9.535%
January 1, 1991	8.26%	1%	9.26%
July 1, 1991	7.715%	1%	8.715%
January 1, 1992	7.002%	1%	8.002%
July 1, 1992	6.68%	1%	7.68%
January 1, 1993	5.797%	1%	6.797%
July 1, 1993	5.313%	1%	6.313%
January 1, 1994	5.025%	1%	6.025%
July 1, 1994	6.128%	1%	7.128%
January 1, 1995	7.38%	1%	8.38%
July 1, 1995	6.813%	1%	7.813%
January 1, 1996	5.953%	1%	6.953%
July 1, 1996	6.162%	1%	7.162%
January 1, 1997	6.340%	1%	7.340%
July 1, 1997	6.497%	1%	7.497%