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“WHAT WE’VE GOT HERE IS FAILURE TO COMMUNICATE”¹: THE PLAIN
WRITING ACT OF 2010

*Rachel Stabler*²

“The minute you read something and you can’t understand it you can almost be sure that it was drawn up by a lawyer. . . . If it’s in a few words and is plain and understandable only one way, it was written by a non-lawyer.”³

Lawyers have long had a damaging, but accurate, reputation for using language that the general public cannot understand. In the twentieth century, the plain language movement began fighting against the complicated legal language that has made lawyers the subject of this criticism. After decades of legislation against such language in the private sector, the movement finally reached the federal government when Congress passed the Plain Writing Act of 2010, requiring certain government communications to be written in simple, easy-to-understand language. With this Act, Congress had the opportunity to mandate plain language as a minimum for its citizens. However, a look at government communication published since the Act’s passage demonstrates that the government is still using the same complicated legal language it has always used.

This article identifies why the Act has not succeeded in stimulating the government to use plain language. Specifically, Part I briefly introduces the plain language movement. Part II starts by discussing the legislative history of the Act and continues by explaining the Act’s requirements. To illustrate how agencies are failing to comply with the Act, Part III closely examines samples of written government communications—including the preambles to regulations that garnered notable public attention. Given this failure, Part IV concludes that the Act has not been successful because it has no oversight and enforcement—instead relying on an uninformed public to enforce its provisions—and suggests changes that Congress can make to improve compliance with the Act.

1. COOL HAND LUKE (Warner Bros. 1967).

2. Lecturer in Law, University of Miami School of Law. This article benefitted greatly from the Legal Writing Institute’s 2013 Writers’ Workshop. Thanks are also due to Rosario Lozada Schrier, Rachel H. Smith, and Lauren Morse for comments on previous drafts and to Jordan Sarason for research assistance.

3. WILL ROGERS, WEEKLY ARTICLES: THE LAWYERS TALKING (Steven K. Gragert 6th ed., 1982) (1933–1935).

I. The Problem of Legal Language and the Rise of the Plain Language Movement⁴

Criticizing lawyers for the language they use is not a new phenomenon.⁵ Jonathan Swift complained of lawyers who spoke in "a peculiar cant and jargon of their own, that no other mortal can understand."⁶ Jeremy Bentham accused lawyers of "poisoning language in order to fleece their clients."⁷ Thomas Jefferson's critical view of lawyers' language can be seen in his comments about a bill that he had drafted:

I should apologize, perhaps, for the style of this bill. I dislike the verbose and intricate style of the English statutes. . . . You, however, can easily correct this bill to the taste of my brother lawyers, by making every other word a "said" or "aforesaid," and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means"⁸

Modern writers continue the criticism: "[L]awyers and legal scholars have not gone out of their way to make the law accessible to the ordinary person. Just the opposite: Legal professionals, like the priests of some obscure religion, too often try to keep the law mysterious and inaccessible."⁹ It is no surprise, then, that the public most commonly associates lawyers with the use of incomprehensible language.¹⁰

Rejecting lawyers' use of incomprehensible language, the Plain English movement was brought about by "the notion that people have a right to understand legal documents that affect their rights and obligations."¹¹ Much has been written about the history of this movement, which has its origins in the consumer movement of the twentieth century.¹² Beginning in the 1930s, legislators began

4. For a more thorough review of the highlights of the plain English movement, see JOSEPH KIMBLE, *WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW* 45–102 (2012).

5. See Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 520–22 (1985); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 346–47 (1988).

6. JONATHAN SWIFT, *GULLIVER'S TRAVELS* 287 (Rand McNally ed. 1912) (1726).

7. 5 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 236 (Bowring ed. 1843).

8. LETTER FROM THOMAS JEFFERSON TO JOSEPH C. CABELL, in 17 THE WRITINGS OF THOMAS JEFFERSON, at 417–18 (Albert Ellergy Bergh ed., 1903) (1817).

9. JAY M. FEINMAN, *LAW* 101 3 (3d ed. 2010).

10. Gopen, *supra* note 5, at 333; see also Benson, *supra* note 5, at 531 ("There is plentiful evidence that lawyers' language is hocus-pocus to non-lawyers, and that non-lawyers cannot comprehend it.").

11. PETER M. TIERSMA, *LEGAL LANGUAGE* 220 (1999); see also Annetta Cheek, *The Plain Regulations Act, HR 3786*, 91 MICH. B.J., May 2012, at 40, 41 (2012) ("[C]itizens have a right to be able to understand the regulations that govern their lives[.]"); Jane M. Siegel, *The Politics and Power of Plain Language*, 90 MICH. B.J., Feb. 2011, at 48–49 (2011) ("[U]se [of] plain language . . . is the right thing to do: a human right.").

12. See, e.g., Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CAN. BUS. L. J. 408, 408 (1981–1982); Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REV. 103, 105 (1994–1995); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 2 (1992); Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain*

making efforts to require disclosure of information to the consumer.¹³ Then in the mid-1970s, the goal shifted from simply requiring the disclosure of information to requiring that that information be communicated in a language the consumer could understand.¹⁴

This movement towards plain language began in the private sector in 1974, when Nationwide Mutual Life Insurance Co. and Sentry Life Insurance Co. began writing their insurance policies in simplified language.¹⁵ Then, in 1975, the movement gained momentum when Citibank of New York introduced a new promissory note written in plain language.¹⁶ For example, the original note's provision on delay in enforcement was fifty words long:

No failure or delay on the part of the Bank in exercising, and no failure to file or otherwise perfect or enforce the Bank's security interest in or with respect to any Collateral, shall operate as a waiver of any right or remedy hereunder or release any of the undersigned¹⁷

The revised note cut this provision to fourteen words: "You can delay enforcing any of your rights under this note without losing them."¹⁸

This promissory note seems to be the watershed moment for the movement; it was announced in a press conference, drawing significant attention from both electronic and print media.¹⁹ This announcement also drew the attention of a New York politician, who would go on to introduce a bill in the state legislature requiring plain language in consumer contracts.²⁰ New York passed the bill in 1978, becoming one of the first states to have a law on the books requiring the use of plain language.²¹ Since then, most states have followed suit, enacting laws requiring

Nonsense?, 78 LAW LIBR. J. 683, 686 (1986).

13. See Felsenfeld, *supra* note 12, at 411. For example, the Securities Act of 1933 required that issuers of securities disclose material information to potential investors. See *id.*; 15 U.S.C. §§ 77a-77aa (2006). Other laws requiring similar disclosures include the Retail Installment Sales Acts of the 1950's and the Truth in Lending Act of 1969, 15 U.S.C. §§ 1601-1667f (2006). *Id.*

14. Felsenfeld, *supra* note 12, at 412; Lloyd, *supra* note 12, at 686.

15. Carl Felsenfeld, *The Future of Plain English*, 62 MICH. B.J., Nov. 1983, at 942, 942 (1983); George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J., Nov. 1983, at 945, 946 (1983).

16. Friman, *supra* note 12, at 105; KIMBLE, *supra* note 4, at 64; see also Gertrude Block, *Plain Language Laws: Promise v Performance*, 62 MICH. B.J., Nov. 1983, at 950, 951 (1983).

17. TIERSMA, *supra* note 11, at 258.

18. *Id.* at 261.

19. See Duncan MacDonald, *The Story of a Famous Promissory Note*, 10 SCRIBES J. LEGAL WRITING 79, 84 (2005-2006).

20. See *id.*; Friman, *supra* note 12, at 105. As initially introduced, the bill required all promissory notes to be written in the form of Citibank's note, which Citibank opposed. MacDonald, *supra* note 19, at 85. The law was revised to require that consumer contracts of \$50,000 or less be "[w]ritten in a clear and coherent manner using words with common and every day meanings" and be "[a]ppropriately divided and captioned by its various sections." Friman, *supra* note 12, at 105-06.

21. Friman, *supra* note 12, at 105; Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 2 (1992). By the time the New York statute was enacted, Minnesota and Maryland had already passed laws requiring plain language in insurance policies. See Friman, *supra* note 12, at 105; George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 347 (1988); Hathaway,

plain language in consumer or insurance contracts.²²

Federal efforts requiring that communication be in plain language began also in the mid-1970s.²³ In 1974, Congress passed the Employee Retirement Income Security Act of 1974, requiring that employee plans be "written in a manner calculated to be understood by the average plan participant."²⁴ One year later, it passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, requiring "simple and readily understood language" in warranties for consumer products.²⁵

These initial efforts only reached the private sector.²⁶ However, that changed in 1978 when President Carter issued Executive Order 12,044, a directive to executive agencies about improving regulations.²⁷ The order sought to make regulations "as simple and clear as possible" by requiring that agencies write significant new regulations in plain English so that those who were required to comply with the regulations would be able to understand them.²⁸ The order also directed agencies to review their existing regulations to determine whether the language needed to be simplified or clarified.²⁹ Unfortunately, this order provided no real guidance as to what "plain English" was or how to achieve it,³⁰ and proved largely ineffective.³¹ President Reagan revoked the order shortly after taking office, replacing it with an order that required a cost-benefit analysis of regulations.³² Efforts to incorporate plain language into government communications then waned.³³

President Clinton revived plain language efforts at the federal level, providing

supra note 15, at 945, 947.

22. In his 1992 article, Kimble compiled a comprehensive appendix listing plain language laws by state. See Kimble, *supra* note 21, at 32-37 (Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin). Since 1992, several additional states have enacted laws requiring the use of plain language in insurance contracts. See, e.g., COLO. REV. STAT. § 10-4-633.5 (2013) (insurance contracts); N.H. REV. STAT. ANN. § 4-20-H:5 (2012) (insurance contracts); see also R.I. GEN. LAWS § 27-74-11 (2010) (discount medical plan organization contracts).

23. See Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain Nonsense?*, 78 LAW LIBR. J. 683, 686 (1986).

24. *Id.*; 29 U.S.C. § 1022(a) (2006).

25. Lloyd, *supra* note 23, at 686; 15 U.S.C. § 2302(a) (2006).

26. Lloyd, *supra* note 23, at 686.

27. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

28. *Id.*

29. *Id.*

30. See *id.*

31. Betsy A. Bowen, Thomas M. Duffy & Erwin R. Steinberg, *Analyzing the Various Approaches of Plain Language Laws*, in PLAIN LANGUAGE: PRINCIPLES AND PRACTICE 20-21 (Erwin R. Steinberg ed., 1991). Bowen, Duffy, and Steinberg give five reasons for the lack of response to Carter's order: 1) the order lacked criteria for determining when "plain English" was used; 2) those writing regulations failed to recognize that they use a special language; 3) the order only applied to executive agencies, not independent agencies; 4) the order was only in effect for three years; and 5) the order did not apply to the private sector. See *id.*

32. See Exec. Order 12,291, 3 C.F.R. 127 (1982). Regardless, Carter's order was set to expire on April 30, 1981, just a few months after Reagan revoked it. See Exec. Order 12,221, 3 C.F.R. 266 (1981).

33. See Bowen, Duffy & Steinberg, *supra* note 31, at 21.

better guidance about the meaning of “plain language” and expanding the scope of the plain language mandate. First, in 1993, he issued an executive order that directed agencies to write regulations so that they would be simple and easily understood.³⁴ Then, in 1998, Clinton issued a memorandum to the heads of executive departments and agencies.³⁵ This memorandum, part of an effort to make government communications more “responsive, accessible, and understandable,” required the government to use plain language.³⁶ After noting that plain language requirements would vary based on a document’s intended audience, Clinton set out the characteristics of plain language documents as those documents that have “logical organization [and] easy to read design features” and use “common every day words, except for necessary technical terms; ‘you’ and other pronouns, the active voice, and short sentences.”³⁷

Clinton broadened the scope of his plain language mandate beyond the “significant regulations” targeted in the Carter order. The Clinton memorandum required 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.”³⁸ As for regulations, the memorandum required agencies to use plain language in all proposed and final rulemaking and further encouraged agencies to rewrite existing regulations in plain language.³⁹

Before this memorandum, a few agencies like the Securities and Exchange Commission (“SEC”) were already making their own efforts to communicate with the public using plain language by challenging employees to “find the worst piece of ‘gobbledygook’ and transform it into plain English.”⁴⁰ In addition to this contest, the SEC began a project that offered a shorter review period for disclosure documents written in plain English.⁴¹ The Veterans Benefits Administration was also making efforts to use plain language; it trained 800 employees to write for the general public instead of bureaucrats or lawyers.⁴²

After the Clinton memorandum, a few more agencies initiated efforts to communicate in plain language. The Social Security Administration began a plain language initiative in 1999, which included publishing a plain language desk reference book and training employees who corresponded with the public.⁴³ The Department of Commerce formed a committee to circulate information about plain

34. Exec. Order 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2012).

35. Memorandum on Plain Language in Government Writing, 34 WEEKLY COMP. PRES. DOC. 1010 (June 1, 1998).

36. *Id.*

37. *Id.*

38. *Id.* Agencies had until January 1, 2002, to ensure that all such documents created before this date were in plain language. *Id.*

39. *Id.*

40. PRESS RELEASE 97-59, CHAIRMAN ARTHUR LEVITT ISSUES CHALLENGE TO SEC STAFF TO HEIGHTEN AWARENESS OF NEED FOR PLAIN ENGLISH (1997), available at <http://sec.gov/news/press/pressarchive/1997/97-59.txt>. The winner received a \$250 U.S. Savings Bond. *Id.*

41. KIMBLE, *supra* note 4, at 56.

42. Annetta Cheek, *Plain Language in the Federal Government*, 79 MICH. B.J., Jan. 2000, at 44, 44 (2000).

43. *Id.* at 45.

language among the department’s various agencies; it also recorded a plain language training program that it made available to its employees and other agencies.⁴⁴ The Federal Aviation Administration issued an order providing plain language guidelines and directing employees to “communicate clearly, effectively, and in plain language that is readily understood by all.”⁴⁵

Although a few agencies were making efforts towards plain language, the progress was slow.⁴⁶ In 2003, a group of federal employees who “had become frustrated by years of struggling to get their own agencies to think about their readers” founded the Center for Plain Language in Washington, D.C.⁴⁷ The Center for Plain Language is a non-profit organization that “wants government and business documents to be clear and understandable.”⁴⁸ After three years of working towards this goal with limited success, the Center took a new approach: getting Congress to pass a bill requiring the government to use plain language.⁴⁹

II. The Plain Writing Act of 2010

A. Legislative History

In 2007, Congress underwent significant change. After twelve years of a Republican-controlled Congress, Democrats gained control of both houses of Congress.⁵⁰ In the middle of this contentious environment, Representative Bruce Braley—with the encouragement of the Center for Plain Language⁵¹—was able to gather bipartisan support in sponsoring a bill in the House of Representatives on September 17, 2007, titled the “Plain Language in Government Communications Act of 2007.”⁵² After a favorable report from the Committee on Oversight and

44. *Id.* at 45–46.

45. DEP’T OF TRANSP., FEDERAL AVIATION ADMINISTRATION ORDER 1000.36 (2003), available at http://www.faa.gov/documentlibrary/media/order/branding_writing/order1000_36.pdf.

46. See Cheek, *supra* note 42, at 44 (noting that “the federal government [wa]s inching towards a plain language standard”); see also H.R. REP. NO. 110–580, at 3 (2008) (noting that “efforts to promote plain language have waned”); S. REP. NO. 110–412, at 3 (2008) (noting that “the plain language initiative has been implemented unevenly”).

47. Annetta L. Cheek, *The Plain Writing Act of 2010*, 90 MICH. B.J., Oct. 2011, at 52, 52 (2011).

48. CENTER FOR PLAIN LANGUAGE, ABOUT THE CENTER, <http://centerforplainlanguage.org/about/> (last visited July 12, 2012).

49. Cheek, *supra* note 47, at 52; KIMBLE, *supra* note 4, at 57.

50. Shailagh Murry & Jonathan Weisman, *Democrats Take Control on Hill*, WASH. POST., Jan. 5, 2007, at A01.

51. Cheek, *supra* note 47, at 52.

52. H.R. 3548, 110th Cong. (2007). In 2006, Representative Candice Miller and Representative Stephen Lynch made an initial attempt to pass a plain language law for the government when they introduced the “Regulation in Plain Language Act.” H.R. 4809, 109th Cong. (2d Sess. 2006). The bill would have amended the Paperwork Reduction Act to require that agencies write regulations in plain language. *Id.* It also required agencies to designate an agency coordinator, train employees in plain language, and report to Congress periodically on their implementation of plain language. *Id.* Despite a favorable report from the Committee on Government Reform, the bill did not pass before the close of the 109th Congress. H.R. REP. NO. 109–660, at 1 (2006).

Government Reform,⁵³ the House passed its version of the bill on April 14, 2008, by a vote of 376-1.⁵⁴ Senator Daniel Akaka introduced a companion bill in the Senate on November 1, 2007, with the support of both Republican and Democratic cosponsors.⁵⁵ The Senate version of the bill also received a favorable report from the Committee on Homeland Security and Governmental Affairs.⁵⁶ However, the bill never made it past the Senate because Senator Robert Bennett placed a hold on the bill.⁵⁷ It is unclear why he placed this hold—perhaps because it was not limited to English-language documents,⁵⁸ or because he was concerned that it would affect the Federal Election Commission's and the Election Assistance Commission's ability to use precise legal terms.⁵⁹ Whatever the reason, Senator Bennett did not lift the hold before the end of the 110th Congress.⁶⁰

After this initial unsuccessful attempt, the bill was introduced again in the 111th Congress.⁶¹ Representative Braley introduced the bill in the House on February 10, 2009, which referred the bill to the Committee on Oversight and Government reform.⁶² While the bill was in committee, Representative Edolphus Towns introduced an amendment that changed several provisions of the bill: 1) it changed the scope of the bill by narrowing the definition of covered documents; 2) it added provisions clarifying the responsibilities of the Office of Management and Budget ("OMB"); 3) it changed the reporting requirement so that agencies would post their reports online instead of sending them to Congress; and 4) it added a provision to the bill clarifying that the act would not be judicially reviewable.⁶³ With these changes, the committee reported the bill favorably and recommended that it pass.⁶⁴ The bill then returned to the House floor for a vote on March 17, 2010. Although it faced more opposition than the 2008 version, it still passed by an overwhelming margin of 386-33.⁶⁵

Senator Akaka introduced the bill in the Senate on March 11, 2009.⁶⁶ The Senate again referred the bill to the Committee on Homeland Security and Governmental Affairs, which again reported the bill favorably and recommended that it pass.⁶⁷ As with the House version, the Senate version of the bill was

53. See H.R. REP. No. 110-580, at 5 (2008).

54. 154 CONG. REC. H2245 (daily ed. Apr. 14, 2008).

55. See S. REP. No. 110-412 (2008).

56. See S. REP. No. 110-412, at 1 (2008).

57. Cheek, *supra* note 47, at 52.

58. See *id.*

59. See Terry Kivlan, *Utah Senator Stalls 'Plain Language' Bill*, GOV'T EXEC. (Sept. 15, 2008), <http://www.govexec.com/oversight/2008/09/utah-senator-stalls-plain-language-bill/27669/>.

60. Cheek, *supra* note 47, at 52.

61. A few changes had been made to the bill since the House passed it in the previous Congress. See *infra* note 79.

62. H.R. REP. No. 111-432 (2010).

63. See *id.* at 4-6.

64. See *id.* at 1.

65. See 156 CONG. REC. H1560 (daily ed. Mar. 17, 2010). In comparison, the 2008 version only received a single nay vote. *Supra* note 54.

66. S. 574, 111th Cong. (2009).

67. S. REP. No. 111-102 (2009).

amended while in committee to specify that the act would not be judicially reviewable.⁶⁸ Although Senator Bennett placed another hold on the bill, he lifted that hold after Representative Braley personally met with him and agreed to make some minor changes to the bill.⁶⁹

A new version of the House bill was introduced on the Senate floor on September 27, 2010.⁷⁰ The most notable change the Senate made to the House version of the bill was redefining the term “plain writing.”⁷¹ The initial version defined the term as “writing that the intended audience can readily understand and use because that writing is clear, concise, well-organized, and follows other best practices of plain writing.”⁷² The Senate’s amended version defined the term in a way that no longer focused on the reader’s ability to understand and use the language. Instead, the Senate defined “plain writing” as follows: “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience.”⁷³ The revised bill passed the Senate the same day by unanimous consent.⁷⁴

Two days later, the amended version returned to the House for debate, where, unlike any previous versions, the bill faced vocal opposition. Representative Jason Chaffetz spoke in opposition to the bill, his chief concern being the cost of the bill. Although he agreed with the goal of plain writing, he argued that the definition of “plain writing” was not clear and that the bill was therefore unlikely to accomplish its purpose or justify the projected cost: “Federal agencies that deal with the public should obviously be communicating the benefits and services they provide in clear, understandable language. It should not require legislation to accomplish that goal, and it is not clear how the legislation would actually achieve that.”⁷⁵

68. *See id.* at 6.

69. Press Release, United States Congressman Bruce Braley, Senate Passes Braley Plain Language Act (Sept. 28, 2010), available at <https://braley.house.gov/press-release/senate-passes-braley-plain-language-act>; *see also* Cheek, *supra* note 57, at 52.

70. *See* 156 CONG. REC. S7559 (daily ed. Sept. 27, 2010).

71. *See id.* The Senate also made two other changes. First, it adjusted the coverage of the plain writing requirement from documents “relevant to” obtaining government benefits or filing taxes, to documents “necessary for” obtaining benefits or filing taxes. *See id.* Second, it added a cross-reference in the section on agency websites. *See id.*

72. *Id.*

73. *Id.*

74. *See id.*

75. 156 CONG. REC. H7314–15 (daily ed. Sept. 29, 2010). The projected cost of the Act is \$5 million per year. H.R. REP. NO. 111–432, at 8 (2010). According to the report, this cost would be “to implement the additional employee training and reporting requirements.” *Id.* However, many proponents of plain language argue that using plain language actually saves money. *See, e.g.,* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FINAL GUIDANCE ON IMPLEMENTING THE PLAIN WRITING ACT OF 2010, at 1 (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf> [*hereinafter* “OMB GUIDANCE”] (noting that “plain writing can . . . save money.”); KIMBLE, *supra* note 4, at 103–33. Indeed, many of the remarks made in Congress in support of the Act noted the money-saving aspect of plain language. *See, e.g.,* 156 Cong. Rec. H7315 (daily ed. Sept. 29, 2010) (remarks by Rep. Braley that “[t]he use of clear, easy-to-understand language in government paperwork will . . . save taxpayers millions of dollars. . . . Replacing [complex forms, letters, and notices] with plain language will . . . save time that agencies currently spend answering questions about what documents mean.”); 156 Cong. Rec. H1540 (daily ed. Mar. 17, 2010) (remarks by Rep. Towns stating that “[t]he use of plain language is a commonsense approach to saving the Federal Government money.”).

Representative Chaffetz's remarks may have swayed some votes—more representatives voted against this bill than any of the previous versions.⁷⁶ Nonetheless, the bill still passed with a strong majority of 341-82.⁷⁷ President Obama—who co-sponsored the earlier version of the Act during his term as a senator in the 110th Congress⁷⁸—signed the bill into law on October 13, 2010.⁷⁹

B. The Act's Purpose and Provisions

1. Purpose

As stated in the Act itself, the Act's 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."⁸⁰ The legislative history of the Act supports this stated purpose. In his remarks supporting the bill when it was initially introduced in the House, Representative William Lacy Clay described the bill as "legislation aimed at making the government more open and accessible," and described the aim of the bill as "mak[ing] information more accessible by requiring agencies to write documents in a way that is clear and easily understood."⁸¹ Representative Braley made similar remarks,⁸² as did Representative Towns⁸³ and Representative Brian Bilbray.⁸⁴

2. Plain Writing Requirement

As the name implies, the Plain Writing Act of 2010 requires that agencies use "plain writing" in certain documents beginning on October 13, 2011—one year after the Act was enacted.⁸⁵ The Act applies only to covered documents, and it defines a "covered document" as one that "(i) is necessary for obtaining any Federal Government benefit or service or filing taxes; (ii) provides information about any

76. Compare 156 CONG. REC. H7371 (daily ed. Sept. 29, 2010) (82 nays) with 156 CONG. REC. H1560 (daily ed. Mar. 17, 2010) (33 nays) and 154 CONG. REC. H2245 (daily ed. Apr. 14, 2008) (1 nay).

77. 156 CONG. REC. H7371 (daily ed. Sept. 29, 2010)

78. See S. 2291, 110th Cong. (2007).

79. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861. The Act differs in several ways from its predecessors introduced in the 110th Congress. See *infra* notes 101, 105, 114. Additionally, the earlier version of the Act included a number of provisions regarding use of the English language and had a more complicated process for developing plain writing guidelines. See 154 Cong. Rec. H2237 (daily ed. Apr. 14, 2008).

80. Plain Writing Act § 2.

81. See 156 Cong. Rec. H1538 (daily ed. Mar. 17, 2010).

82. See 156 Cong. Rec. H1539 (daily ed. Mar. 17, 2010) ("[T]his bill is so important[] because it gives the government the responsibility to communicate effectively with the citizens that we serve.").

83. See 156 Cong. Rec. H1540 (daily ed. Mar. 17, 2010) (describing the bill as "sunshine legislation" and stating that "[r]equiring government documents to be written clearly will make it easier for Americans to understand government communications, and it will make the Federal Government more accountable").

84. See *id.* ("I call on all of us to vote together to support this bill and use it as a marker for more progress at clarifying and opening up the government process and allowing the average citizen to participate.").

85. See Plain Writing Act § 4(b).

Federal Government benefit or service; or (iii) explains to the public how to comply with a requirement the Federal Government administers or enforces.”⁸⁶ This definition “is intended to broadly encompass written communications with the public.”⁸⁷ Although the Act does not require agencies to go back and rewrite all covered documents that existed before the Act, it does require agencies to use plain writing in all covered documents that they issue or substantially revise going forward.⁸⁸ Some specific examples of covered documents that can be found in the Act’s legislative history include instructions that the Department of Health and Human Services issues regarding the Medicare prescription drug program, tax documents from the Internal Revenue Service, letters from the Social Security Administration, and notices from the department of Veterans Affairs.⁸⁹

Although the Act was meant to broadly include communications, it does not include one of the most prominent forms of government communication: regulations.⁹⁰ Nonetheless, even though the act specifically excludes regulations from its coverage, the OMB Guidance clarifies that this provision does not exempt rulemaking preambles, which must be written in plain language.⁹¹

The Act defines “plain writing” as “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience.”⁹² Although the Act does not provide any further information on what “plain writing” is or how to achieve it, the Act does direct OMB to provide guidance,⁹³ which the OMB did on April 13, 2011.⁹⁴ This guidance itself does not provide any more information on the definition of “plain writing” beyond stating that “[s]uch writing avoids jargon, redundancy, ambiguity, and obscurity.”⁹⁵ Rather, the OMB Guidance refers agencies to the Federal Plain Language

86. *Id.* at § 3(2)(A).

87. S. 574, 111th Cong., § 5 (2009). The OMB Guidance provides examples of covered documents for each category named in the Act. For subsection (i), documents “necessary for obtaining any Federal Government benefit or service or filing taxes,” the OMB provides the example of tax forms or benefit applications. OMB GUIDANCE, *supra* note 75, at 5. For subsection (ii), documents that “provide[] information about any Federal Government benefit or service,” the OMB provides the example of handbooks for Medicare or Social Security recipients. *Id.* Finally, for subsection (iii), documents that “explain[] to the public how to comply with a requirement that the Federal Government administers or enforces,” the OMB gives the example of “guidance on how to prepare required reports or comply with safety requirements.” *Id.*

88. *See* Plain Writing Act § 4(b).

89. *See* 156 Cong. Rec. H1539–40 (daily ed. Mar. 17, 2010).

90. Plain Writing Act § 3(2)(C). New bills that would require plain writing in federal regulations were introduced in the 112th Congress, but those bills died in committee. *See* H.R. 3786, 112th Cong. (2012); S. 2237, 112th Cong. (2012). Versions of those bills have again been introduced in the 113th Congress, and have again been referred to committees. *See* H.R. 1557, 113th Cong. (2013); S. 807, 113th Cong. (2013). The House bill was referred to the Committee on the Judiciary and to the Committee on Oversight and Government Reform on April 15, 2013. The Senate bill was referred to the Committee on Homeland Security and Governmental Affairs on April 24, 2013.

91. *See* OMB GUIDANCE, *supra* note 75, at 5.

92. Plain Writing Act § 3(3).

93. *See id.* at § 4(c)(1).

94. *See* OMB GUIDANCE, *supra* note 75, at 5.

95. *Id.* at 1. However, the OMB Guidance does clarify that “[f]or the purposes of the Act, the ‘public’ means anticipated readers or recipients, including any external stakeholders affected by your agency’s mission or with whom your agency is seeking to communicate.” *Id.* It also directs agencies preparing specialized or technical publications to consider the intended audience’s expertise in the subject of the publication. *Id.*

Guidelines published by the Plain Language Action and Information Network (“PLAIN”),⁹⁶ “the official interagency working group designated to assist in issuing plain writing guidance.”⁹⁷ Section II.B.6, *infra*, discusses these Guidelines in detail.

3. Reporting Requirements

In addition to the chief requirement that agencies use plain writing, the Act also requires that agencies provide periodic compliance reports.⁹⁸ Each agency was required to publish an initial implementation report, describing the agency’s plan to comply with the Act, by July 13, 2011, nine months after the date of the Act.⁹⁹ After the initial report, agencies must publish annual reports every year beginning eighteen months after the date of the Act, or every year by April 13.¹⁰⁰ Agencies must post these reports on their websites.¹⁰¹ Although the Act itself provides little guidance on what should be in these reports,¹⁰² the OMB suggests that agencies follow a template on the PLAIN website for both the initial and annual reports.¹⁰³ Additionally, the OMB requires that agencies provide a means for stakeholders and the public to comment on the reports.¹⁰⁴

4. General Compliance Requirements

The Act imposes a number of other general requirements as “preparation for

96. This should be distinguished from the Plain Language Association International, which also goes by “PLAIN.” See PLAIN LANGUAGE ASSOCIATION INTERNATIONAL, <http://www.plainlanguagenetwork.org/> (last visited May 11, 2014).

97. OMB GUIDANCE, *supra* note 75, at 3. PLAIN is a group of “federal employees dedicated to the idea that citizens deserve clear communications from government.” PLAIN LANGUAGE ACTION AND INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES, March 2011, Rev. 1 (2011), available at <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/index.cfm>.

98. Plain Writing Act § 5.

99. *Id.* at § 5(a). These reports will be referred to as the “implementation reports.”

100. *Id.* at § 5(b). These reports will be referred to as the “annual compliance reports.”

101. *Id.* at § 5. As initially drafted, the Act required that the agencies provide their reports to Congress; the amendments that Representative Towns introduced while the Act was in committee changed this to the current requirement that agencies post the reports online. See *supra* note 63. The earlier Plain Language in Government Communications Act of the 110th Congress included a reporting requirement similar to the pre-amendment version, in that it required that agencies give their reports to either Congressional committees (the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House) or the OMB. See H.R. 3548, 110th Cong. (2007); S. 2291, 110th Cong. (2007). The timing of these reports also differed from the earlier act, which required the initial report within six months. *Id.* Finally, the earlier act also required annual reports only for the first two years after the act was passed; after the first two years, compliance reports were required only once every three years. *Id.*

102. See Plain Writing Act § 5. For the initial implementation report, the Act merely says that “each agency shall publish . . . a report on agency compliance with the requirements of this Act.” *Id.* at § 5(a). The Act provides even less guidance for what should be included in this annual compliance report, only stating that agencies should publish “a report on agency compliance with the requirements of this Act.” *Id.* at § 5(b).

103. OMB GUIDANCE, *supra* note 75, at 4–5. The template can be found at <http://www.plainlanguage.gov/plLaw/law/index.cfm> (last visited Aug. 27, 2013).

104. OMB GUIDANCE, *supra* note 75, at 5–6.

implementation of plain writing requirements.”¹⁰⁵ Agencies must designate one senior official to oversee the Act’s implementation.¹⁰⁶ According to the OMB Guidance, this senior official should “have cross-cutting responsibilities within the agency; oversee agency programs, personnel, technology, regulations, or policy; and be involved in agency communications.”¹⁰⁷ The agency should also designate at least one point-of-contact that will receive and respond to input from the public about how the agency is implementing the Act and about the agency’s reports.¹⁰⁸

Each agency must also inform its employees about the Act’s requirements and train those employees on how to write in plain language.¹⁰⁹ According to the OMB Guidance, agencies should target new employees and “[e]mployees who write or edit documents covered by the Act”¹¹⁰

Further, each agency must “create and maintain a plain writing section of the agency’s website . . . that is accessible from the homepage of the agency’s website.”¹¹¹ This website should inform the public about the agency’s compliance with the Act and should publish the agency’s initial and annual compliance reports.¹¹² It should also provide a means for the public to comment on the agency’s compliance and a means for the agency to respond to those comments.¹¹³

5. Enforcement

Finally, one crucial feature of the Act is that it specifies that there is “no judicial review of compliance or noncompliance” with the Act and that the Act does not “create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action.”¹¹⁴ Although it was not part of the initial version of the bill introduced in Congress, both the Senate and House committees amended the bill to include it.¹¹⁵ No discussion of this enforcement provision took place on the congressional floor, either when it was introduced without the provision or when it was voted on after the provision had been added in committee. The only mention of the reason for this provision appears in the Senate Committee Report,

105. Plain Writing Act § 4(a). None of the requirements described in this paragraph were included in the Plain Language in Government Communications Act of the 110th Congress. See H.R. 3548, 110th Cong. (2007); S. 2291, 110th Cong. (2007).

106. Plain Writing Act § 4(a)(1)(A).

107. See OMB GUIDANCE, *supra* note 75, at 4. The OMB instructed agencies to email the name(s) of the senior official to the OMB for publication on the PLAIN website. *Id.*

108. Plain Writing Act § 4(a)(1)(F).

109. *Id.* at § 4(a)(1)(B)–(C).

110. OMB GUIDANCE, *supra* note 75, at 3.

111. Plain Writing Act § 4(a)(1)(E).

112. *Id.* §§ 4(a)(2)(A), 5.

113. *Id.* § 4(a)(2)(B).

114. *Id.* § 6. This provision of the Act was also not included in the Plain Language in Government Communications Act proposed in the 110th Congress. See H.R. 3548, 110th Cong. (2007); S. 2291, 110th Cong. (2007). However, the committee report accompanying the Senate bill indicated that Senator Akaka intended to introduce an amendment adding a similar enforcement provision to the earlier version of the bill. See S. REP. No. 110-412, at 5 (2008).

115. H.R. REP. No. 111-432, *supra*, note 63; S. REP. No. 111-102, *supra* note 68.

which states that the OMB raised concerns that the Act would lead to litigation.¹¹⁶

6. Federal Plain Language Guidelines

As discussed *supra*, section II.B.1, the Act mandated that the OMB provide guidance on meeting the Act's requirements, and, in turn, the OMB directed agencies to the Federal Plain Language Guidelines published by PLAIN for more information on what is meant by "plain writing."¹¹⁷ In its most recent publication, the Federal Plain Language Guidelines provided 112 pages of guidance on what plain writing is and how to achieve it,¹¹⁸ drawing from publications written by leading plain English scholars such as Bryan A. Garner, Joseph Kimble, and Richard Wydick.¹¹⁹ Having relied on these works, the Guidelines provide instruction that is generally solid and consistent with the most commonly accepted elements of plain language. The Guidelines are divided into five topics: 1) "Think about your audience," 2) "Organize," 3) "Write your document," 4) "Write for the web," and 5) "Test."¹²⁰ The first three of these topics are summarized below.¹²¹

a. Audience

The Guidelines begin with "[t]he first rule of plain language," which is to "write for your audience."¹²² The writer should identify the audience, then think about the readers' current knowledge of the situation and "how to guide them from their current knowledge to what [the writer] need[s] them to know."¹²³ The writer should also "address[] separate audiences separately."¹²⁴

b. Organization

The second section of the Guidelines encourages the writer to think of the

116. S. REP. No. 111-102 (2009). In reporting on the amendment, the committee clarified that "it will be the responsibility of agencies, OMB, and Congress to ensure that the plain writing requirements are implemented." *Id.*

117. See OMB GUIDANCE, *supra* note 75, at 4-5. The Act itself allowed agencies to use the PLAIN Guidelines in the interim period after the Act became effective and before the OMB issued its guidance. See Plain Writing Act, § 4(c)(2)(A). Although the OMB's guidance adopts the PLAIN Guidelines, it does allow agencies to modify these guidelines by "changing the specific examples" to "make them more relevant" to each agency. See OMB GUIDANCE, *supra* note 75, at 3.

118. See FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 97. PLAIN first developed the Federal Plain Language Guidelines in the mid-1990s with a primary interest in assisting the drafting of regulations. *Id.* at i.

119. The sources cited in the Guidelines include the following: BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001); JOSEPH KIMBLE, LIFTING THE FOG OF LEGALESE (2006); and RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005).

120. FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 118, at iii-v.

121. The final two sections are aimed at adapting documents to web users and testing documents as they are being written in plain language. See *id.* Because those sections focus more on post-drafting issues than the content of writing, this paper does not discuss them.

122. *Id.* at 1.

123. *Id.* at 2.

124. *Id.* at 3.

questions the audience would ask and then organize the document in the order in which the audience would ask those questions.¹²⁵ The Guidelines suggest two organizational structures. Writers should use chronological order when writing about processes.¹²⁶ For other information, the writer should “put general information first, with specialized information or exceptions to the general information later.”¹²⁷ Also under the heading of organization, the Guidelines encourage writers to use second person pronouns like “you” and “your” to address the user directly, instead of third person pronouns such as “he or she” or “his or her.”¹²⁸ Lastly, writers should “use lots of useful headings,” including question headings, statement headings, and topic headings.¹²⁹ This structure will enable the writer to use shorter sections that appear easier for the reader to comprehend.¹³⁰

c. Writing

The third section, “Write your document,” makes up the majority of the Guidelines.¹³¹ It is broken down into four subsections that address words, sentences, paragraphs, and “[o]ther aids to clarity.”¹³²

The subsection on words begins with instructions on using verbs, including the following:

- Use active voice to eliminate ambiguity about “who is responsible for what”;¹³³
- Use the present tense;¹³⁴
- Avoid using hidden verbs;¹³⁵
- Use the word “must” to indicate requirements instead of “shall”;¹³⁶ and
- Use contractions wherever they sound natural.¹³⁷

125. *Id.* at 6.

126. *Id.* at 6.

127. *Id.* at 7.

128. *Id.* at 10.

129. *Id.* at 11. However, the Guidelines warn against using long headings; rather, “headings should be shorter than the content that follows them.” *Id.* at 13.

130. *Id.* at 15.

131. *See id.* at 17. This section spans over 70 of the guideline’s 112 pages.

132. *Id.* at iii–iv.

133. *Id.* at 20. According to the Guidelines, the use of passive voice “is one of the biggest problems with government documents.” *Id.* However, the Guidelines allow the use of passive voice when the law is the actor. *Id.* at 21 (providing the example, “If you do not pay the royalty on your mineral production, your lease will be terminated. . .”). The Guidelines also allow passive voice “when it doesn’t matter who is doing an action.” *Id.*

134. *Id.* at 22. The present tense is “[t]he simplest and strongest form of a verb.” *Id.*

135. *Id.* at 22–23. A hidden verb is a verb that the writer has turned into a noun. *Id.* at 23. Other authorities refer to hidden verbs as nominalizations. *See, e.g.,* RICHARD WYDICK, *PLAIN ENGLISH FOR LAWYERS* 22–23 (5th ed. 2005).

136. *See* FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 118, at 25.

137. *Id.* at 27.

The Guidelines also instruct writers on the use of nouns:

- Avoid using noun strings, which are groups of nouns “sandwiched together”,¹³⁸
- Use the pronoun “you” when speaking to the audience and the pronoun “we” to refer to the writer’s agency;¹³⁹ and
- Minimize the use of abbreviations by using a simplified name instead.¹⁴⁰

Finally, the section on words concludes with the following pointers:

- Use short, simple words and prefer the familiar word over the obscure;¹⁴¹
- Omit unnecessary words;¹⁴²
- Use definitions rarely;¹⁴³
- Be consistent; use the same term for the same concept;¹⁴⁴
- Avoid unnecessarily complicated language, or “legal, foreign, and technical jargon”,¹⁴⁵ and
- Avoid using slash constructions, such as “and/or.”¹⁴⁶

After instructing writers on the use of words, the Guidelines next instruct on sentence construction:

138. *Id.* at 29. An example of a noun string is “[u]nderground mine worker safety protection procedures development.” *Id.* Noun strings are another common problem in government writing. *Id.*

139. *Id.* at 30. The Guidelines caution the writer to “[b]e sure to define ‘you’ clearly.” *Id.*

140. *Id.* at 33 (suggesting that writers use “the committee” as a shortened term for “Engineering Safety Advisory Committee” instead of “ESAC”). Overusing abbreviations is another common problem in government writing. *Id.* The Guidelines acknowledge that writers sometimes cannot avoid using abbreviations, but instruct writers to “limit the number of abbreviations [they] use in one document to no more than three, and preferably two.” *Id.* at 34.

141. *Id.* at 36–37. The Guidelines point out that there is “no place for literary flair” in government writing because “[p]eople do not curl up in front of the fire with a nice federal regulation to have a relaxing read.” *Id.* at 36.

142. *Id.* at 38. Again, “[w]ordy, dense construction is one of the biggest problems in government writing.” *Id.* at 37. More specifically, writers should look for unnecessary prepositional phrases, redundant words, excess modifiers, and doublets and triplets. *Id.* at 38–39. Examples of unnecessary words include “a number of,” “is able to,” “on the ground that,” “be responsible for,” and “in order to.” *Id.* at 38.

143. *Id.* at 41. “It’s better to take the time to rewrite to avoid needing to define a term.” *Id.*

144. *Id.* at 45. Writers should not feel like they need to use synonyms to make their writing more interesting: “[f]ederal writers are not supposed to be creating great literature.” *Id.*

145. *Id.* at 46. According to the Guidelines, “[r]eaders complain about jargon more than any other writing fault.” *Id.*

146. *Id.* at 48.

- Write short sentences that only express one idea per sentence;¹⁴⁷
- Keep the sentence’s subject, verb, and object close together;¹⁴⁸
- Write in the positive, avoiding double negatives and exceptions to exceptions;¹⁴⁹
- Put the main idea before any exceptions or conditions;¹⁵⁰ and
- Place words carefully to reduce ambiguity.¹⁵¹

The Guidelines then instruct writers on the use of paragraphs:

- Start paragraphs with a topic sentence;¹⁵²
- Use transition words in topic sentences;¹⁵³
- Keep paragraphs short—“no more than 150 words in three to eight sentences” and never longer than 250 words;¹⁵⁴ and
- Address only one topic per paragraph.¹⁵⁵

The last subsection in the Guidelines’ section on “Writing your document” is titled “Other aids to clarity,” and it encourages writers to use or consider using the following:

- Examples, to help clarify complex concepts;¹⁵⁶
- Lists, to organize a series of requirements or other information;¹⁵⁷
- Tables, to help readers “see relationships that are often times hidden in dense text”;¹⁵⁸
- Illustrations;¹⁵⁹ and

147. *Id.* at 50.

148. *Id.* at 52. Writers should follow the natural word order, which is subject-verb-object, and should avoid putting modifiers, phrases, or clauses between these parts of the sentence. *Id.*

149. *Id.* at 54.

150. *Id.* at 56. Writers should use a list if the sentence includes multiple conditions or exceptions; bullets should be used when listing unless using numbers or letters would be helpful for future reference. *Id.* at 58.

151. *Id.* at 60. This particular instruction seems to repeat previous instructions. For example, writers are told to keep subjects and objects close to their verbs, as instructed earlier at page 50. *Id.* Writers are also told to put long conditions after the main clause, repeating the instructions appearing immediately before this subsection. *Id.*

152. *Id.* at 63.

153. *Id.* at 64. Relying on Bryan Garner’s *LEGAL WRITING IN PLAIN ENGLISH*, the Guidelines outline three types of transition words: pointing words, echo links, and explicit connectives. *Id.* at 64 (citing BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 67–71 (2001)).

154. *Id.* at 66. One-sentence paragraphs are allowed occasionally. *Id.*

155. *Id.* at 68.

156. *Id.* at 70.

157. *Id.* at 71.

158. *Id.* at 74. In particular, the Guidelines recommend using an “if-then” table to organize material by a situation and the consequence. *Id.*

159. *Id.* at 77.

- Emphasis such as bold and italics.¹⁶⁰

Finally, because “[n]othing is more annoying than coming upon cross-references in reading material” and most readers “just skip over them,” this subsection advises writers to minimize the use of cross references.¹⁶¹

III. Agency Compliance—or Lack Thereof—with the Act

To ascertain whether and how agencies have complied with the Plain Writing Act of 2010, this section examines the efforts of thirty-five agencies and finds that overall, compliance has been poor. In particular, this section examines the efforts of all fifteen cabinet-level agencies¹⁶² and the twenty “large independent agencies” identified by the Office of Personnel Management.¹⁶³

A. Compliance with the Act’s Reporting Requirements

Generally, compliance with the Act’s requirement that agencies publish periodic reports has been poor. Although the majority of agencies published the first report required by the Act, the rate of compliance has dropped with each ensuing report.

1. Initial Implementation Reports

The Act required that agencies publish their initial implementation reports within nine months after its enactment, or by July 13, 2011.¹⁶⁴ The report should

160. *Id.* at 82. The Guidelines caution writers to “limit emphasis to important information” so as not to dilute its impact. *Id.*

161. *Id.* at 83. If cross-references cannot be eliminated, writers should put cross references at the end of the passage. *Id.* at 84.

162. Department of Agriculture (USDA), Department of Commerce (DOC), Department of Defense (DOD), Department of Education (ED), Department of Energy (DOE), Department of Health and Human Services (HHS), Department of Homeland Security (DHS), Department of Housing and Urban Development (HUD), Department of Justice (DOJ), Department of Labor (DOL), Department of State (DOS), Department of the Interior (DOI), Department of the Treasury (TREAS), Department of Transportation (DOT), and Department of Veterans Affairs (VA).

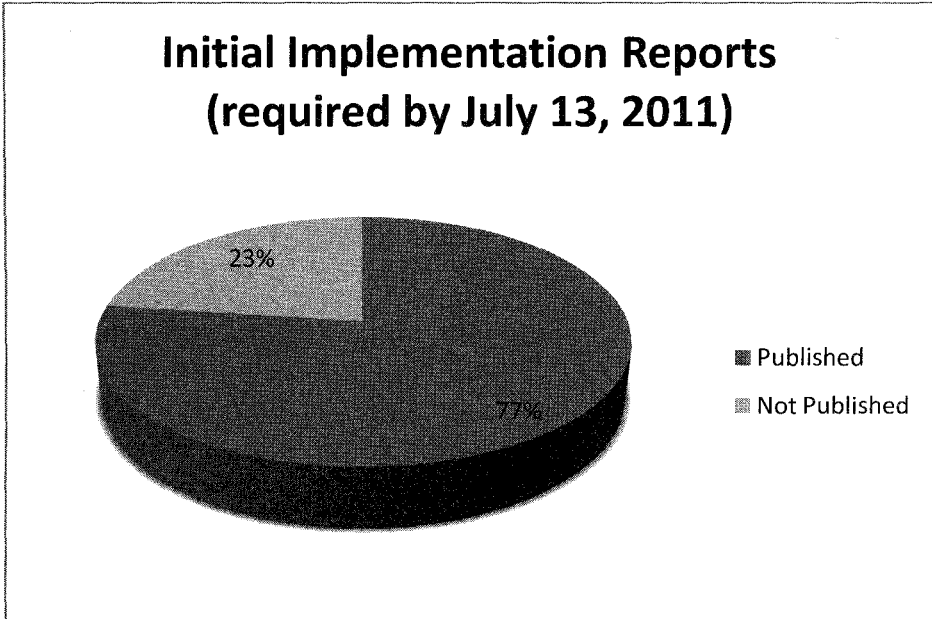
163. Broadcasting Board of Governors (BBG), Court Services and Offender Supervision Agency (CSOSA), Environmental Protection Agency (EPA), Equal Employment Opportunity Commission (EEOC), Federal Communications Commission (FCC), Federal Deposit Insurance Corporation (FDIC), Federal Trade Commission (FTC), General Services Administration (GSA), Government Printing Office (GPO), National Aeronautics and Space Administration (NASA), National Archives and Records Administration (NARA), National Credit Union Administration (NCUA), National Labor Relations Board (NLRB), National Science Foundation (NSF), Nuclear Regulatory Commission (NRC)

Office of Personnel Management (OPM), Securities and Exchange Commission (SEC)

Small Business Administration (SBA), Smithsonian Institution (SI), and Social Security Administration (SSA). OFFICE OF PERSONNEL MANAGEMENT, FEDERAL AGENCIES LIST, <http://www.opm.gov/about-us/open-government/Data/Apps/Agencies/index.aspx> (last visited Aug. 25, 2013). “Large independent agencies” are those agencies with more than 1,000 employees. *See id.*

164. Plain Writing Act § 5(a).

“describe the agency plan for compliance with the requirements of th[e] Act.”¹⁶⁵ By the end of 2013, two and a half years after the reports were due, twenty-seven of the thirty-five agencies surveyed had published their implementation reports on their websites.¹⁶⁶



Most of these reports followed the OMB’s Guidance and used the template provided on the PLAIN website.¹⁶⁷ This template is divided into seven parts, which—if an agency were to put in a good faith effort to complete—would provide a fairly comprehensive report:

165. *Id.*

166. As of February 18, 2014, the following agencies had published implementation reports: DHS, DOC, DOD, DOE, DOI, DOJ, DOL, DOS, DOT, ED, EPA, FCC, FDIC, FTC, GSA, HHS, HUD, NARA, NASA, NCUA, NRC, OPM, SBA, SEC, SSA, USDA, and VA. The VA published its implementation act in June 2013, nearly two years after the date required by the Act. See VA Implementation at 1. Similarly, the DOD did not publish an implementation plan until April 11, 2013. See DOD Implementation at 1. However, on November 22, 2011, the Director of Administration and Management of the DOD issued a memorandum that set out the Act’s requirements, outlined what the DOD had done so far in complying with the Act, and asked that the recipients designate a point-of-contact to work with the senior official. See MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS ET AL. FROM MICHAEL RHODES, REQUIREMENTS AND INITIAL IMPLEMENTATION OF PUBLIC LAW 111-74, “PLAIN WRITING ACT OF 2010,” (THE ACT) IN THE DEPARTMENT OF DEFENSE (DOD) (2011), available at

http://www.dtic.mil/whs/directives/plainlanguage/OSD_13949_11.pdf.

167. See PLAIN Compliance Report Template, *supra* note 103, at 1.

1. The agency should provide the names and contact information of the senior agency official responsible for overseeing implementation of the Act.¹⁶⁸
2. The agency should, in a table format, explain the types of communication it makes to the public, who the user of each type of communication is, and what has changed by using plain writing.¹⁶⁹
3. The agency should explain how it has informed its employees about the Act's requirements.¹⁷⁰
4. The agency should describe the training it has given employees, including the type of training, number of employees trained, and the date of the training.¹⁷¹
5. The agency should "list the ways [they] intend to stay in compliance with the Act."¹⁷²
6. The agency should provide the link to and information about its plain writing webpage.¹⁷³
7. Finally, the agency should describe how it has "measured the effectiveness" of its use of plain writing, including "provid[ing] feedback as to user experience in identifying any noticeable change in comprehension and improved level of service."¹⁷⁴

With some exceptions, the implementation reports are generally paltry and provide little useful information. The length of the twenty-six reports ranges from one page to thirteen pages;¹⁷⁵ on average, the reports are only 3.5 pages long. Indeed, many reports are less than comprehensive. For example, instead of describing a process to oversee compliance, a few agencies merely tell the reader who is responsible for overseeing compliance. The report from the Department of Transportation ("DOT")¹⁷⁶ includes a section on establishing a process for overseeing ongoing compliance that states, in its entirety, that "[t]he Executive

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 2.

173. *Id.*

174. *Id.* at 3.

175. The DOL, DOT, and EPA implementation reports are all one page long; the DOD's implementation report is thirteen pages long.

176. Admittedly, this article uses more than three abbreviations, which the Guidelines advise against. See *supra*, note 140. The main reason justifying this deviation is that the Guidelines' advice to instead use a shortened name would cause more confusion. Indeed, it would result in calling over half of the agencies either "the Department" or "the Commission," leaving the reader unsure to which agency the author is referring.

Secretariat and the Office of the General Counsel are responsible for ensuring that covered documents are written in plain language.”¹⁷⁷ The report from the Environmental Protection Agency (“EPA”) is only slightly more detailed. As with the DOT, the EPA first reports on who is responsible for overseeing compliance: “Each national-program and regional office will appoint a designated official for plain writing” and these “designate [sic] officials will devise and implement processes for ongoing compliance.”¹⁷⁸ Regarding process, the report states just that “the senior official for plain writing and the designated officials will meet regularly to oversee compliance.”¹⁷⁹

The DOT’s report on training employees is similarly vague; the report states only that it is “making training courses available” to its employees.¹⁸⁰ It does not state what kind of training will be available, when it will be available, which—if any—employees it will require to take the training, or how many employees it expects to take the training.¹⁸¹

The reason for these agencies’ lackluster reports may be that they did not use the PLAIN template; however, even those agencies using the template did not always produce a better report. For example, the Department of Housing and Urban Development merely reported that “[e]mployees have taken plain language classes [webinars] through Web Manager University.”¹⁸² It does not specify how many employees had taken training or whether those employees are the employees responsible for writing covered documents.¹⁸³ Similarly, the Department of Commerce also followed the template, but its report on training states only that it would provide online training and live PLAIN-provided training.¹⁸⁴ It also does not state when the training would take place, which employees would be required to take the training, or how many employees it expected to take the training.¹⁸⁵ The Federal Trade Commission (“FTC”) is equally vague, stating that it told all of its employees to review the PLAIN Guidelines, and that it “directed employees to . . . web-based training tools and resources.”¹⁸⁶ Beyond telling employees to read the Guidelines and other resources, the FTC indicates no formal training courses, either online or in-person.¹⁸⁷

177. PLAIN WRITING PLAN, DOT’S COMMITMENT TO PLAIN LANGUAGE AND STATUTORY REPORT (2012), available at <http://www.dot.gov/mission/open/plain-writing-plan>.

178. EPA PLAIN WRITING INITIATIVE, PLAIN WRITING ACT INITIAL REPORT (2011), available at <http://epa.gov/plainwriting/report.html>.

179. *Id.*

180. PLAIN WRITING PLAN, DOT’S COMMITMENT TO PLAIN LANGUAGE AND STATUTORY REPORT, *supra* note 178.

181. *See id.*

182. U.S. DEP’T OF HOUS. AND URBAN DEV., PLAIN WRITING ACT COMPLIANCE REPORT (2011), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=Plainlanguage rpt072011.pdf>.

183. *See id.*

184. U.S. DEP’T OF COMMERCE, PLAIN WRITING ACT COMPLIANCE REPORT (2012), available at http://www.commerce.gov/sites/default/files/documents/2012/september/deptofcommerce_compliance_report_042013_updated_typocorrected.pdf.

185. *See id.*

186. U.S. FEDERAL TRADE COMM’N, PLAIN WRITING ACT INITIAL REPORT 3 (2011) (this implementation plan is no longer available online, but it is on file with the author).

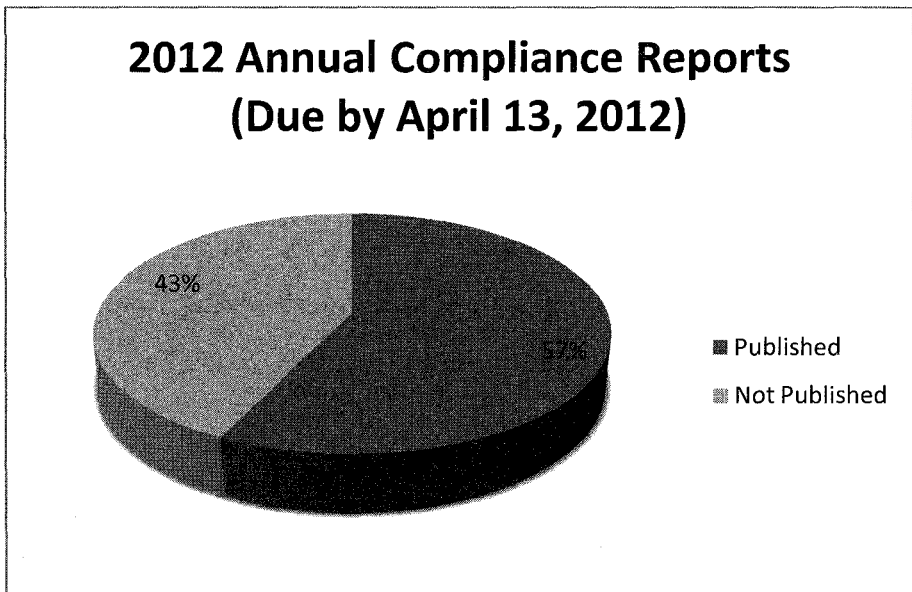
187. *See id.*

Overall, although most of the agencies complied with the letter of the law by publishing implementation reports, they have not complied with the spirit of the law because their reports provide little information about how the agencies plan to implement the Act.

2. Annual Compliance Reports

a. 2012

Fewer agencies published their first annual compliance reports, which were due April 13, 2012, than published their implementation reports.¹⁸⁸ Of the thirty-five agencies surveyed, only twenty had published their first annual compliance report by the end of 2013, over a year and a half after they were due.¹⁸⁹



Like the implementation reports, the majority of these compliance reports followed the recommendation in the OMB Guidance and used the PLAIN template,¹⁹⁰ which is the same as the template for the implementation reports.¹⁹¹ Even though most of the agencies used the same template for their annual reports, the annual reports varied in length even more than the implementation reports; the

188. See Plain Writing Act of 2010, Pub. L. No. 111-274, § 5(b), 124 Stat. 2861, 1262.

189. As of February 18, 2014, the agencies who had published annual compliance reports for 2012 were as follows: DOC, DOD, DOE, DOJ, DOL, ED, EPA, FCC, FDIC, GSA, HHS, NARA, NASA, NCUA, NRC, OPM, SBA, SEC, SSA, and USDA. See Appendix A.

190. See *supra* note 103. The agencies that did not use the template include the DOJ, DOL, EPA, FDIC, HHS, NCUA, NRC SBA, and SEC.

191. The contents of this template are described *supra*, notes 167–174.

SEC provided a one-page report,¹⁹² while the Department of Agriculture (“USDA”) published a report that was forty-five pages long.¹⁹³

As with the initial implementation reports, a number of the 2012 compliance reports provided the bare minimum amount of information, resulting in compliance reports that tell the reader little about what efforts are being made to use plain language. For example, EPA again did not follow the template and used mostly the same language from its initial report.¹⁹⁴ Although it did provide an appendix with the names of the officials that its national programs and regional offices designated, the only other change to the report was to add two sentences to the section on ongoing compliance and sustaining change.¹⁹⁵ Specifically, the EPA provided more detail on the processes that the designated officials implemented: “These processes include communications officials’ approval of documents; multi-level managerial review for plain writing; designating plain-writing coordinators in individual offices; and refresher training courses.”¹⁹⁶ The other addition was a sentence stating that many offices already had plain writing procedures in place.¹⁹⁷ The report did not provide any new information about training specific to plain writing or about how many employees had taken such training.¹⁹⁸

Other agencies failed to provide information about training that they had provided since they published their implementation reports. For example, the Department of Defense’s report reads more like an implementation report, focusing on training that it “will” offer without giving any specifics about the frequency or duration of the training or the number of employees that it had already trained or intended to train.¹⁹⁹

Many agencies also failed to provide specific information regarding what documents it written in plain language. The SEC made no mention of the types or names of documents it writes that are covered by the Act, much less how it has written those documents in plain language.²⁰⁰

Another area that commonly lacked detail was the section providing information about public feedback on the agencies’ efforts to use plain language. Although most agencies repeated their plain language email addresses, most provided little additional information. For example, the National Credit Union Administration provided its plain writing email address, but did not report whether it had received any emails at that address.²⁰¹ Other agencies, like the Department

192. U.S. SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010 (2012) (this implementation plan is no longer available online, but it is on file with the author).

193. U.S. DEP’T OF AGRIC., PLAIN WRITING ACT COMPLIANCE REPORT (2012), available at http://www.usda.gov/documents/USDA_Compliance_Report_04-13-2012.pdf.

194. See U.S. ENVTL. PROT. AGENCY, PLAIN WRITING ACT ANNUAL REPORT (2012), available at <http://www.epa.gov/plainlanguage/2012-annual-report.html>.

195. See *id.*

196. *Id.*

197. See *id.*

198. See *id.*

199. DEP’T OF DEF., PLAIN WRITING ACT COMPLIANCE REPORT (2013), available at http://www.dtic.mil/whs/directives/plainlanguage/Plain_Writing_Act_Compliance_Report_2013.pdf.

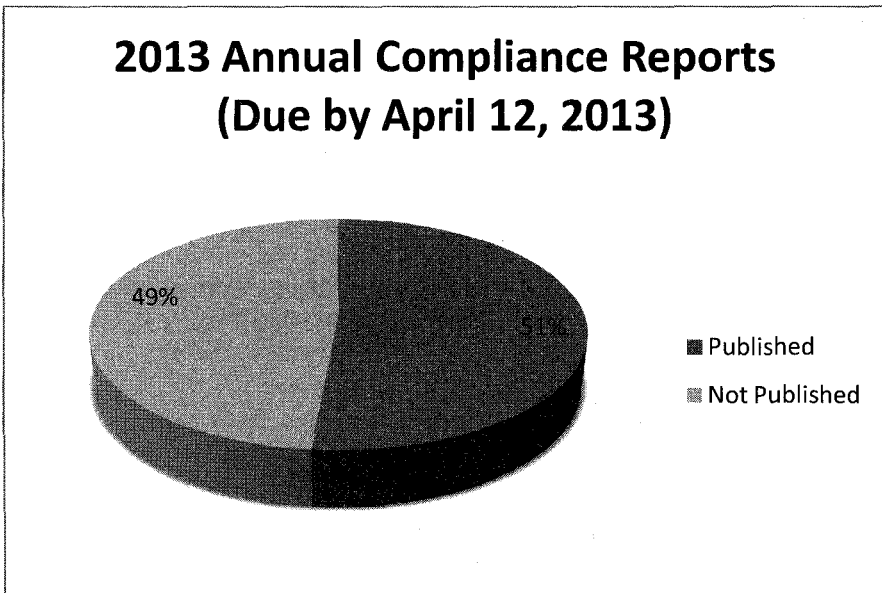
200. See SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010, *supra* note 193.

201. NAT’L CREDIT UNION ADMIN., PLAIN WRITING ACT COMPLIANCE 2012-2013, at 2 (2013), available at <http://www.ncua.gov/Legal/Documents/Reports/PWA2013.pdf>.

of Energy (“DOE”), used this section to report general information on customer satisfaction with their websites overall, rather than satisfaction with their use of plain language specifically.²⁰²

b. 2013

Finally, even fewer agencies published their second annual compliance report, which was due on April 12, 2013.²⁰³ Indeed, only eighteen of the thirty-five agencies had published their reports by the end of 2013—over eight months after the reports were due.²⁰⁴



The 2013 reports suffer from many of the same problems that the 2012 reports had, including little detail on training, covered documents, and public feedback. Interestingly, some of the agencies known for their plain language efforts did not seem to put much effort into reporting their compliance with the Act. For example, the SEC was one of the first agencies to encourage plain language.²⁰⁵ Nonetheless, both of its compliance reports are less than one page long.²⁰⁶

202. DEP’T OF ENERGY, PLAIN WRITING ACT COMPLIANCE REPORT, at 5 (2013), available at <http://energy.gov/downloads/plain-language-compliance-report-2013>.

203. See *supra*, note 100.

204. The following agencies had published their 2013 compliance report as of February 18, 2014: DOC, DOD, DOE, DOL DOJ, DOT, EPA, FCC, FDIC, GSA, HHS, NARA, NCUA, NRC, SEC, SSA, USDA, and VA. See Appendix A.

205. See *supra* notes 40–41.

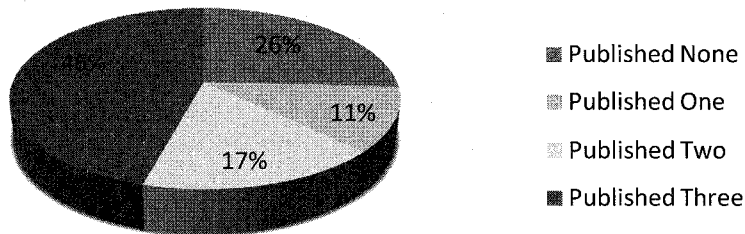
206. See SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010, *supra* note 193; SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010 (2013) (this compliance report is no longer available online, but it is on file with the author).

Moreover, its 2013 Compliance Report is an exact duplicate of its 2012 Compliance Report, with one exception—the date.²⁰⁷

However, some agencies are making a good faith effort to provide useful information. In particular, the Social Security Administration included a table with detailed information about training—including the name of the training course, duration of the training course, and the number of employees trained in the training course.²⁰⁸ The USDA is another agency providing detailed, useful information; its 2013 Report includes a table that spans thirty-five pages and provides specific examples of covered documents and what plain writing improvements it made to those documents.²⁰⁹

But overall, by the end of 2013, only sixteen—less than 50% of the agencies examined—had fully complied with the reporting requirements of the Act by publishing all three of the required reports.²¹⁰

Overall Publishing of Initial Implementation, 2012 Annual Report, and 2013 Annual Report



Moreover, the reports that have been published are generally lackluster. A few agencies are making a genuine effort to provide accurate, valuable information. But most of the agencies have not complied with the reporting requirements, and those

207. Compare SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010, *supra* note 206, with SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010, *supra* note 192.

208. See SOC. SEC. ADMIN., 2013 PLAIN WRITING COMPLIANCE REPORT 13–17 (2014), available at http://www.ssa.gov/plain-language/SSA-2013_Plain_Writing_Compliance_Report.pdf.

209. U.S. DEP’T OF AGRIC., PLAIN WRITING ACT COMPLIANCE REPORT 6–40(2013), available at <http://www.usda.gov/documents/usda-plain-writing-act-2013-compliance-report.pdf>.

210. See Appendix A. As of February 18, 2014, the following agencies had published all three reports: DOC, DOD, DOE, DOJ, DOL, EPA, FCC, FDIC, GSA, HHS, NARA, NCUA, NRC, SEC, SSA, and USDA. This means that of the twenty large independent agencies, only eight had published all three reports. The cabinet-level agencies had a better rate of compliance, with eight of fifteen agencies publishing all three reports.

agencies that have technically complied with them have only done so perfunctorily by publishing reports that do very little in the way of reporting useful information.

B. Compliance with the General Requirements

Not only have agencies failed to comply with the reporting requirements, but they have also, for the most part, failed to comply with many of the Act's other "general" requirements.²¹¹ One area agencies have done well is the requirement that they appoint a senior official to oversee the Act's implementation,²¹² a requirement that can be met by simply providing an individual's name. A majority of the agencies—twenty-seven total—has provided this name, and all but one of these names have been included on the PLAIN website's directory.²¹³

The Act also requires agencies to designate a point-of-contact,²¹⁴ and the PLAIN website also lists this agency contact information.²¹⁵ Fewer of the agencies surveyed—only sixteen—had contact information on this list.²¹⁶ Of these sixteen agencies, about half provided a general plain writing or plain language email address;²¹⁷ seven provided a named individual's email address;²¹⁸ and one provided a more general email address.²¹⁹ As with the names of the senior officials, the PLAIN website did not include the contact information some of the agencies provided in their compliance reports or on their plain writing websites.²²⁰

211. See *supra* notes 105–113 and accompanying text.

212. See *supra* notes 106–107 and accompanying text.

213. See PLAIN WRITING ACT OF 2010: PLAIN LANGUAGE IN FEDERAL AGENCIES, <http://www.plainlanguage.gov/pLAW/fedGovt/index.cfm> (last visited Apr. 8, 2013). The nine agencies that were not included on the PLAIN website list are the following: HUD, BBG, CSOSA, EEOC, FDIC, GPO, NLRB, NSF, and SI.

214. See *supra* note 108. Curiously, the OMB Guidance made no mention of this particular requirement when summarizing the Act's deadlines and requirements. See OMB GUIDANCE, *supra* note 75, at 2.

215. See PLAIN WRITING ACT OF 2010: PLAIN LANGUAGE IN FEDERAL AGENCIES, *supra* note 213.

216. Those sixteen agencies are as follows: DOC, DOD, ED, DOE, HHS, HUD, DOL, DOI, FDIC, GSA, NASA, NARA, NCUA, SSA, TREAS, and USDA. See *id.*

217. DOC, DOD, HHS, DOL, TREAS, FDIC, NARA, NCUA and USDA. See *id.*

218. ED and SSA provided the senior agency official's email address; DOE, DOI, GSA, and NASA provided the agency point-of-contact's email address. See *id.*

219. HUD provided the webmaster's email address. See *id.*

220. The DOJ's website encourages users to email the webmaster if they have trouble understanding the website. DEPARTMENT OF JUSTICE, PLAIN WRITING (2014), available at

www.justice.gov/open/plainlanguage.html. DOT also provided a general plain language email address in its website. See DEP'T OF TRANSP., COMMITMENT TO PLAIN LANGUAGE AND STATUTORY REPORT (2013), available at <http://www.dot.gov/open/plain-language>. Although EPA does not specifically name a "point-of-contact," it does provide the email address of its senior official. See U.S. ENVTL. PROT. AGENCY, PLAIN WRITING ACT ANNUAL REPORT (2012), *supra* note 195. FCC also provided a plain language email address in its first annual compliance report. See FEDERAL COMMUNICATIONS COMMISSION, PLAIN WRITING ACT COMPLIANCE REPORT (2012), available at <http://www.fcc.gov/encyclopedia/plain-writing-act-compliance-report-april-13-2012>. The NRC's website provides an address and telephone number for its senior official and for its plain writing contact. See NUCLEAR REGULATORY COMMISSION, PLAIN WRITING AT THE NRC (2013), available at <http://www.nrc.gov/public-involve/open/plain-writing.html>. The OPM encourages the public to contact it through its open government blog. OFFICE OF PERS. MGMT., OPEN GOV'T BLOG, (2012), available at <http://www.opm.gov/blogs/openopm/>. The SBA's website also includes the names of its points of contact and a plain language email address. SMALL BUS. ADMIN., PLAIN LANGUAGE PAGE, available at <http://www.sba.gov/content/plain-language-page-0>. Finally, the SEC's first annual compliance report also provided a plain language email address for public comments, as does the website's plain writing initiative

Another of the Act’s general requirements was that agencies create a “plain writing” webpage section of their websites.²²¹ All but seven of the agencies surveyed have complied with this requirement.²²² Again, as with the implementation and compliance reports, most of these websites followed a template provided on the PLAIN website.²²³

Even though most of the agencies have created a plain writing webpage, the usefulness of many of these webpages is questionable at best because they are difficult to find. The Act requires that the webpage be “accessible from the homepage of the agency’s website,”²²⁴ but this directive has proven ambiguous. Twelve of the agencies have taken this requirement at face value and provided a link directly on their homepage to the plain writing section.²²⁵ However, the OMB’s guidance interpreted this part of the Act as requiring the plain writing webpage to be “either located on or accessible from” the agency’s *open government page*.²²⁶ Thirteen agencies have followed this guidance and provided a link on the agency’s open government page²²⁷ instead of on the agency’s home page.²²⁸ The remaining three agencies have plain writing webpages, but those webpages are not accessible from the home page or the open page; a user could find the webpage by searching the agency’s website for “plain writing” or “plain language.”

page. SEC. AND EXCH. COMM’N, COMPLIANCE REPORT ON IMPLEMENTATION OF THE PLAIN WRITING ACT OF 2010, *supra* note 193; SEC. AND EXCH. COMM’N, PLAIN WRITING INITIATIVE (2014), *available at* <https://www.sec.gov/plainwriting.shtml>.

221. *See supra* notes 111–113.

222. The seven agencies that have not yet created such a webpage include BBG, CSOSA, EEOC, GPO, NLRB, NSF, and SI.

223. The template webpage describes the Act, states the agency’s commitment to writing documents in plain language, names the agency officials overseeing the plain language efforts, includes agency contact information and asks users to contact the agency regarding documents they cannot understand, and provides a place to include the initial and annual compliance reports. *See* MODEL LANGUAGE FOR AGENCY PLAIN LANGUAGE PAGE, http://www.plainlanguage.gov/plLaw/law/agency_pl_page.cfm (last visited Aug. 27, 2013).

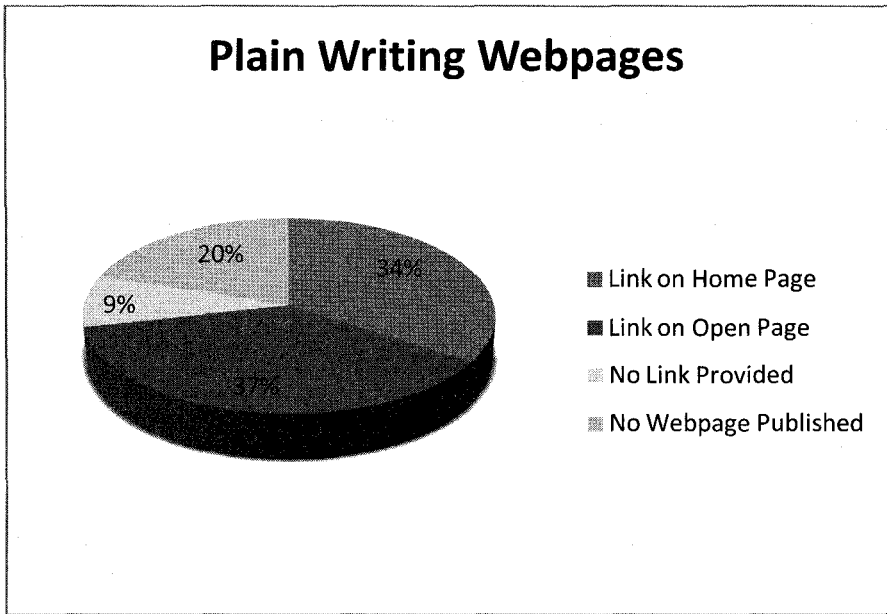
224. Plain Writing Act §4(a)(1)(E).

225. DOC, DOD, DOL, FCC, FDIC, HHS, NCUA, NRC, SEC, SBA, USDA, and VA. When issuing its Plain Language Report Cards, the Center for Plain Language included a category that awarded points for a plain writing webpage that was accessible from the agency’s homepage but did not award points for webpages linked from the agency’s open government page. *See* CTR FOR PLAIN LANGUAGE, PLAIN LANGUAGE REPORT CARDS, <http://centerforplainlanguage.org/plain-language-report-card/> (last visited Apr. 17, 2013).

226. OMB GUIDANCE, *supra* note 75, at 4. This seems to contradict the OMB’s statement a few sentences earlier that “your agency must create and maintain a plain writing section of your website that is accessible from your agency’s homepage.” *Id.* Nonetheless, the OMB Guidance does note the Act’s connection to the Open Government Initiative, pointing out that the Act “is designed to promote the goals of the President’s Open Government Initiative. *Id.* at 1. This connection to the open government initiative is also seen in the Act’s legislative history. In his remarks to the House upon introducing the bill, Representative Clay stated, “The administration recently issued a directive on open government. One of the simple principles of the directive is that information should be accessible. This is the aim of the bill.” 156 CONG. REC. H1538 (daily ed. Mar. 17, 2010).

227. The agency’s open government page should be located at [www.\[agency\].gov/open](http://www.[agency].gov/open). OMB GUIDANCE, *supra* note 75, at 4.

228. The thirteen agencies that provide a link on their open government page are DHS, DOE, DOI, DOJ, DOT, ED, EPA, FTC, GSA, HUD, NARA, OPM, and TREAS.



C. Compliance with the Plain Writing Requirement

Ultimately, the main purpose of the Act is to have agencies use plain writing in their communications so that the public can better understand government communications; all the other requirements are a means of achieving and measuring compliance with the plain writing requirement. Therefore, the most important part of compliance is that agencies actually write their covered documents in plain writing that the public can understand. It comes as no surprise that the agencies, which have mostly done poorly at complying with the more technical requirements of the Act, are also faring poorly when it comes to communicating in plain language. This failure can be seen in many of the covered documents that agencies have issued since the date the Act became effective.

1. Implementation and Compliance Reports²²⁹

Ironically, many of the implementation and compliance reports addressing agencies' progress in using plain writing fail to follow the Federal Plain Language Guidelines. The most common problem in the reports is the consistent use of passive voice;²³⁰ indeed, the Guidelines noted that this was a common problem in government writing.²³¹ Nonetheless, at least half of the agencies use passive voice

229. For ease of readability, the remainder of this paper does not include a citation for every implementation report and annual compliance report mentioned. Instead, that information has been compiled in Appendix A. This paper will use the following shorthand: “[Agency] Implementation” for the implementation reports; “[Agency] 2012” for the 2012 annual compliance reports; and “[Agency] 2013” for the 2013 annual compliance reports.

230. Although there are times when using passive voice is appropriate, this article focuses on the use of passive voice when active voice would be a better choice.

231. See *supra* note 133.

in their implementation reports.²³² One of the most egregious examples is the DOE's implementation report, which uses the passive voice in every sentence in its section on training—describing classes that “will be offered,” “will be promoted,” “will be conducted,” “will be taught,” and “will be provided.”²³³ Another common problem that the Guidelines pointed out was the overuse of abbreviations.²³⁴ Again, several agencies use too many abbreviations in their implementation reports; for example, the SSA used six abbreviations—ONI, QUICC, ORDP, POMS, OPI, and OL—in its two-page report.²³⁵ Other common ways that implementation reports fail to comply with the Guidelines include using hidden verbs²³⁶ and failing to prefer personal pronouns.²³⁷ Many of these problems persist in the subsequent annual compliance reports published in both 2012²³⁸ and 2013.²³⁹

232. See, e.g., DHS Implementation, at 1–2 (“may be found”; “as requested by”); DOC Implementation, at 1–2 (“were emailed”; “will be revised and updated”); DOD Implementation, at 8, 12 (“are noted in”; “will be published”); DOJ Implementation, at 4 (“will be reminded”; “must be written”; “will be published”); DOL Implementation, at 1 (“will be used”; “are written”); ED Implementation, at 1–2 (“will be conducted”; “is being established”; “is being developed”; “will be created”; “was prepared by”); EPA at 1 (“was emailed”; “[h]as been included”); FCC Implementation at 1 (“were achieved by”; “were identified by”); FDIC Implementation, at 1, 3–4 (“was signed into law by”; “memorandum is issued” “are believed to be”; “will be submitted”; “will be circulated”; “will be conducted”; “may be provided”); FTC Implementation, at 2–3 (“are sent”; “have been advised”; “have been encouraged”; “have been told”); GSA Implementation, at 2 (“need to be rewritten”; “will be offered”); HUD Implementation, at 1 (“was redesigned”); NCUA Implementation, at 1–2 (“believed to be”; “will be updated”; “will be required”); NRC Implementation, at 1–4 (“are made”; “were already being written”; “were briefed”; “was added”; “was issued”; “were also directed”; “have been published”; “was announced”; “will be presented”; “will be updated”); OPM Implementation, at 5–6 (“is evaluated”; “has been established”; “will be created”); SBA Implementation, at 1 (“has been trained”; “is performed”); SEC Implementation, at 2 (“will be scheduled”; “will also be made”; “are requested”).

233. DOE Implementation, at 2.

234. See FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 97.

235. SSA Implementation; see also DHS Implementation, at 1–3 (“OMB”; “DHS”; “POC”; “USCIS”; “CHCO”; “GSA”); DOD Implementation, at 6, 11 (“DA&M”; “DoD”; “WHS”; “OSD”); FDIC Implementation, at 1–3 (“FDIC”; “OMB”; “CU”; “DOA”; “OPA”; “DIT”); NCUA Implementation, at 1 (“OGC”; “OHR”; “PACA”; “OED”; “OCIO”).

236. See, e.g., DHS Implementation, at 2–3 (“[p]rovides direction for”; “[p]rovides official recognition for”; “for inclusion in”; “keep records about”); DOD Implementation, at 6 (“implementation and compliance”); EPA Implementation, at 1 (“for the preparation of”); SBA Implementation, at 1 (“implementation of”); USDA Implementation, at 6 (“[t]he addition of”).

237. See, e.g., DHS Implementation; DOD Implementation; DOC Implementation; DOJ Implementation; DOT Implementation; ED Implementation; EPA Implementation; FDIC Implementation; FTC Implementation; HUD Implementation; NCUA Implementation.

238. The most common problem was the use of passive voice. See, e.g., DOC 2012, at 5–9 (“have been informed”; “have been notified”; “will be required”; “are fully implemented”; “it was agreed that”; “as requested by”); DOD 2012, at 1–2 (“may be contacted”; “have been shared”; “is emphasized”; “will be published”; “are provided”; “have been identified”; “will be reviewed and revised”); DOE 2012, at 1–5 (“are written”; “are encouraged”; “was redesigned”; “are explained”; “were led by”; “was recognized”; “was named”; “was relaunched”); DOJ 2012, at 1–8 (“were interpreted”; “were reviewed and adjusted”; “has been designated”; “have been revised and posted”; “was implemented”; “is . . . communicated”; “is made available”; “were designated”); DOL 2012, at 1 (“have been identified”; “must be taken”; “is to be completed”; “will be required”); ED 2012, at 1–2 (“is posted”; “was provided”; “was prepared and presented by”; “will be conducted”; “has undergone”); FCC 2012, at 1 (“was established”; “were edited . . . and updated”; “were informed”; “were briefed”; “will be discussed”); FDIC 2012, at 1–4 (“were assigned”; “was widely advertised”; “has been completed by”; “is also being prepared”; “were identified and reported”; “were well received by”; “was signed into law by”; “may be carried out by”); NRC 2012, at 1 (“are reminded”; “are stored”; “are instructed”; “will be posted”; “are encouraged”; “is being developed”); SBA 2012, at 1 (“have

2. Rulemaking Preambles

Agencies have also failed to use plain language in rulemaking preambles—even in proposed rules that were the focus of media attention and likely to attract a great number of readers. Although the Act specifically exempts regulations, the rulemaking preambles that agencies must include with any proposed or final rule are still included in the definition of “covered documents.”²⁴⁰ The preamble should “inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal.”²⁴¹ The preamble should also “fully deal with major alternative resolutions for the issues in the proceeding, explaining clearly why they were rejected in favor of the option selected.”²⁴² Finally, “[a] key part of preambles to final rules is the agency’s response to significant public comments.”²⁴³

Since the Act took effect, agencies have published rulemaking preambles that fail to use plain writing, even in proposed rules that address issues of particular interest to the public. For example, the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury submitted a proposed rule on February 6, 2013, involving a requirement of the Patient Protection and Affordable Care Act: religious employers’ insurance coverage of

been published”; “have already been started”; “will be distributed”). The use of hidden verbs was another common mistake. *See, e.g.*, DOD 2012, at 1 (“oversight of implementation and administration”; “distribution of”); DOE 2012, at 1 (“enforcement of”; “review of”); ED 2012, at 2 (“has undergone significant changes”); FCC 2012, at 1 (“conducted a review”); FDIC 2012, at 2 (“conducted a sample review”); HHS 2012, at 4 (“proper notification of”; “convene meetings with”); NCUA 2012, at 1 (“inclusion”).

239. The same common problems recur in the 2013 reports. Again, many agencies used passive voice. *See, e.g.*, DOC 2013, at 11 (“be written”; “can be quickly understood by”; “requested by”); DOD 2013 at 1, 3–4 (“was sent”; “are offered”; “is emphasized”; “were attended by”; “will be considered”; “will be reviewed and revised”); DOE 2013, at 2, 4 (“asked by”; “attended by”; “were led by”); DOJ 2013, at 1, 4–5 (“have been taken”; “will be monitored by”; “to be determined by”; “will be completed by”; “has to be reviewed by”); DOT 2013, at 1 (“produced by”); FCC 2013, at 1 (“were edited”; “were reformatted” “were briefed”; “were informed”); FDIC 2013, at 1–3 (“were assigned”; “was made available”; “are occasionally identified and reported”); NARA 2013, at 3, 18 (“will be conducted”; “was collected”; “was completed by”); NCUA 2013, at 2–3 (“were authorized”; “are reviewed by”; “conducted by”; “issued directly by”); NRC 2013, at 1 (“are reminded”; “are posted”; “are encouraged”). Agencies also continued to use hidden verbs. *See, e.g.*, DOC 2013, at 11 (“provides oversight”; “conducting audits, inspecting, evaluations, and investigations”); DOD 2013, at 1, 3 (“oversight of implementation and administration of”; “provided training”; “the revision of documents”); DOE 2013, at 2 (“the enforcement of”; “there was emphasis on”; “review of”); DOJ 2013, at 1 (“the posting of”); DOT 2013, at 1–2, 5 (“completed a redesign”; “with complete reviews of”; “implementation of”); FCC 2013, at 1 (“development of”); FDIC 2013, at 1, 3 (“to provide comments”; “conduct sample reviews”); HHS 2013, at 1, 3, 7 (“issuance of”; “the establishment and maintenance of”; “the development of”); NARA 2013, at 2 (“submission of”); NCUA 2013, at 2 (“assessment of”); NRC 2013, at 1 (“passage of”); SSA 2013, at 1 (“improvement and growth”; “oversight”); USDA 2013, at 41–42 (“implementation of”; “reviews of”). A few agencies used noun strings. *See, e.g.*, NARA 2013, at 18 (“content contributor updates”; “customer survey satisfaction scores”); NCUA 2013, at 3 (“examination quality control process”).

240. *See supra*, note 90.

241. 1 C.F.R. § 18.12(a) (2013). A major purpose of the preamble “is to inform the public of the supporting reasons and purposes of the final rule.” JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 337 (5th ed. 2012). “Agencies often use the statement to advise interested persons how the rule will be applied, to respond to questions raised by comments received during the rulemaking, and as a ‘legislative history’ that can be referred to in future applications of the rule.” *Id.*

242. *See LUBBERS, supra* note 241, at 341.

243. *Id.* at 342.

contraceptives for women.²⁴⁴ This controversial requirement garnered significant attention from the public, as evidenced by the high number of comments that the agencies received in response to the proposed rule's advance notice of rulemaking,²⁴⁵ and the coverage of the notice of proposed rulemaking in the media and in the blogosphere.²⁴⁶ Nonetheless, the preamble still suffers from many of the most common problems identified in the Plain Writing Guidelines:²⁴⁷

- It uses passive voice ("established or maintained by"; "to be received"; "are encouraged"; "as prescribed by"; "can be found"; "are summarized in"; "would be passed on"; "be broadened"; "could be administered effectively by"; "were raised by"),²⁴⁸
- It does not use personal pronouns ("the departments" instead of "we");²⁴⁹
- It uses more than the suggested maximum of three abbreviations ("ANPRM"; "CMS"; "EBSA"; "PHS"; "ERISA"; "HRSA" "RFRA"),²⁵⁰
- It uses unnecessarily complicated or obscure words ("contemporaneous with the issuance of").²⁵¹
- It uses legal jargon ("foregoing");²⁵²

244. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013).

245. The advance notice received approximately 200,000 comments. *Id.* at 8459. According to the Sunlight Foundation, the proposed rule received "more comments than any other regulatory proposal on any subject government-wide." Nancy Watzman, *Contraceptives Remain Most Controversial Health Care Provision*, SUNLIGHT FOUNDATION, Mar. 22, 2013, <http://reporting.sunlightfoundation.com/2013/contraceptives-remain-most-controversial-health-care-provision/>. According to the Sunlight Foundation, of the regulations that drew at least one comment, only 11% drew more than 100 comments. *See id.*

246. *See, e.g.*, Stephanie Condon, *New Obamacare Birth Control Rules Seek Middle Ground*, CBS NEWS POLITICAL EYE, Feb. 1, 2013, http://www.cbsnews.com/8301-34222_162-57567155-10391739/new-obamacare-birth-control-rules-seek-middle-ground/; Dan Diamond, *Obamacare's Birth Control Mandate: The Most Controversial Legislation Ever?*, THE HEALTH CARE BLOG, May 2, 2013, <http://thehealthcareblog.com/blog/2013/05/02/obamacares-birth-control-mandate-the-most-controversial-legislation-ever/>; J.D. Kleinke, *Pandora's Pillbox: Obamacare as Proxy Culture War*, THE HUFFINGTON POST POLITICS BLOG, Mar. 29, 2013, http://www.huffingtonpost.com/jd-kleinke/obamacare-contraception_b_2972764.html; Sarah Kliff, *Here's Obamacare's Most Controversial Regulation*, THE WASHINGTON POST WONKBLOG, Mar. 25, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/25/heres-obamacares-most-controversial-provision/>.

247. The lists and examples in Part 0.0 are not meant to exhaustively list every plain writing mistake, but simply to provide illustrative samples of each type of mistake.

248. Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 244, at 8456–60.

249. Although the preamble does use "you" when instructing readers how to deliver comments, it uses the term "the Departments" instead of "we" throughout the preamble. *Id.* at 8457.

250. *Id.* at 8456–60.

251. *Id.* at 8458.

252. *Id.* The word "foregoing" is one of the words listed specifically in the Guidelines as an example of legal language. *See* FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 97 118.

- It uses hidden verbs (“the imposition of”; “issuance of”; “establishment or maintenance of;” “had undertaken a review of”; “exclusion of”; “the inculcation of”; “the inclusion of”; “the provision of”);²⁵³
- It includes long sentences that address more than one topic (“They noted that drug rebates, one suggested source of funds, often belong to another entity (such as the plan sponsor and/or the plan participants and beneficiaries), not the third party administrator, and stated that, in their view, costs incurred by third party administrators would ultimately be passed on to plan sponsors and/or plan participants and beneficiaries unless a separate source of funding could be found, such as some form of public funding or stand-alone contraceptive coverage with no premium or cost sharing.”);²⁵⁴
- It does not omit unnecessary words (“for purposes of”; “to which they object on religious grounds”; “because of the religious beliefs of the organization”; “a number of”; “in order to”; “seeking to avail themselves of”);²⁵⁵ and
- It does not always follow the subject-verb-object format (“provides to participants a notice.”)²⁵⁶

The Nuclear Regulatory Commission (“NRC”) also has issued rulemaking preambles that fail to comply with the Plain Language Guidelines. On April 18, 2012, the NRC issued an advanced notice of proposed rulemaking addressing nuclear plants’ capabilities in responding to onsite emergencies.²⁵⁷ This rulemaking was part of the NRC’s “lessons-learned efforts associated with the March 2011 Fukushima Dai-ichi Nuclear Power Plant accident in Japan,”²⁵⁸ which the NRC noted had garnered public interest.²⁵⁹ As with the preamble discussed above, this preamble also fails to follow several of the Guidelines:

- It uses passive voice (“received”; “will be considered”; “was lost”; “was provided”; “were implemented”; “are referred to”);²⁶⁰
- It uses unnecessarily complicated language (“subsequently”);²⁶¹
- It uses legal jargon (“hereafter”);²⁶²

253. Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 244, at 8457–60.

254. *Id.* at 8460. This sentence is over eighty words long. *See id.*

255. *Id.* at 8458–60. Indeed, the Guidelines specifically mention the phrases “a number of” and “in order to” as phrases that agencies should not use. *See* FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 97, at 38.

256. Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 244, at 8458.

257. Onsite Emergency Response Capabilities, 77 Fed. Reg. 23161 (proposed Apr. 18, 2012).

258. *Id.*

259. *See* NRC 2012, at 1 (describing the nuclear accident as a “high profile event[.]”); NRC 2013, at 1 (same).

260. Onsite Emergency Response Capabilities, *supra* note 257, at 23161–63.

261. *Id.* at 23162.

262. *Id.*

- It uses noun strings ("onsite emergency response capabilities");²⁶³
- It uses well over the suggested maximum of three abbreviations ("NRC"; "ANPR"; "ADAMS"; "SBO"; "INPO"; "NTTF"; "SRM"; "EOPs"; "SAMGs"; "TSC"; "EDMGs");²⁶⁴
- It uses hidden verbs ("revision to"; "development of"; "consideration of"; "conduct a methodical and systematic review of"; "make additional improvements");²⁶⁵
- It fails to use personal pronouns (using either "NRC" or "the Commission" instead of the personal pronoun "we");²⁶⁶ and
- It fails to omit unnecessary words ("is only able to"; "is able to"; "with respect to"; "as well as"; "at the time of"; "prior to").²⁶⁷

The NRC later issued a proposed rule on the same subject that included many of the same failures.²⁶⁸ Ironically, at the end of the document, the Commission included a section on "Plain Writing" where it stated that it "ha[d] written this document, including the preliminary proposed rule language, to be consistent with the Plain Writing Act."²⁶⁹

The preamble to a proposed rule from the Transportation Security Administration ("TSA"), part of the Department of Homeland Security, suffers from many of the same problems. The TSA issued this notice of proposed rulemaking on March 26, 2013, addressing its use of "advanced imaging technology" in airport screenings.²⁷⁰ Advanced imaging technology garnered media attention when the TSA first introduced it in 2010²⁷¹ and again in 2013 when

263. *Id.* at 23161.

264. *Id.* at 23161–63.

265. *Id.*

266. *Id.* at 23161.

267. *Id.* at 23161–62.

268. *See* Onsite Emergency Response Capabilities, 78 Fed. Reg. 1154 (Jan. 8, 2013). The draft regulatory basis also uses passive voice ("will be considered") and hidden verbs ("ensure consideration of"), and fails to use personal pronouns ("NRC" or "the Commission" instead of "we" and "the public" instead of "you"). *See id.*

269. *Id.* at 1155. The NRC has included similar statements in other proposed rules. *See, e.g.*, Revision of Fee Schedules; Fee Recovery for Fiscal Year 2013, 78 Fed. Reg. 14880, 14894 (stating that the document had been written to comply with the Plain Writing Act and requesting feedback "with respect to the clarity and effectiveness of the language used").

270. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18287 (Mar. 26, 2013). The TSA issued the March 2013 rulemaking in response to a decision by the United States Court of Appeals for the District of Columbia. *See id.* In its opinion, the court found that the use of the imaging technology, "producing an image of the unclothed passenger, . . . intrudes upon . . . personal privacy." *Electronic Privacy Information Center v. United States Department of Homeland Security*, 653 F.3d 1, 6 (D.C. Cir. 2011). As such, the court held that using this technology "substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Id.* The court found that TSA's failure to do notice-and-comment rulemaking before it began using the technology was unjustified and ordered the TSA to engage in such rulemaking. *Id.* at 11. The court did not order the TSA to stop using the imaging technology. *Id.*

271. *See, e.g.*, Thomas Grillo, *It's the Invasion of Full-Body Scanners at Logan*, BOS. HERALD, Mar. 6, 2010, at 014; Kristen Mack, *Invasion of the Full-Body Scanners; O'Hare Passengers to be Randomly Selected, Have Pat-Down Option*, CHI. TRIB., Feb. 24, 2010, at C1; David G. Savage, *Scanners Pit Privacy*

the TSA replaced the initial technology with technology that provided “enhanced privacy.”²⁷² The preamble to the proposed rule struggles with many of the most common plain writing errors:

- It uses passive voice (“is being issued”; “were initially deployed”; “was tested by”; “is detected”; “must be performed”; “imposed by”; “were installed . . . and used by”; “have been implemented”; “was provided to”);²⁷³
- It uses hidden verbs (“inspection of”; “use of”; “review of”; “development and procurement of”);²⁷⁴
- It does not always keep the subject, verb, and object close together (“include with your comments a self-addressed, stamped postcard”); (“It is the primary mission of DHS to prevent terrorist attacksFalse”; “plotted to bring on board aircraft liquid explosives”);²⁷⁵ and
- It does not omit unnecessary words (“the privacy of passengers”; “[t]he level of acceptance by passengers”; “on the torsos of female passengers”; “in order to”).²⁷⁶

The EPA has also published a preamble that commits many of these mistakes. This preamble, which introduced a proposed rule that would require certain reports to be submitted electronically instead of on paper, specifically points out “the large scope of this proposal.”²⁷⁷ Nonetheless, the following plain writing errors appear in the preamble:

- It uses passive voice (“must be received”; “are only accepted”; “are processed”; “was re-confirmed in”; “is administered”; “are required”; “are identified in”);²⁷⁸
- It uses too many abbreviations (“NPDES”; “EPA”; “CWA”; “CBI”; “DMR”; “QNCR”; “ANCR”);²⁷⁹
- It uses hidden verbs (“allocation and use of”; “achievement of”; “implementation of”);²⁸⁰

Against Security: The TSA is Adding Machines So It Can Do Fully-Body Screenings. A diverse group of critics sees it as a violation, L.A. TIMES, Jan. 13, 2010, at A11; Gary Stoller, *Backlash Grows vs. Full-Body Scanners; Fliers Worry About Privacy, Health Risks*, USA TODAY, July 13, 2010, at 1A.

272. Passenger Screening Using Advanced Imaging Technology, *supra* note 270, at 18289; *see, e.g.*, Hugo Martin, *TSA’s “Nude” Body Scanning is History*, L.A. TIMES, June 3, 2013, at A10; *Revealing Scanners Exit Airports*, CHI. TRIB., June 4, 2013, at C2; Mike M. Ahlers, *TSA Removes Body Scanners Criticized as Too Revealing*, CNN.COM, May 30, 2013, <http://www.cnn.com/2013/05/29/travel/tsa-backscatter/index.html>.

273. Passenger Screening Using Advanced Imaging Technology, *supra* note 270, at 18289–91.

274. *Id.* at 18289.

275. *Id.* at 18288.

276. *Id.* at 18289. “In order to” is one of the specific examples of unnecessary words in the Federal Plain Language Guidelines. *See supra* note 142.

277. NPDES Electronic Reporting Rule, 78 Fed. Reg. 46006, 46006 (July 30, 2013).

278. *Id.* at 46006–07.

279. *Id.* at 46006–09.

280. *Id.* at 46006–07.

- It uses legal jargon (“thereby”),²⁸¹
- It does not omit unnecessary words (“in order to”; “to prescribe such regulations as are necessary”),²⁸² and
- It does not use personal pronouns (“EPA” instead of “we”).²⁸³

3. Other documents

In addition to rulemaking preambles, the Act applies broadly to any number of documents. For example, in 2012, the Department of Justice issued an overview of the Privacy Act of 1974.²⁸⁴ Developments in the summer of 2013 regarding leaks at the National Security Administration have heightened public interest in federal privacy issues, including the Privacy Act.²⁸⁵ The Department’s overview of that act, which is nearly 300 pages long, includes the most common plain writing errors:

- It uses legal jargon (“thereafter”; “thereof”; “inasmuch as”),²⁸⁶
- It uses hidden verbs (“the collection, maintenance, use, and dissemination of”; “issue a report”; “administration of”),²⁸⁷
- It uses passive voice (“is made”; “is contained in”; “passed by”).
- It uses “shall” instead of “must”,²⁸⁸
- It does not omit unnecessary words (“in order to”; “a number of”; “on the ground that” “the deference usually accorded the interpretations of the agency that has been charged with the administration of a statute”; “with regard to”),²⁸⁹ and
- It does not follow the subject-verb-object format (“Adding to these interpretational difficulties is the fact that . . .”).²⁹⁰

Additionally, the single six-sentence paragraph on the webpage that introduces the overview is also riddled with hidden verbs and passive voice.²⁹¹

281. *Id.* at 46007.

282. *Id.*

283. *E.g., id.*

284. DEP’T OF JUSTICE, OFFICE OF PRIVACY AND CIVIL LIBERTIES: OVERVIEW OF THE PRIVACY ACT (2012), available at <http://www.justice.gov/opcl/1974privacyact-2012.pdf>.

285. *See, e.g.*, ELECTRONIC PRIVACY INFORMATION CENTER, EPIC RENEWS PETITION TO NSA TO SUSPEND DOMESTIC SURVEILLANCE PROGRAM (2013), available at <http://epic.org/2013/07/epic-renews-petition-to-nsa-to.html> (arguing that the NSA violated the Privacy Act of 1974); ANDREW COHEN, PRIVACY EXPERT HOOFNAGLE ANALYZES IMPLICATIONS OF NSA SURVEILLANCE (2013), available at <http://www.law.berkeley.edu/15551.htm>.

286. DEP’T OF JUSTICE, OFFICE OF PRIVACY AND CIVIL LIBERTIES: OVERVIEW OF THE PRIVACY ACT, *supra* note 284, at 116, 250, 263, 280.

287. *Id.* at 1–2.

288. *Id.* at 123.

289. *Id.* at 20, 137, 86.

290. *Id.* at 1.

291. *See* DEP’T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, 2012 EDITION, (2012), available at <http://www.justice.gov/opcl/1974privacyact-overview.htm>. The paragraph includes the following hidden

Some agencies included lists of relevant documents covered by the Act in their implementation or compliance reports.²⁹² For example, the DOE stated that it would use plain language in “every letter, publication, form, notice, or instruction,” and specifically identified funding opportunity announcements as one such document.²⁹³ Nonetheless, the DOE continues to issue funding opportunity announcements that do not comply with the Guidelines. For example, in an announcement issued on May 4, 2012, the DOE sought proposals to develop wireless charging technology for electric vehicles.²⁹⁴ This announcement, however, fails to comply with the Guidelines in the following ways:

- It uses passive voice (“will be independently evaluated by”; “will be funded directly by”);²⁹⁵
- It uses hidden verbs (“sufficient for recharging of”; “the primary focus of this project is the advancement of”; “incorporate refinements or upgrades to”);²⁹⁶
- It uses numerous abbreviations that are not widely known (“NNSA”; “FFRDC” “NETL” “WFO” “FOA”);²⁹⁷
- It uses legal jargon (“aforementioned”);²⁹⁸
- It uses noun strings (“federal motor vehicle safety standards and emissions requirements”; “safety and electromagnetic field (EMF) emissions standards”);²⁹⁹
- It uses the word “shall” instead of “must”;³⁰⁰
- It does not omit unnecessary words (“in order for”; “in order to”; “be responsible for”; “as contained in the discussions below”);³⁰¹ and
- It does not prefer personal pronouns (using “applicant” instead of “you” and “DOE” instead of “we”).³⁰²

Similarly, the Federal Communications Commission (“FCC”) also included “notices” in a list of documents covered by the Act,³⁰³ but it still publishes

verbs: “is a discussion of”; “provides reference to, and legal analysis of”; and “citation . . . is provided.” *Id.* It also uses the passive voice as follows: “prepared by”; “is provided in”; “is not intended”; “was issued electronically and sent for publication”; “is scheduled to be revised”). *Id.*

292. The PLAIN template included a section where agencies were instructed to include such documents. *See supra* note 169.

293. DOE Implementation, at 3.

294. U.S. DEP’T OF ENERGY, FINANCIAL ASSISTANCE FUNDING OPPORTUNITY ANNOUNCEMENT, WIRELESS CHARGING FOR ELECTRIC VEHICLES, FUNDING OPPORTUNITY NO. DE-FOA-000667, AMENDMENT 00001 (2012), available at <https://eere-exchange.energy.gov/FileContent.aspx?FileID=bc7eef7e-7b54-4c28-8c2a-c60a9d28130d>.

295. *Id.* at 7.

296. *Id.* at 7, 11.

297. *Id.* at 15.

298. *Id.* at 6.

299. *Id.* at 8, 10.

300. *Id.* at . 3–4, 7–12.

301. *Id.* at 2, 7.

302. *Id.* at 42.

303. FCC Implementation at 1.

notices that do not use plain language. On April 1, 2013, the FCC released a public notice seeking comments on its broadcast indecency policies.³⁰⁴ This notice also proved to be of popular public interest; in the first two months after the notice's release, it received almost 100,000 public comments.³⁰⁵ Indeed, the FCC itself acknowledged the public interest in the issue when it doubled the amount of time given for comments.³⁰⁶ Yet again, despite the general public's interest, the FCC failed to use plain writing in this notice, including the following errors:

- It uses the passive voice ("were foreclosed by"; "are invited"; "may be filed"; "can be filed"; "must be filed"; "must be addressed"; "must be delivered"; "must be held together"; "must be disposed of"; "should be addressed"; "shall be treated"; "are reminded"; "is required"; "are set forth");³⁰⁷
- It uses hidden verbs ("commence a review"; "make changes to"; "the pendency of"; "a listing of");³⁰⁸
- It uses legal jargon ("aforementioned");³⁰⁹
- It does not use personal pronouns (using the term "Commission" instead of "we");³¹⁰ and
- It does not omit unnecessary words ("[s]ince . . . thus far"; "in accordance with"; "pertaining to").³¹¹

The number and consistency of these mistakes across the board indicates that, in addition to failing to comply with the Act's technical requirements, agencies are failing to comply with the Act's most crucial requirement—they are not using language that the public can easily understand and use.

IV. Shortcomings and Solutions

First, on the positive side, the Act has done some good. The government does seem to have made a few small steps towards plain writing. Agencies have

304. See FED. COMM'N, FCC REDUCES BACKLOG OF BROADCAST INDECENCY COMPLAINTS BY 70% (MORE THAN ONE MILLION COMPLAINTS); SEEKS COMMENT ON ADOPTING EGREGIOUS CASES POLICY (2013), available at <http://www.fcc.gov/document/fcc-cuts-indecency-complaints-1-million-seeks-comment-policy>.

305. See FCC ELECTRONIC COMMENT FILING SYSTEM, PROCEEDING 13-86 DETAILS, <http://apps.fcc.gov/ecfs/proceeding/view?z=xaulg&name=13-86> (last visited June 5, 2013).

306. The FCC announced the notice in the Federal Register on April 19, 2013, making the deadline for comments May 20, 2013. See FCC Proposed Consent Decree, Clean Air Act Citizen Suit, 78 Fed. Reg. 23562-63 (Apr. 19, 2013). The FCC later extended the deadline by thirty days, noting "the interest of the public in having sufficient time for review and consideration of the various positions and concerns." FCC PUBLIC NOTICE, FCC EXTENDS PLEADING CYCLE FOR INDECENCY CASES POLICY (May 10, 2013), <http://apps.fcc.gov/ecfs/proceeding/view?z=xaulg&name=13-86> (last visited June 5, 2013).

307. FED. COMM'N, FCC REDUCES BACKLOG OF BROADCAST INDECENCY COMPLAINTS BY 70% (MORE THAN ONE MILLION COMPLAINTS); SEEKS COMMENT ON ADOPTING EGREGIOUS CASES POLICY, *supra* note 304, at 1-3.

308. *Id.*

309. *Id.* at 2.

310. *Id.* at 1-3.

311. *Id.*

begun moving away from some of the worst offenders in plain writing—legal jargon such as “hereafter,” “aforementioned,” “foregoing,” and “wherefore.” Although some of the covered documents analyzed in the section above continue to use these words, for the large part, this type of legal jargon seems to be on the decline.³¹² Further, because of the Act, many agencies are now proclaiming a commitment to plain writing on their websites and are training employees in plain writing. And once a year, at least one person in many agencies will look at its agency’s attempts to use plain writing.

But even though the Act has made some progress towards plain writing, it has not done enough. Overall, the government is still not using plain writing in most of its communications with the public. The Center for Plain Language published Plain Writing Report Cards in July 2012 that support this: the average score of the twelve agencies examined was only 133 points out of a possible 300—less than 50%.³¹³ The Center only awarded one A, which went to the USDA.³¹⁴ Seven of the agencies received a D or below; the remaining agencies received mostly C’s, with a few agencies also earning B’s.³¹⁵

Indeed, a close look at the covered documents examined above also reveal that government agencies are still making many of the same mistakes that the Guidelines warned against. For example, the Guidelines identify passive voice, unnecessary words, and excessive abbreviations as the most common plain writing problems in government writing.³¹⁶ Nonetheless, all of the documents examined above still make at least two, if not all three, of these mistakes.

The Act’s main shortcoming is that there is no oversight or enforcement. Indeed, the Act has been described as “a mostly hortatory law.”³¹⁷ There is no supervision—no way of making sure that agencies are actually following through with the requirement that they use plain writing. The version of the Act initially introduced in Congress did include a measure of oversight and enforcement: it required agencies to submit their periodic reports to the OMB, which would in turn report to Congress. With the Towns amendment, however, that changed to publishing the reports online. Although publishing the reports online makes them more readily available to the general public, it removed any automatic oversight. Instead of being reviewed by the OMB, the reports now go online where there is no guarantee that any individual will ever actually read the report.³¹⁸ No government

312. Granted, all but one of the documents analyzed in Part III.0, *supra*, used legal jargon. See *supra* notes 252, 262, 281, 286, 298, and 309. However, most of those documents that used legal jargon only did so once, as compared to the many times the documents repeated the other mistakes. See *id.*

313. See CTR FOR PLAIN LANGUAGE, PLAIN LANGUAGE REPORT CARDS, <http://centerforplainlanguage.org/plain-language-report-card/> (last visited Apr. 17, 2013). The Center graded the following agencies: DHS, DOD, DOJ, DOL, DOT, EPA, HHS, NARA, SBA, SSA, USDA, and VA. *Id.* The lowest overall grade went to the VA, which received an F in both categories. See *id.*

314. In addition to points, the Center assigned two grades for each agency: one for “[b]asic Act requirements” and one for “supporting activities.” *Id.* The USDA received the A in the first category and a B in the second category, giving it the highest overall grade. See *id.* The VA received the lowest grade, earning two F’s. See *id.*

315. See *id.*

316. See *supra* notes 133, 140, 142.

317. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 351 (5th ed. 2012).

318. Not only is there no guarantee that any individual will ever read the report, it seems highly unlikely that a member of the general public will ever actually find the report in the first place. As discussed in Part B.c.B, *supra*, only eleven agencies included a link to their plain writing page on their homepage, and those

official or committee is appointed to review the reports or given any authority to discipline agencies that fail to comply with the Act.

Instead, the Act relies on the public for enforcement. However, the general public is not aware of the Act’s existence. Several agencies reported either no or very few comments from the public regarding their use of plain writing.³¹⁹ Indeed, if you ask the next layperson you meet whether he or she is aware that a law exists requiring the government to use plain writing, the most likely response will be surprise or disbelief. Even among lawyers, personal experience has revealed that many colleagues, including those in the legal academy, are not aware of the Act or that plain language is now required in many government communications.

This lack of awareness is where the problem lies. The Act relies on the public to tell agencies when they are not using plain language, but the public does not know that the agencies are required to use plain language. It is no surprise, then, that agencies continue to use the stuffy, complicated language that they have always used.

For the Act to succeed, it needs better oversight and enforcement.³²⁰ Although it is unlikely that Congress would ever pass a bill allowing judicial review or private causes of action relating to the government’s failure to use plain language, there are alternative methods that would assist in ensuring agencies’ compliance with the Act.

First, if the Act is going to rely on the public to help the government reach its goal of plain language, the public has to know about the goal. One of the best ways to ensure public awareness of the Act is to include information about it in the very covered documents that are meant for the public. Although perhaps not feasible for every covered document, most could include a sentence or two that 1) tells the reader that the government is required to use plain language that the reader can understand and 2) provides an email address or other contact information where the reader can get in touch with the agency if the reader has trouble understanding

that did put it in small font at the very bottom of the page. A person would have to be looking for the reports to find them, but, as discussed *infra*, most individuals are not aware of the Act or the existence of these reports in the first place.

319. See ED 2012, at 3 (noting that it did not receive any comments from the public between August 2011 and July 2012); FDIC 2012, at 3 (noting that it received little public input and no complaints about non-compliance); DOD 2013, at 1 (noting that it received only one request from the public to rewrite a document in plain writing); GSA 2013, at 3 (noting that it did not receive any requests to clarify any of its web pages in 2012).

320. On a positive note, the two bills currently pending in the 113th Congress that would require plain language in regulations both have better oversight and enforcement procedures than the Plain Writing Act of 2010. The Plain Regulations Act of 2013, pending in the House, requires agencies to certify to the Director of the OMB that they have used plain language in their proposed regulations; if the Director finds that an agency has not used plain language, the Director will return the regulation for the agency to redraft and resubmit it. Plain Regulations Act of 2013, H.R. 1557, 113th Cong. §§ 4(c), 5(a) (2013). The Plain Writing Act for Regulations of 2013, pending in the Senate, also require agencies to certify that they have used plain language; however, it does not give the Director authority to require agencies to redraft regulations not written in plain language. See S. 807, 113th Cong. §4(c) (2013). Instead, it requires the Comptroller General to submit an annual report to Congress that

(1) evaluates the extent to which regulations use plain writing. . . ; (2) assesses the extent to which plain writing helped increase the level of public participation in the rulemaking process; and (3) provides recommendations to . . . improve compliance with . . . the Act[] and better use plain writing to enhance public understanding of regulations and increase public participation in the rulemaking process.

Id. at § 6(c).

what the document says or believes it is not written in plain language. Companies that use commercial vehicles sometimes employ a similar technique by including “How’s my driving?” stickers on vehicles, requesting others on the road to report back on the company’s drivers.³²¹ In the same way, agencies could solicit feedback on their writers. By adopting this technique, agencies will not only inform the public about the Act’s existence, but also encourage feedback from their intended audience—readers who need to understand their documents. This will help solve one problem that has plagued agency writers—they do not know they are using complicated language.³²²

Second, in addition to improving public awareness and participation, another way to increase compliance with the Act is to provide for more oversight by Congress by reviving the requirement in the earlier version of the bill that the agencies report to the OMB and that the OMB then report to Congress.³²³ Unlike members of the general public who may or may not read the reports, the OMB would be obligated to review the reports every year, ensuring that someone is actually reading the reports that the agencies are publishing. However, to allow the OMB—and subsequently, Congress—to review the agencies’ progress in a meaningful way, the OMB guidance should be updated to include more specific requirements for these reports.

Much like the template created by PLAIN,³²⁴ agencies should be required to provide detailed information about how they are implementing the Act, including specifics about the frequency and attendance of plain language training and multiple sample documents that the agency believes it has written in plain language. The OMB would review not only those reports, but also conduct its own survey—examining other covered documents and surveying different intended audiences to determine how well agencies are complying with the Act—to prepare its own report to Congress. After receiving this OMB report, the congressional committees would then be able to impose consequences—such as public reprimands, employee discipline, or even reduced funding—on agencies that fail to comply with the Act’s requirements.³²⁵

With these changes, Congress will bring about better compliance with the Act. True, the switch to plain language will still take time.³²⁶ But agencies will no

321. One company offering these services guarantees results, promising a 10% reduction in at-fault accidents during the first year of using its signs. See DRIVERCHECK, <http://www.drivercheck.net> (last visited Aug. 15, 2013).

322. See Betsy A. Bowen, Thomas M. Duffy & Erwin R. Steinberg, *Analyzing the Various Approaches of Plain Language Laws*, in PLAIN LANGUAGE: PRINCIPLES AND PRACTICE 21 (Erwin R. Steinberg ed., 1991) (“[T]he people who write government regulations do not recognize that they speak and write a special language that is foreign to the average citizen[.]”). This is a problem with legal writers in general. See Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 570 (1985) (“To ask [many] lawyers to give up legalese for Plain English is to ask them to admit to themselves and others that they cannot distinguish, for example, between a complete sentence and a sentence fragment, or to confess that the notion of active and passive verbs eludes them.”).

323. See *supra* note 63; S. 574, 111th Cong. § 5 (2009). This would be in addition to the current requirement that the reports be posted online.

324. See *supra* note 103.

325. As Representative Chaffetz said, “Tell and direct and insist that every agency and every document be instituted in plain, clear language, and if the head of that agency can’t achieve that goal, then they should fire somebody and get somebody who can do that.” 156 CONG. REC. H7315 (daily ed. Sept. 29, 2010).

326. See, e.g., Annetta L. Cheek, *The Plain Writing Act of 2010*, 90 MICH. B.J., Oct. 2011, at 52, 53

longer be able to easily ignore the Act’s mandates, and the agencies that do will suffer consequences. Over time, the complicated language that the government is known for will be replaced with language that the public can easily understand and use.

V. Conclusion

The use of complicated legal language has long been a problem that the plain language movement has sought to correct, and the Plain Writing Act was certainly a step in the right direction. But instead of passing a law that would ensure that the government respects its citizens’ right to plain language, Congress passed a toothless act that has thus far fallen short of its goal. This failure can be attributed to the Act’s lack of any oversight or enforcement procedures, a flaw that Representative Braley himself seems to have acknowledged: “Unless federal agencies are held accountable, they won’t implement the changes required by the Plain Writing Act.”³²⁷ However, this problem can be fixed. Increasing public awareness and participation, along with increased congressional oversight and enforcement will go a long way towards solving some of the remaining problems with the Act. Congress needs to act to make these changes. Until it gets serious about enforcing the Act, government agencies will continue to write in a way that requires the public to sift through complicated legal language to decipher what the agencies are trying to say, and the government’s failure to communicate will persist.

(2011) (“Federal agency writers are not going to be converted into plain language overnight.”).

327. UNITED STATES CONGRESSMAN BRUCE BRALEY, BRALEY JOINS CENTER FOR PLAIN LANGUAGE TO UNVEIL FIRST-EVER “PLAIN LANGUAGE REPORT CARD” (2012), available at <http://braley.house.gov/press-release/braley-joins-center-plain-language-unveil-first-ever-%E2%80%9Cplain-language-report-card%E2%80%9D>.

Appendix A

*Table of Implementation and Annual Compliance Reports
Updated February 18, 2014*

Agency Name	Implementation Report	2012 Annual Compliance Report	2013 Annual Compliance Report
BBG	Not published.	Not published.	Not published.
CSOSA	Not published.	Not published.	Not published.
DHS	http://www.dhs.gov/sites/default/files/publications/DHS-Implementation-Plan-04102013-final.pdf	Not published.	Not published.
DOC	http://www.commerce.gov/sites/default/files/documents/2011/july/doc_compliance_report_july132011_2_0.pdf	http://www.commerce.gov/sites/default/files/documents/2012/april/deptofcommerce_compliance_report_042013_updated.pdf	http://www.commerce.gov/sites/default/files/documents/2013/may/deptofcommerce_compliance_report_04_30_13.pdf
DOD	http://www.dtic.mil/whs/directives/correspdf/502513p.pdf	Not available online. ³²⁸	http://www.dtic.mil/whs/directives/plainlanguage/Plain_Writing_Act_Compliance_Report_2013.pdf
DOE	http://energy.gov/downloads/plain-writing-implementation-plan	http://energy.gov/downloads/plain-language-compliance-report	http://energy.gov/downloads/plain-language-compliance-report-2013
DOI	http://www.doi.gov/open/Plain-Writing-Act-Implementation-Plan.cfm	Not published.	Not published.
DOJ	http://www.justice.gov/open/initial-plan.html	http://www.justice.gov/open/docs/pw-1st-annual-rpt.pdf	http://www.justice.gov/open/docs/pw-annual-rpt.pdf
DOL	http://www.dol.gov/dol/	http://www.dol.gov/dol/	http://

328. The DOD 2012 Report is no longer available online; however, a copy is on file with the author.

	plainwriting/ 20110713report.htm	plainwriting/ 20120412report.htm	www.dol.gov/ dol/ plainwriting/ 20130413report .htm
DOS	http://www.state.gov/ documents/ organization/ 168827.pdf	Not published.	Not published.
DOT	http://www.dot.gov/ mission/open/plain- writing-plan	Not published.	http:// www.dot.gov/ mission/open/ plain-writing- act-2010-2013- compliance- report
ED	Not available online. ³²⁹	http://www.ed.gov/plain- language/documents/ plain-writing- compliance-2012.doc	Not published.
EEOC	Not published.	Not published.	Not published.
EPA	http://www.epa.gov/ plainlanguage/ report.html	http://www.epa.gov/ plainlanguage/2012- annual-report.html	http:// www.epa.gov/ plainlanguage/ 2013-annual- report.html
FCC	http://www.fcc.gov/ encyclopedia/plain- writing-fcc	http://www.fcc.gov/ encyclopedia/plain- writing-act-compliance- report-april-13-2012	http:// www.fcc.gov/ plain-writing- act-compliance- report-april- 2013
FDIC	http://fdic.gov/ plainlanguage/ pwcompliance201 2.pdf	http://fdic.gov/ plainlanguage/ pwcompliance201 2.pdf	http:// www.fdic.gov/ plainlanguage/ pwcompliance eport2013.pdf
FTC	Not available online. ³³⁰	Not published.	Not published.
GPO	Not published.	Not published.	Not published.
GSA	http://www.gsa.gov/ graphics/admin/ Plain_Language_Imple mentation_Plan_for_G SA.pdf	http://www.gsa.gov/ graphics/admin/ GSA_PlainLanguageCo mplianceReport_2012.pd f	http:// www.gsa.gov/ portal/mediaId/ 170891/ fileName/ GSA_PlainLan guageComplian

329. The ED Implementation Plan is no longer available online; however, a copy is on file with the author.

330. The FTC Implementation Plan is no longer available online; however, a copy is on file with the author.

			ceReport_2013
HHS	http://www.hhs.gov/open/recordsandreports/plainwritingact/plain_writing_act_report.pdf	http://www.hhs.gov/open/recordsandreports/plainwritingact/plain_writing_act_compliance_report.pdf	http://www.hhs.gov/open/recordsandreports/plainwritingact/plain_writing_act_compliance_report_april_2013.pdf
HUD	http://portal.hud.gov/hudportal/documents/huddoc?id=Plainlanguageprt072011.pdf	Not published.	Not published.
NARA	http://www.archives.gov/open/plain-writing/reports/compliance-report-071311.pdf	http://www.archives.gov/open/plain-writing/reports/compliance-report-0412.pdf	http://www.archives.gov/open/plain-writing/reports/compliance-report-0413.pdf
NASA	http://www.nasa.gov/open/plainlanguage_compliance_report.html	http://www.nasa.gov/open/plainlanguage_compliance_report_dec2012.html	Not published.
NCUA	http://www.ncua.gov/Legal/plainlanguage/Pages/Plan.aspx	http://www.ncua.gov/Legal/Documents/Reports/PWA2012.pdf	http://www.ncua.gov/Legal/Documents/Reports/PWA2013.pdf
NLRB	Not published.	Not published.	Not published.
NRC	http://www.nrc.gov/public-involve/open/plain-writing/nrc-plans-rpts-news/nrc-plain-writing-compliance-report-071211.pdf	http://pbadupws.nrc.gov/docs/ML1210/ML12107A329.pdf	http://pbadupws.nrc.gov/docs/ML1311/ML13119A472.pdf
NSF	Not published.	Not published.	Not published.
OPM	http://www.opm.gov/plainlanguage/Plain-Writing-Plan.pdf	http://www.opm.gov/plainlanguage/2012PlainWritingActComplianceReport.pdf	Not published.
SBA	http://www.sba.gov/content/plain-language-page-0	http://www.sba.gov/content/plain-language-page-0	Not published.
SEC	http://sec.gov/plainwriting/	Not available online. ³³¹	Not available online. ³³²

331. The SEC 2012 Compliance Report is no longer available online; however, a copy is on file with the author

	plainwritingplan.pdf		
SI	Not published.	Not published.	Not published.
SSA	http://www.socialsecurity.gov/plain-language/PlainWritingActImplementationPlan.pdf	http://www.socialsecurity.gov/plain-language/PlainWritingActComplianceReport2011.pdf	http://www.ssa.gov/plain-language/PlainWritingActComplianceReportfor2012.pdf
TREAS	Not published.	Not published.	Not published.
USDA	http://www.usda.gov/documents/PL-Report-final.pdf	http://www.usda.gov/documents/USDA_Compliance_Report_04-13-2012.pdf	http://www.usda.gov/documents/usda-plain-writing-act-2013-compliance-report.pdf
VA	http://www.va.gov/opa/publications/docs/VA_PL_ImplementationPlan_Final2.pdf	Not published.	http://www.va.gov/opa/publications/docs/VA_compliance_report_July2013.pdf