

# The Problem with Words: Plain Language and Public Participation in Rulemaking

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## ABSTRACT

*This Article, part of the special issue commemorating the fiftieth anniversary of the Administrative Conference of the United States (“ACUS”), situates ACUS’s recommendations for improving public rulemaking participation in the context of the federal “plain language” movement. The connection between broader, better public participation and more comprehensible rulemaking materials seems obvious, and ACUS recommendations have recognized this connection for almost half a century. Remarkably, though, the series of presidential and statutory plain-language directives on this topic have not even mentioned the relationship of comprehensibility to participation until very recently. In 2012, the Office of Information and Regulatory Affairs (“OIRA”) issued “Executive Summary Guidance,” instructing that “straightforward executive summaries” be included in “lengthy or complex rules.” OIRA reasoned that “[p]ublic participation cannot occur . . . if members of the public are unable to obtain a clear sense of the content of [regulatory] requirements.”*

*Using a novel dataset of proposed and final rule documents from 2010 through 2014, this Article examines the effect of the executive summary requirement. The results show that the use of executive summaries increased substantially compared with the modest executive-summary practice pre-Guidance. Additionally, agencies have done fairly well in providing summaries for “lengthy” rules. Success in providing the summary in “complex” rules, and in following the standard template recommended by the Guidance is mixed. The most significant finding is the stunning failure of the new executive summary requirement to produce more comprehensible rulemaking information. Standard readability measures place the executive summaries at a level of difficulty that would challenge even college graduates. Moreover, executive summaries are, on average, even less readable than the remainder of the rule preambles that they are supposed to make more accessible to a broader audience.*

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*Still, some bright spots appear in this generally gloomy picture, as some agencies (or parts of agencies) have become better at producing readable executive summaries. After speculating about why efforts to “legislate” more comprehensible rulemaking documents persistently fail, this Article urges ACUS to pursue its commitment to broader rulemaking participation by studying successful—and unsuccessful—agency practices in this area. The goal should be to identify best practices and make informed and practicable recommendations for producing rulemaking materials that interested members of the public could actually understand.*

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## INTRODUCTION

*“It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.*

—Alexander Hamilton (1788)<sup>1</sup>

*“The public notice giving function of the Federal Register requires, at a minimum, that each rulemaking document be intelligible.”*

—Administrative Committee of  
the Federal Register (1976)<sup>2</sup>

<sup>1</sup> THE FEDERALIST NO. 62, at 344 (Alexander Hamilton) (E.H. Scott ed., 1898).

<sup>2</sup> Clarity of Rulemaking Documents in the Federal Register, 41 Fed. Reg. 56,623, 56,623 (Dec. 29, 1976) [hereinafter 1976 Final Rule].

ACUS believes in rulemaking. Fifteen of the thirty-two recommendations and statements made since the 2010 ACUS revival<sup>3</sup> deal directly with rulemaking or with issues of particular importance to rulemaking.<sup>4</sup> ACUS also believes that broad public participation in rulemaking matters. In fact, ACUS recommendations have urged that:

- Agencies consider “using social media tools to raise the visibility of rulemakings,”<sup>5</sup> as well as “to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings”;<sup>6</sup>
- Agencies recognize that “raising awareness among missing stakeholders (those directly affected by the proposed rule who are historically unlikely to participate in the traditional comment process) . . . will require new outreach strategies”;<sup>7</sup>
- Agency websites be designed to “efficiently enable the public to retrieve all available information . . . about . . . ongoing rulemakings,”<sup>8</sup> and “improve access for persons who have faced barriers to effectively participating in rulemaking in the past”;<sup>9</sup> and
- Regulations.gov (the federal government rulemaking portal) provide information “explaining what types of comments are most beneficial and listing best practices for parties submitting comments.”<sup>10</sup>

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<sup>3</sup> See *History*, ADMIN. CONF. U.S., <https://www.acus.gov/history> (last visited Sept. 1, 2015).

<sup>4</sup> In addition to the recommendations cited below, *infra* notes 5–21, see ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272 (Dec. 17, 2013); ACUS Statement #18, Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76,275 (Dec. 17, 2013); ACUS Recommendation 2013-2, Benefit-Cost Analysis at Independent Regulatory Agencies, 78 Fed. Reg. 41,355 (July 10, 2013); ACUS Recommendation 2012-4, Paperwork Reduction Act, 77 Fed. Reg. 47,808 (Aug. 10, 2012); ACUS Recommendation 2012-2, Midnight Rules, 77 Fed. Reg. 47,802, 47,802 (Aug. 10, 2012).

<sup>5</sup> ACUS Recommendation 2011-8, Agency Innovations in E-Rulemaking, 77 Fed. Reg. 2264, 2265 (Jan. 17, 2012).

<sup>6</sup> ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269, 76,270 (Jan. 17, 2012).

<sup>7</sup> *Id.* at 76,271.

<sup>8</sup> ACUS Recommendation 2011-8, 77 Fed. Reg. at 2265.

<sup>9</sup> *Id.*

<sup>10</sup> ACUS Recommendation 2011-2, Rulemaking Comments, 76 Fed. Reg. 48,791, 48,791 (Aug. 9, 2011).

In a series of recommendations, ACUS has sought to highlight “‘best practices’ designed to increase the opportunities for public participation”<sup>11</sup> and understanding in rulemaking, including:

- Posting all comments in the online docket;<sup>12</sup>
- Incorporating in the online docket “all studies and reports on which the proposal for rulemaking draws, as soon as practicable”;<sup>13</sup>
- Indexing rulemaking dockets “at an appropriate level of detail,”<sup>14</sup> noting that the rulemaking record “plays an essential role in informing the public of potential agency action and in improving the public’s ability to understand and participate in agency decisionmaking”;<sup>15</sup>
- Providing, “particularly for lengthy regulations, a section-by-section analysis in the preamble in which the organization . . . corresponds to the organization of the final rules themselves”;<sup>16</sup>
- Presenting information about the applicability of regulatory analysis requirements in the form of a clear and easy-to-understand chart;<sup>17</sup>
- Communicating information about agencies’ use of science “in a manner that is clear to the general public”<sup>18</sup> and that gives “members of the public . . . access to the information necessary to reproduce or assess the agency’s technical or scientific conclusions”;<sup>19</sup>
- Ensuring that materials incorporated by reference in proposed and final rules “be reasonably available both to regulated and other interested parties”;<sup>20</sup> and
- Adjusting ex parte communications policies to avoid the possibility “that certain people or groups may have, or be perceived

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> ACUS Recommendation 2011-1, Legal Considerations in e-Rulemaking, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011).

<sup>14</sup> ACUS Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,358, 41,360 (July 10, 2013).

<sup>15</sup> *Id.* at 41,358.

<sup>16</sup> ACUS Recommendation 2014-3, Guidance in the Rulemaking Process, 79 Fed. Reg. 35,992, 35,993 (June 25, 2014).

<sup>17</sup> See ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,801, 47,801–02 (Aug. 10, 2012).

<sup>18</sup> ACUS Recommendation 2013-3, Science in the Administrative Process, 78 Fed. Reg. 41,357, 41,358 (July 10, 2013).

<sup>19</sup> *Id.*

<sup>20</sup> ACUS Recommendation 2011-5, Incorporation by Reference, 77 Fed. Reg. 2257, 2258 (Jan. 17, 2012).

to have, greater access to agency personnel [during rulemaking] than others.”<sup>21</sup>

The concern that the rulemaking process and its outputs should be accessible to “ordinary” people as well as to large regulated firms is not a new development for ACUS. In 2013, an ACUS recommendation remarked: “The Conference has consistently supported full and effective public participation in rulemaking.”<sup>22</sup> Indeed, as Part I explains, ACUS’s very first set of recommendations included two remarkably ambitious efforts to make rulemaking documents more comprehensible to the public and to give historically under-represented stakeholders a meaningful voice in the comment process.<sup>23</sup>

Yet, as Professor Richard Pierce’s contribution to this special issue points out,<sup>24</sup> studies of rulemaking continue to reveal that large regulated firms participate more extensively—and more effectively—than other types of stakeholders or members of the general public.<sup>25</sup> The Authors of this Article are part of a university research group—the Cornell eRulemaking Initiative (“CeRI”)—that does action research using Web 2.0 and other new technologies to support broader, better public participation in rulemaking (the RegulationRoom project).<sup>26</sup> Seven years of experience working with federal agencies in live rulemakings has convinced the Authors that Professor Pierce is correct: the current rulemaking process, despite its formal promises of

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21 ACUS Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993, 35,994 (June 25, 2014).

22 ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269, 76,270 n.5 (Jan. 17, 2012).

23 See *infra* Part I.

24 Richard J. Pierce, Jr., *The Administrative Conference and Empirical Research*, 83 GEO. WASH. L. REV. 1564 (2015).

25 *Id.* at 104, 106. A large literature documents that the notice-and-comment process tends to be dominated by a limited range of mostly corporate participants. See, e.g., Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46, 50–51 (2007); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 951, 958 (2006); see also CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 193–95 (4th ed. 2011) (summarizing studies that find business interest dominance, although querying whether the participation gap between business and other interests might be narrowing).

26 Information about CeRI and the RegulationRoom project can be found at <http://www.lawschool.cornell.edu/cei/> and at <http://regulationroom.org/>, respectively. The results of CeRI’s public participation research to date is summarized in CYNTHIA R. FARINA & MARY J. NEWHART, IBM CTR. FOR THE BUS. OF GOV’T, *RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION* (2013), <http://www.businessofgovernment.org/sites/default/files/Rulemaking%202%200.pdf>.

transparency and broad participation rights, *routinely and systematically* disadvantages consumers, small business owners, local and tribal government entities, nongovernmental organizations, and similar kinds of stakeholders, as well as members of the general public. Many of the factors Professor Pierce discusses—*e.g.*, collective action problems and inequalities in access and resources<sup>27</sup>—seem largely beyond the ability of ACUS to help agencies remediate. From our on-the-ground perspective, however, one of the most persistent and pernicious contributors to rulemaking’s “bias” in favor of large regulated firms is a problem that lies completely within the rulemaking agency’s control.

To illustrate this problem, imagine that the Department of Transportation (“DOT”) publishes the following in the Federal Register as its Notice of a Proposed Rulemaking (“NPRM”) on “Enhanced Airline Passenger Protections”:

The most pressing air passenger problem right now is that consumers cannot tell what the total cost of air transportation will be, including ancillary fees, before deciding to buy. This prevents comparison shopping across airlines. Our proposed fee transparency rules would make airlines disclose all fees at the point of sale, so travelers know the total cost of their airline ticket with no surprises later.

Also, the new rules would substantially increase the amount paid to air travelers when they are involuntarily bumped off flights. The new rules will also allow passengers to cancel their reservation within twenty-four hours without penalty on non-refundable tickets. They will prohibit price increases once a ticket has been bought. They will require airlines to tell passengers about flight status changes in a more timely fashion.

The proposal also expands the tarmac delay rule that went into effect in April. Foreign airlines operating at U.S. airports would have to develop contingency plans for tarmac delays and publish them to their websites. The rule also would be expanded to small and non-hub airports for U.S. carriers.

DOT is currently considering the new rules and anyone may comment on the proposed changes until September 23. To submit your comments, visit the Regulations.gov website.

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<sup>27</sup> Pierce, *supra* note 24, at 104–06.

Imagine further that this is *all* the NPRM says. It does not contain the actual regulatory text of the proposed changes; no cost-benefit or other regulatory analyses are provided.

Of course, this hypothetical NPRM is purely hypothetical. DOT rulemakers understand that if they were to publish something so abbreviated, a federal court, on review of the final rule, would almost certainly vacate and remand for failure to give notice adequate to allow meaningful comment.<sup>28</sup> Accordingly, the NPRM actually published in the *Enhanced Airline Passenger Protections* rulemaking extensively discussed the agency's legal authority, policy objectives, factual assumptions, and possible alternative approaches.<sup>29</sup> It identified areas where DOT sought more information.<sup>30</sup> It provided compliance details, such as specifics about how, when, and where airlines would have to disclose baggage and other ancillary fees.<sup>31</sup> It gave the actual text of the proposed new regulation.<sup>32</sup> It was accompanied by a draft Regulatory Impact Analysis ("RIA"),<sup>33</sup> laying out the bases and methodology of DOT's cost and benefit projections.<sup>34</sup>

The point of imagining a drastically abbreviated NPRM is to observe how differently situated four potential commenters—a major airline, the executive director of a small regional airport, a small travel agency, and a frequent business traveler—are in the hypothetical versus the actual rulemaking. The content of the imaginary NPRM is general and conclusory, but it is equally accessible to all four potential commenters. To be sure, the major airline will still have a decided edge in crafting comments. As a repeat player, it knows the regulatory environment and history, and it has the resources to hire lawyers, economists, and other regulatory experts able to make well-educated guesses about the facts and arguments that might influence the agency.<sup>35</sup> Still, in this hypothetical scenario, the "notice" that initiates public comment has given all four stakeholders the *same information* about what DOT is proposing and why.

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28 See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 7.3, 7.8 (5th ed. 2010).

29 Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,318–36 (June 8, 2010).

30 *Id.* at 32,329.

31 *Id.* at 32,323.

32 *Id.* at 32,336–41.

33 ECONOMETRICA, INC. & HDR DECISION ECONOMICS, PRELIMINARY REGULATORY ANALYSIS: CONSUMER RULEMAKING NPRM: ENHANCING AIRLINE PASSENGER PROTECTIONS II (2010), <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2010-0140-0003> [hereinafter PRELIMINARY REGULATORY ANALYSIS].

34 *Id.* at 26–28.

35 See Pierce, *supra* note 24, at 104–06.

By contrast, in the actual rulemaking, the major airline's edge becomes a chasm. The real NPRM was almost 26,000 words long (about 104 manuscript pages).<sup>36</sup> Based on a common readability test, its text was written at a reading level considerably above the ability of eighty percent of adults in the U.S.<sup>37</sup> By comparison, the hypothetical NPRM above contains 207 words and tests at a readability level comfortably within accepted guidelines for general public comprehensibility.<sup>38</sup> The real RIA,<sup>39</sup> attached to the NPRM, was an additional 35,000 words in the form of 107 single-spaced pages of text, tables, and graphs. Neither the length nor the readability level of the actual airline passenger rights materials were unusual. Indeed, as demonstrated by the examination of other rulemaking documents in Part II, the NPRM was shorter and more readable than average.

To the major airline and its experts, the dense information in the actual rulemaking documents is gold. It enables them to create the "long, well-crafted [comments], rich in data and analysis" of which Professor Pierce speaks.<sup>40</sup> But what about the other potential commenters? The small regional airport director *might* be able wade through rulemaking documents that are the length of many novels in order to identify the parts relevant to her operations and write a responsive comment of modest length that expresses her concerns. For the average travel agent and frequent business traveler, however, the information in the NPRM and RIA is about as accessible as if the documents were written in hieroglyphics. What these stakeholders know about the rulemaking will likely remain as general and conclusory as what appears in the imaginary NPRM above—which was created by paraphrasing articles about the rulemaking in *USA Today* and *CNN*.<sup>41</sup> Small wonder that these stakeholders submit comments

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<sup>36</sup> Enhancing Airline Passenger Protections, 75 Fed. Reg. at 32,318–41.

<sup>37</sup> The real NPRM text scored at an 11.8 grade level in the Flesch-Kincaid readability test. According to the Department of Education National Adult Literacy Survey, 80% of U.S. adults read below the tenth grade level. *See infra* text accompanying notes 201–218.

<sup>38</sup> The hypothetical NPRM scored at an 8.1 grade level. *See infra* text accompanying notes 201–18.

<sup>39</sup> PRELIMINARY REGULATORY ANALYSIS, *supra* note 33.

<sup>40</sup> *See* Pierce, *supra* note 24, at 106.

<sup>41</sup> *See* David Grossman, 2010: *The Year Airline Passengers Struck Back*, *USA TODAY* (Sept. 7, 2010, 2:06 PM), [http://usatoday30.usatoday.com/travel/experts/grossman/2010-09-07-improving-air-travel-passenger-rights\\_N.htm](http://usatoday30.usatoday.com/travel/experts/grossman/2010-09-07-improving-air-travel-passenger-rights_N.htm); Marnie Hunter, *Feds Propose New Airline Passenger Protections*, *CNN* (June 3, 2010, 10:12 AM), <http://www.cnn.com/2010/TRAVEL/06/02/airline.passenger.protections/index.html>.



amounting to little more than “save us from irresponsible, deceptive airlines.”<sup>42</sup>

This Article does not suggest that less information in rulemaking is better. Rather, its goal is to uncover a major cause of systematic bias that hides in plain view: the length and complexity of rulemaking documents make it possible for large regulated firms to submit the sophisticated, highly detailed comments that rulemakers take seriously.<sup>43</sup> These characteristics simultaneously make it impossible for most other types of stakeholders and members of the general public to contribute more than “slogans that are more appropriate as bumper stickers than as contributions to a decisionmaking process.”<sup>44</sup>

Part I briefly reprises the almost fifty-year history of efforts to make rulemaking documents more accessible to ordinary people. Notably, although the link between comprehensibility and public participation was clearly perceived at the outset, this connection was lost in the “plain language” movement as time passed.<sup>45</sup>

Part II focuses on a recent effort in which this was rediscovered: the 2012 instruction (“Executive Summary Guidance” or “Guidance”) from the Office of Information and Regulatory Affairs (“OIRA”) that “straightforward executive summaries” be included in preambles for “lengthy or complex rules (both proposed and final).”<sup>46</sup> This Article presents the results of a novel empirical study of the executive summaries included in rulemaking documents in the years before and after the Guidance. Although some aspects of the new executive

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<sup>42</sup> Cf. Pierce, *supra* note 24, at 105 (noting that most comments will generally amount to nothing more than “slogans”).

<sup>43</sup> See *id.* at 106.

<sup>44</sup> *Id.* at 105. As Professor Pierce points out, the Authors are on record as agreeing that much of what currently constitutes the “public” part of public comments deserves little attention from rulemakers. See *id.* at 106 n.34 (citing Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 139–44 (2012)). The animating force of the RegulationRoom project is discovering how technology and human support might change this. Farina et al., *supra*, at 125.

<sup>45</sup> This Article does not engage in the debate about precisely what plain language means and what are the best methodologies for achieving comprehensible regulatory documents. It adopts the definition of David Mellinkoff, a pioneer in the U.S. movement to use clear, simple, and brief language and sentence structure in legal drafting: “[P]lain language [is] an imprecise expression of hope for improvement in the language of the law.” *Plain language*, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE (1992); see also Douglas Martin, Obituaries, *David Mellinkoff*, 85, *Enemy of Legalese*, N.Y. TIMES, Jan. 16, 2000, at 37.

<sup>46</sup> Memorandum from Cass R. Sunstein, Administrator, Office of Info. & Reg. Affairs, to Heads of Exec. Dep’ts and Agencies (Jan. 4, 2012), [https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements\\_executive-summaries.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements_executive-summaries.pdf) [hereinafter Exec. Summ. Guidance].

summary practice are very positive, the actual impact of the requirements has perversely been to create even less comprehensible text about the rulemaking.

Part III concludes by speculating about possible explanations for the persistent problem of rulemaking documents that, as a practical matter, provide useful information to only a small fraction of the individuals and entities affected by proposed and final rules. Rather than proposing yet another set of comprehensibility directives, this Article urges ACUS to make the problem a focus of its commitment to careful research into actual agency behaviors, with the goal of developing recommendations that disseminate ideas and practices with a track record of success.

#### I. A SHORT HISTORY OF THE CAMPAIGN FOR COMPREHENSIBLE RULEMAKING DOCUMENTS

*“Mrs. Knauer [Richard Nixon’s Special Assistant for Consumer Affairs] observed that the Federal Register ‘is absolutely incomprehensible to the average consumer.’ The President commented ‘Or to anyone else.’”*<sup>47</sup>

On October 22, 1968, Betty Furness, Lyndon Johnson’s Special Assistant for Consumer Affairs, wrote to Chairman Jerre Williams of the fledgling ACUS.<sup>48</sup> She proposed an area of investigation for ACUS’s initial set of recommendations:

Since entering government service, I have become concerned about the lack of consumer involvement in government rule making affecting consumers. Day by day, agencies of our government fill the Federal Register with proposed and final rules, orders, and policies which directly and importantly affect consumers. Yet these publications go virtually unnoticed by consumers. More importantly, consumers are not participating in the establishment of the rules which are supposed to reflect the interest of the consumer.

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Obviously, the consumer is in a poor position to attempt to comprehend the legal and technical language comprising the typical Federal Register notice—if, indeed, he knows of the existence of the Federal Register. The consumer does not

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<sup>47</sup> Preparation and Transmittal of Documents Generally: Summary Statements and Highlights Listing, 36 Fed. Reg. 5203, 5203 (Mar. 18, 1971) (to be codified at 1 C.F.R. pt. 16).

<sup>48</sup> Letter from Betty Furness, Special Assistant to the President for Consumer Affairs, to Hon. Jerre S. Williams, Chairman, Admin. Conference of the U.S. (Oct. 22, 1968) [hereinafter Furness Memo] (on file with *The George Washington Law Review*).

have the benefit of the professional advice available to industry through house counsel, trade associations, trade papers, Washington counsel, etc. In most cases he has neither the time nor the collateral library materials to allow him to keep track of developments.

. . . .

Essentially, what I am proposing is that there be established a regular publication serving the needs of consumers in the same way that the Federal Register serves the needs of the regulated industry—a “Consumer’s Federal Register” if you will. I think it would serve consumers’ needs if the major issues, culled from each proposed and final rule directly and importantly affecting consumers, were summarized in such a publication with brief explanation of how the consumer could register his views or obtain more information from the agency issuing the rule.<sup>49</sup>

ACUS acted swiftly on Furness’s concern. Citing “a widespread public need which is not now met by the ‘Federal Register’ or by agency and private publications of a more specialized nature,” the Conference recommended:

A consumer bulletin should be established on an experimental basis. It should *extract and paraphrase in popular terms the substance* of Federal agency actions of significant interest to consumers. Initially, the bulletin should concentrate on

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<sup>49</sup> Furness Memo, *supra* note 48. Furness had been vocal in arguing that industry primarily and disproportionately benefited from existing rulemaking practices; for example, in an earlier memo to Joseph Califano, President Johnson’s top domestic advisor, she wrote:

It has been over 30 years since the Supreme Court forced the Executive and Legislative branches of the Federal Government to give industry better notice of, and opportunity for participation in rule-making (*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). During that time the Federal Register Act, the Administrative Procedure Act and the daily Federal Register itself have afforded industry “due process,” and industry has availed itself of the opportunities provided by law. However, these procedures and enactments were not really designed to, nor do they perform the function of providing the consumer-voter with that notice sufficient to stimulate him to participate in the making of rules which may affect him directly.

Memorandum from Betty Furness, Special Assistant to the President for Consumer Affairs, to Joseph Califano, Consumers and the Federal Register (Stimulating Citizens to Participate in Governmental Decisions) (Aug. 6, 1968) [hereinafter Califano Memo] (on file with *The George Washington Law Review*). Ms. Furness initially sought an Executive Order calling for the creation of a weekly list of consumer issues. See Califano Memo, *supra*. Subsequent discussions between White House advisors and ACUS leadership produced an agreement that Furness would formally request ACUS to take up the matter. See Memorandum from Jerre S. Williams, Chairman, Admin. Conference of the U.S., to Members of the Council (Sept. 18, 1968) (on file with *The George Washington Law Review*); see also Furness Memo, *supra* note 48.

items published in the “Federal Register,” but as it gains public acceptance, it should be broadened to include materials secured from other sources.<sup>50</sup>

The goal, said the recommendation, was to “not only disseminate information, but also stimulate public response.”<sup>51</sup>

When Chairman Williams initially responded to Furness’s letter, he had explained:

You will be pleased to know that this proposal bears a substantial relationship to other matters that the Conference is now engaged in studying. The need for establishing means by which the unorganized public can be aware of governmental actions which affect them and can be adequately represented in those governmental activities is the subject of these other studies. Thus, your proposal fits well with work of the Administrative Conference already underway.<sup>52</sup>

This related work became “Representation of the Poor in Agency Rulemaking of Direct Consequence to Them.”<sup>53</sup> Adopted the same day as the *Consumer Bulletin Recommendation*,<sup>54</sup> this recommendation urged agencies to “engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially.”<sup>55</sup> It called for “strong efforts, by use of existing as well as newly devised procedures, to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings,” and it outlined specific steps agencies could take to inform the poor about rulemakings and elicit their comments.<sup>56</sup>

Within a year of the *Consumer Bulletin Recommendation*, President Richard Nixon, in a special message to Congress on consumer

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<sup>50</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-4: CONSUMER BULLETIN 1 (1968), <http://www.acus.gov/sites/default/files/documents/68-4.no-FR.pdf> (emphasis added).

<sup>51</sup> *Id.*

<sup>52</sup> Letter from Jerre S. Williams, Chairman, Admin. Conference of the U.S., to Betty Furness, Special Assistant to the President for Consumer Affairs (Oct. 25, 1968) (on file with *The George Washington Law Review*).

<sup>53</sup> ACUS Recommendation 68-5, Representation of the Poor in Agency Rulemaking of Direct Consequence to Them, 1 C.F.R. § 305.68-5 (1993).

<sup>54</sup> RECOMMENDATION 68-4, *supra* note 50, <http://www.acus.gov/sites/default/files/documents/68-4.no-FR.pdf>.

<sup>55</sup> 1 C.F.R. § 305.68-5.

<sup>56</sup> *Id.* These steps included paying “the personal expenses and wage losses incurred by individuals incident to their participation in rulemaking” and creating an agency “People’s Counsel,” an entity charged with “represent[ing] the interests of the poor in all Federal administrative rulemaking substantially affecting the poor.” *Id.*

protection,<sup>57</sup> said he was asking his Special Assistant for Consumer Affairs to implement the idea that one industry newsletter had dubbed “a ‘public’ version of the *Federal Register*.”<sup>58</sup> Nixon explained that “[t]he material [the new Consumer Bulletin] presents, which will include notices of hearings, proposed and final rules and orders, and other useful information, will be *translated from its technical form into language which is readily understandable by the layman*.”<sup>59</sup>

A year later, the concern about inaccessibility of rulemaking documents was picked up by the Administrative Committee of the Federal Register (“ACFR”).<sup>60</sup> On December 1, 1970, the ACFR issued an NPRM that began with a refreshingly candid, if understated, admission: “Over the years many persons have pointed out that the Federal Register is a difficult document for the average layman to use.”<sup>61</sup> Observing that “criticisms along this line have increased in the recent past in direct proportion to the growing interest in consumer affairs,” the ACFR proposed to require “a brief statement *written in layman’s language describing the contents*” as part of most “documents submitted for publication.”<sup>62</sup> The final rule (“1971 rule”),<sup>63</sup> issued three months later, required the new “summary statement” to include the name of the issuing agency, the “principal subject of the document,” and “any important dates, such as [the] closing date for comments.”<sup>64</sup> The preamble of the 1971 rule reiterated that the summary statement

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<sup>57</sup> *The President’s Message to the Congress Outlining his Legislative Program*, Oct. 30, 1969, 5 WEEKLY COMPILATION PRESIDENTIAL DOCUMENTS 1516 (Nov. 3, 1969), <http://www.presidency.ucsb.edu/ws/?pid=2299> [hereinafter *Nixon Message to Congress*].

<sup>58</sup> *Plans to Help the Consumer*, BROADCASTING, Dec. 2, 1968, at 49 (noting Betty Funn’s proposal to the conference) (on file with *The George Washington Law Review*).

<sup>59</sup> *Nixon Message to Congress*, *supra* note 57, at 1521 (emphasis added). Initially, the Consumer Bulletin was published by a new Office of Consumer Affairs located in the Executive Office of the President. *See id.* at 1517–18. The Office of Consumer Affairs was relocated into the Department of Health, Education, and Welfare (now Health and Human Services), Exec. Order No. 11,702, 38 Fed. Reg. 2957 (Jan. 31, 1973), and published the *Consumer News* with a supplement called the *Consumer Register* until at least the late 1970s. *See, e.g.*, U.S. Office of Consumer Affairs, CONSUMER NEWS, June 15, 1979.

<sup>60</sup> The Administrative Committee of the Federal Register is established by statute and consists of “the Archivist of the United States[,] . . . an officer of the Department of Justice designated by the Attorney General, and the Public Printer . . .” 44 U.S.C. § 1506 (2012). The Director of the Federal Register serves as Secretary. *Id.*

<sup>61</sup> Preparation and Transmittal of Documents: Proposed Summary Statements, 35 Fed. Reg. 18,297, 18,297 (Dec. 1, 1970) (to be codified at 1 C.F.R. pt. 16).

<sup>62</sup> *Id.* (emphasis added). Documents that were “nonsubstantive or editorial [in] nature” would be excluded from the proposal. *Id.* at 18,298.

<sup>63</sup> Preparation and Transmittal of Documents Generally: Summary Statements and Highlights Listing, 36 Fed. Reg. 5203, 5204 (Mar. 18, 1971) (to be codified at 1 C.F.R. pt. 16).

<sup>64</sup> *Id.*

was to be “written in layman’s language,” although this phrase did not appear in the text of the proposed rule itself.<sup>65</sup>

The examples included in the 1971 rule underscore how brief the new summary was expected to be,<sup>66</sup> and the ACFR admitted that many commenters had pressed it to “go much further” and require “a clear, concise explanation of the substance of the document and the major issues involved.”<sup>67</sup> The ACFR refused on grounds that this exceeded the scope of what it had proposed, but said it had become “convinced that further efforts to improve the Federal Register necessitate actions to improve the individual documents submitted for publication therein.”<sup>68</sup> The ACFR directed agencies’ attention to the legislative history of 5 U.S.C. § 553 (the notice and comment rulemaking section of the Administrative Procedure Act (“APA”)),<sup>69</sup> which, it said, “indicates that Congress intended that *each proposed rulemaking document would clearly state* the issues involved.”<sup>70</sup> It urged each agency to “review its rulemaking program to [e]nsure that each document is *written in the clearest possible manner*” and recommended “that each document contain an adequate preamble explaining the significance of the action taken or being proposed.” Whenever the length of the preamble warrants, the first paragraph should be a summary of the substance of the document and the major issues involved.”<sup>71</sup> In a nod to the *Consumer Bulletin Recommendation*,<sup>72</sup> it pointed out that “a summary paragraph in each document *clearly writ-*

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<sup>65</sup> See *id.* at 5203–04.

<sup>66</sup> *Id.* at 5204. The examples given were: “DETERGENTS—proposed FTC labeling and advertising requirements for synthetic detergents—comment period ends 4-19-71; public hearing 4-26-71. COAL MINE SAFETY—Interior Department procedures to assess civil penalties for violations—effective 1-16-71.” *Id.*

<sup>67</sup> *Id.* at 5203.

<sup>68</sup> *Id.*

<sup>69</sup> 5 U.S.C. § 553 (2012).

<sup>70</sup> Preparation and Transmittal of Documents Generally, 36 Fed. Reg. at 5203 (emphasis added). The ACFR relied on language in the Senate Committee Report that courts eventually used to justify expanded notice requirements: “Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.” *Id.* (citing S. REP. NO. 79-752, at 16 (1945); see, e.g., *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977) (using “sufficient to fairly apprise all interested parties” test for adequacy of rulemaking notice). Ironically, these requirements contributed to the kinds of preambles that are incomprehensible to most stakeholders.

<sup>71</sup> Preparation and Transmittal of Documents Generally, 36 Fed. Reg. at 5203 (emphasis added).

<sup>72</sup> RECOMMENDATION 68-4, *supra* note 50, <http://www.acus.gov/sites/default/files/documents/68-4.no-FR.pdf>; see also Preparation and Transmittal of Documents Generally, 36 Fed. Reg. at 5203 (specifically discussing President Nixon’s conversation with Ms. Knauer about the Federal Register being “absolutely incomprehensible to the average consumer”).

*ten in layman's terms* would facilitate the publication of a separate consumer oriented publication of the type recommended by [ACUS] in 1969.”<sup>73</sup>

In the preamble to the 1971 rule, the ACFR exhorted readers to bring to the attention of the Federal Register any rulemaking documents that were not clearly written.<sup>74</sup> It turned out that the ACFR was serious about this seemingly quixotic request. In 1976, it issued a second NPRM, entitled *Clarity of Explanatory Material*,<sup>75</sup> “intended to improve the clarity of documents published in the Federal Register since the present preamble requirement has not resulted in clear, simple explanations of rulemaking documents.”<sup>76</sup> The final rule (“1976 rule”) amended 1 C.F.R. § 18.12 to provide:

Preamble Requirements.

(a) Each agency submitting a proposed or final rule document for publication shall prepare a preamble *which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal.*<sup>77</sup>

It also now required the summary that commenters had sought in the 1971 rulemaking:

(b) The preamble shall . . . contain the following information:

. . . Summary: Brief statements, *in simple language*, of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action.<sup>78</sup>

The ACFR was utterly unimpressed by one federal agency comment complaining that “the proposed approach . . . reduces everything for lay public consumption.”<sup>79</sup> The “public notice giving function of the Federal Register,” the ACFR reiterated, “requires, at a minimum, that each rulemaking document be intelligible.”<sup>80</sup> The 1976 amendments remain in effect today.<sup>81</sup>

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<sup>73</sup> Preparation and Transmittal of Documents Generally, 36 Fed. Reg. at 5203 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> Preparation of Federal Register Documents: Clarity of Explanatory Material, 41 Fed. Reg. 32,861, 32,861 (Aug. 5, 1976) (to be codified at 1 C.F.R. pt. 18).

<sup>76</sup> 1976 Final Rule, *supra* note 2, at 56,623.

<sup>77</sup> *Id.* at 56,624 (emphasis added); *see also* 1 C.F.R. § 18.12 (2015).

<sup>78</sup> 1976 Final Rule, *supra* note 2, at 56,624–25 (emphasis added); *see also* 1 C.F.R. § 18.12.

<sup>79</sup> 1976 Final Rule, *supra* note 2, at 56,623–24.

<sup>80</sup> *Id.* at 56,623.

<sup>81</sup> *See* 1 C.F.R. § 18.12.

These early comprehensibility efforts clearly recognized the direct connection between understandable information about proposed rules and public participation in rulemaking.<sup>82</sup> However, over the next forty years, this connection was obscured by other policy justifications for plain-language drafting of regulatory documents.

In 1978, President Jimmy Carter issued Executive Order 12,044 (“Carter Order”).<sup>83</sup> The Carter Order, which established many of the elements that now constitute centralized regulatory review, began: “Regulations shall be *as simple and clear as possible*.”<sup>84</sup> The Order instructed that “[a]gencies shall give the public an early and meaningful opportunity to participate in the development of agency regulations.”<sup>85</sup> However, creating comprehensible rulemaking documents was not among the items included in this section on public participation.<sup>86</sup> A subsequent section did expressly instruct agencies to determine that “significant” regulations are “written in plain English,” but the justification focused on increasing compliance, not participation.<sup>87</sup>

President Ronald Reagan revoked the Carter Order in 1981, replacing it with the more extensive regulatory review requirements of Executive Order 12,291 (“Reagan Order”).<sup>88</sup> The Reagan Order, which remained in effect during the George H.W. Bush presidency, contained no reference to plain language or comprehensibility, and it referred only briefly to public participation.<sup>89</sup>

Attention to comprehensible regulatory documents revived during the Clinton Administration. In this period, which included the

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<sup>82</sup> See *supra* notes 48–81 and accompanying text.

<sup>83</sup> Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

<sup>84</sup> *Id.* § 1, 3 C.F.R. at 152 (emphasis added).

<sup>85</sup> *Id.* § 2(c), 3 C.F.R. at 153.

<sup>86</sup> *Id.* Instead, this section directed agencies to “consider” using “advance notice of proposed rulemaking,” “holding open conferences or public hearings,” publishing notices in places “likely to be read by those affected,” and providing minimum sixty day comment periods. *Id.*

<sup>87</sup> *Id.* § 2(d)(5), 3 C.F.R. at 153–54 (noting that a regulation should be “understandable to those who must *comply* with it” (emphasis added)). Carter also signed into law the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–3521 (2012)), which, among other things, requires agencies to certify that requests for information in a proposed rule are “written using plain, coherent, and unambiguous terminology and [are] understandable to those who are to respond.” 44 U.S.C. § 3506(c)(3)(D) (2012).

<sup>88</sup> Exec. Order No. 12,291 § 10, 3 C.F.R. 127, 134 (1981), *reprinted in* 5 U.S.C. § 601 app. at 795 (1982).

<sup>89</sup> *Id.* § 4(b), 3 C.F.R. at 130 (requiring agency to determine, in the case of final major rules, “that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular”).



creation of the National Partnership for Reinventing Government,<sup>90</sup> plain language was linked with lowering the societal costs of regulation. President Clinton's Executive Order 12,866 ("Clinton Order"), which superseded the Reagan Order in September 1993,<sup>91</sup> instructed: "Each agency shall draft its regulations to be simple and easy to understand, *with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.*"<sup>92</sup> In addition, reflecting sensitivity to criticism that OIRA—tasked with review of agency rulemaking<sup>93</sup>—covertly favored anti-regulatory interests,<sup>94</sup> the Clinton Order linked plain language with new transparency of the regulatory review process.<sup>95</sup> Agencies were instructed to "[i]dentify for the public, *in a complete, clear, and simple manner,*" the substantive changes made during OIRA review.<sup>96</sup> Both the agency and OIRA were directed to use "*plain, understandable language*" in "[a]ll information provided to the public."<sup>97</sup> The Clinton Order did revive the Carter Administration's emphasis on public participation. It directed agencies to "provide the public with meaningful participation in the regulatory process" and "a meaningful opportunity to comment," but the only specific instruction toward these ends was the reappearance of the minimum sixty-day comment period.<sup>98</sup>

Early in his second term, President Clinton issued a memorandum to executive departments and agencies entitled *Plain Language in Government Writing* ("Plain Language Memorandum").<sup>99</sup> This

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<sup>90</sup> John Kamensky, *A Brief History of Vice President Al Gore's National Partnership for Reinventing Government During the Administration of President Bill Clinton 1993–2001*, NAT'L P'SHIP FOR REINVENTING GOV'T (Jan. 12, 2001), <http://govinfo.library.unt.edu/npr/whowere/historyofnpr.html>.

<sup>91</sup> See Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1993), *reprinted in* 5 U.S.C. § 601 app. at 802, 806 (2012).

<sup>92</sup> *Id.* at § 1, 3 C.F.R. at 640 (emphasis added). Similarly, Executive Order 12,988, entitled *Civil Justice Reform*, focused on good drafting practices to "reduce needless litigation." Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4729 (Feb. 7, 1996). Section three, entitled *Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System*, directs the use of "clear language" in proposed statutes or regulations in the context of a list of specific substantive provisions, including preemption, retroactivity, and impact on existing statutes or regulations. *Id.* at 4730–31.

<sup>93</sup> Exec. Order No. 12,866 § 2(b), 3 C.F.R. at 640.

<sup>94</sup> See, e.g., Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 191–92 (1986) (noting potential for anti-regulatory bias of the Office of Management and Budget, OIRA's umbrella agency).

<sup>95</sup> Exec. Order No. 12,866 § 6(a)(3)(E), 3 C.F.R. at 646.

<sup>96</sup> *Id.* § 6(a)(3)(E)(ii), 3 C.F.R. at 646.

<sup>97</sup> *Id.* §§ 6(a)(3)(F), 6(b)(5), 3 C.F.R. at 646, 648 (emphasis added).

<sup>98</sup> *Id.* § 6(a)(1), 3 C.F.R. at 644.

<sup>99</sup> Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 10,

memorandum, which is still in effect, remains the broadest effort to date to mandate comprehensible regulatory documents. It directs executive agencies to “use plain language in all new documents [written after October 1, 1998], other than regulations, that explain how to obtain a benefit or service or how to comply with a requirement you administer or enforce.”<sup>100</sup> After January 1, 1999, the directive expanded coverage to “all proposed and final rulemaking documents published in the Federal Register.”<sup>101</sup> The Plain Language Memorandum closed with the President “ask[ing] the independent agencies to comply with these directives.”<sup>102</sup>

Like the Clinton Order,<sup>103</sup> the Plain Language Memorandum justifies comprehensibility on grounds of accountability and efficiency: “The Federal Government’s writing must be in plain language. By using plain language, we send a clear message about what the Government is doing, what it requires, and what services it offers. Plain language saves the Government and the private sector time, effort, and money.”<sup>104</sup>

The Clinton Administration subsequently issued detailed compliance guidance,<sup>105</sup> now incorporated in the *Federal Register Document Drafting Handbook* (“Handbook”).<sup>106</sup> The Handbook generally follows the Plain Language Memorandum’s rationale for comprehensibility, with the addition of a reference to trust: “Remember, plain language saves the Government and the private sector time, effort and money. . . . Readable regulations help the public find requirements quickly and understand them easily. They increase compliance,

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1998) [hereinafter Plain-Language Memorandum]. See also John Kamensky, *Reinvention in the Second Clinton-Gore Administration: Changing the Culture of Government Agencies—1997–2001*, NAT’L P’SHP FOR REINVENTING GOV’T (Jan. 12, 2001), <http://govinfo.library.unt.edu/npr/whowere/historypart4.html> (“[A]gencies are now required to communicate in clear language with their customers.”).

<sup>100</sup> Plain-Language Memorandum, *supra* note 99, at 31,885.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* For an example of an independent agency that heeded this invitation, see the Nuclear Regulatory Commission’s webpage, *Federal Plain Writing Mandates*, U.S. NUCLEAR REG. COMM’N. (June 5, 2015), <http://www.nrc.gov/public-involve/open/plain-writing/fed-mandates.html>.

<sup>103</sup> Exec. Order No. 12,866, 3 C.F.R. 646.

<sup>104</sup> Plain-Language Memorandum, *supra* note 99, at 31,885.

<sup>105</sup> *How to Comply with the President’s Memo on Plain Language*, PLAINLANGUAGE.GOV (July 1998), <http://www.plainlanguage.gov/howto/guidelines/PresMemoGuidelines.cfm>.

<sup>106</sup> See NAT’L ARCHIVES & RECORDS ADMIN., OFFICE OF THE FED. REGISTER, *FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK* iii (rev. ed. Oct. 1998), <http://www.archives.gov/federal-register/write/handbook/ddh.pdf> [hereinafter *FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK*].

strengthen enforcement, and decrease mistakes, frustration, phone calls, appeals, and distrust of government. Everyone gains.”<sup>107</sup>

Everyone may indeed gain from plain language, but the originally perceived link between comprehensibility of rulemaking documents and the ability of the public to participate in the rulemaking process remained lost.

George W. Bush amended the Clinton Order twice.<sup>108</sup> However, the instruction to draft regulations that are “simple to understand” remained unaltered.<sup>109</sup>

President Obama further supplemented the Clinton Order by issuing Executive Order 13,563, *Improving Regulation and Regulatory Review* (“Obama Order”).<sup>110</sup> In the Obama Order, comprehensibility reappears as one of the “General Principles of Regulation”: “Our regulatory system . . . must ensure that regulations are *accessible, consistent, written in plain language, and easy to understand*.”<sup>111</sup> Section two, devoted specifically to public participation, directs agencies to take several actions to ensure “the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.”<sup>112</sup> These actions include a sixty-day minimum comment period and “timely online access to the rulemaking docket . . . including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.”<sup>113</sup> Conspicuously lacking, however, is a requirement that agencies enable public participation by producing rulemaking documents that laypeople can understand.<sup>114</sup>

Congress finally entered the picture by passing the Plain Writing Act of 2010 (“PWA”).<sup>115</sup> Unlike the presidential initiatives, which formally bind only executive departments and agencies,<sup>116</sup> the PWA ap-

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<sup>107</sup> *Id.* at MRR-1.

<sup>108</sup> See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763–65 (Jan. 23, 2007); Exec. Order No. 13,258, 67 Fed. Reg. 9385, 9385–86 (Feb. 28, 2002).

<sup>109</sup> See Exec. Order No. 13,422, 72 Fed. Reg. at 2763–65; Exec. Order No. 13,258, 67 Fed. Reg. at 9385–86.

<sup>110</sup> See Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012).

<sup>111</sup> *Id.* § 1(a), 3 C.F.R. at 215 (emphasis added).

<sup>112</sup> *Id.* § 2(a), 3 C.F.R. at 216.

<sup>113</sup> *Id.* § 2(b), 3 C.F.R. at 216.

<sup>114</sup> See *id.*

<sup>115</sup> Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (codified at 5 U.S.C. § 301 (2012)).

<sup>116</sup> See VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 1–2 (2014).

plies to independent agencies as well.<sup>117</sup> Echoing presidential statements of purpose, the PWA aims “to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.”<sup>118</sup> Most of the PWA’s requirements are procedural. Agencies must designate one or more senior officials to oversee plain writing initiatives, create a plain writing section of their websites, establish training and compliance processes, and publish annual reports.<sup>119</sup> The substantive heart of the PWA is the requirement that, by October 2011, agencies must “use plain writing in every *covered document*,”<sup>120</sup> a term defined by an oddly phrased set of criteria that explicitly excludes regulations,<sup>121</sup> but does—according to OIRA’s 2011 Final Guidance on Implementing the Plain Writing Act of 2010 (“PWA Guidance”)—include the preambles to proposed and final rules.<sup>122</sup>

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<sup>117</sup> Somewhat confusingly, the PWA applies to “agencies,” defined as “an Executive agency, as defined under section 105 or title 5, United States Code.” 5 U.S.C. § 301 sec. 3(1). Section 105 in turn defines executive agencies as “an Executive department, a Government corporation, and an independent establishment.” 5 U.S.C. § 105.

<sup>118</sup> 5 U.S.C. § 301 sec. 2.

<sup>119</sup> *Id.* § 301 sec. 4–5.

<sup>120</sup> *Id.* § 301 sec. 4(b) (emphasis added).

<sup>121</sup> *Id.* § 301 sec. 3(2)(C).

<sup>122</sup> See Memorandum from Cass R. Sunstein, Administrator, Office of Info. and Reg. Affairs, to Heads of Exec. Dep’ts and Agencies, Final Guidance on Implementing the Plain Writing Act 5 (Apr. 13, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf> [hereinafter PWA Guidance]. Whether rulemaking preambles are categorically included depends on how you interpret the statutory definition:

The term “covered document”—

(A) means any document that—

(i) is necessary for obtaining any Federal Government benefit or service or filing taxes;

(ii) provides information about any Federal Government benefit or service; or

(iii) explains to the public how to comply with a requirement the Federal Government administers or enforces;

(B) includes (whether in paper or electronic form) a letter, publication, form, notice, or instruction; and

(C) does not include a regulation.

5 U.S.C. § 301 sec. 3(2). The PWA Guidance reads (A) and (B) as disjunctive, *i.e.*, a covered document could be any of the three types in (A) *or* a letter, publication, form, notice, or instruction. PWA Guidance, *supra*, at 5. On this reading, NPRMs and final rules are categorically covered documents except for the exclusion of the actual new regulatory text. If, however, (A) and (B) are read as conjunctive (because of the “and” that follows the clause in (B)), then it seems that coverage of rulemaking documents depends on whether their particular content falls into one of the subsection (A) types. It is hard to imagine many documents described in (A) that would not take the form of “a letter, publication, form, notice, or instruction” in paper or electronic form—but, as a practical matter—who has the incentive (and standing) to contest OIRA’s expansive interpretation?

The PWA Guidance reminds executive agencies that the Clinton Order<sup>123</sup> and the Obama Order<sup>124</sup> already require them to write regulations in a manner that is “simple and easy to understand.”<sup>125</sup> It also contains an expanded list of the “many benefits” of “[c]lear and simple communication.”<sup>126</sup>

[P]lain writing can:

- improve public understanding of government communications;
- save money and increase efficiency;
- reduce the need for the public to seek clarification from agency staff;
- improve public understanding of agency requirements and thereby assist the public in complying with them;
- reduce resources spent on enforcement;
- improve public understanding of agency forms and applications and thereby assist the public in completing them; and
- reduce the number of errors that are made and thus the amount of time and effort that the agency and the public need to devote to correcting those errors.<sup>127</sup>

Facilitating public rulemaking participation still has not made the list.<sup>128</sup>

Finally, more than forty years after Betty Furness’s letter,<sup>129</sup> the link between public rulemaking participation and comprehensibility of rulemaking documents was rediscovered in OIRA’s January 2012 Executive Summary Guidance.<sup>130</sup> Reiterating the Obama Order’s call for regulations to “‘be adopted through a process that involves public participation,’ including an ‘open exchange of information and perspectives,’”<sup>131</sup> the Guidance observed: “*Public participation cannot occur if the requirements of rules are unduly complex and if members of the public are unable to obtain a clear sense of the content of those*

<sup>123</sup> See Exec. Order No. 12,866 § 1(b)(12), 3 C.F.R. 638, 640 (1993).

<sup>124</sup> Exec. Order No. 13,563 § 4, 3 C.F.R. 215, 216 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816, 817 (2012).

<sup>125</sup> PWA Guidance, *supra* note 122, at 5 n.5.

<sup>126</sup> *Id.* at 1.

<sup>127</sup> *Id.* at 1–2.

<sup>128</sup> The PWA Guidance began in a promising manner: “In his January 21, 2009, Memorandum on Transparency and Open Government, President Obama emphasized the importance of establishing ‘a system of transparency, public participation, and collaboration.’ Plain writing is indispensable to achieving these goals.” *Id.* at 1. However, the indispensability of plain writing to public participation remains inchoate, with no further mention of the relationship in the six-page memorandum. See *id.* 1–6.

<sup>129</sup> See Furness Memo, *supra* note 48, at 1.

<sup>130</sup> Exec. Summ. Guidance, *supra* note 46, at 1.

<sup>131</sup> *Id.* (quoting the Obama Order).

*requirements.*”<sup>132</sup> Accordingly, it instructs agencies to include “straightforward executive summaries” in the preambles for “lengthy and complex rules (both proposed and final).”<sup>133</sup> The next Part examines the success of this instruction.

## II. “STRAIGHTFORWARD EXECUTIVE SUMMARIES”: A PRELIMINARY EMPIRICAL STUDY

*“Information has value only when it’s being read and understood.”*<sup>134</sup>

This empirical study examines executive summary practice in the two years before and after OIRA’s Executive Summary Guidance. The Guidance, issued on January 4, 2012, was “effective immediately.”<sup>135</sup> However, the study uses February 1, 2012, as the breakpoint in the dataset in order to allow a reasonable period of time for agencies’ internal drafting process to reflect the new executive summary requirement. This breakpoint also recognizes the lag time between when an agency submits a completed rule document to the Federal Register and when that document is actually published.

The study uses four factors to assess whether post-Guidance executive summaries have provided the public with “a clear sense of the content”<sup>136</sup> of proposed and final rules:

**INCIDENCE.** How many proposed and final rulemaking documents actually include an executive summary? How are agencies interpreting the instruction that executive summaries should be provided for “lengthy or complex rules?”<sup>137</sup>

**LENGTH.** How long are executive summaries? The Executive Summary Guidance provides a “[s]uggested [t]emplate” that contemplates “generally 3–4 pages of a double-spaced Word document maximum, although unusually complex or lengthy regulatory actions may require longer executive summaries.”<sup>138</sup>

**FORMAT.** Has the Executive Summary Guidance standardized the structure of executive summaries? The Guidance template is formatted with three titled sections: (1) “Purpose of the Regulatory

<sup>132</sup> *Id.* (emphasis added).

<sup>133</sup> *Id.*

<sup>134</sup> Jakob Nielsen, *Do Government Agencies and Non-Profits Get ROI from Usability?*, NIELSEN NORMAN GROUP (Feb. 12, 2007), <http://www.nngroup.com/articles/government-non-profits-usability-roi/>.

<sup>135</sup> Exec. Summ. Guidance, *supra* note 46, at 1.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 2.

Action,” (2) “Summary of the Major Provisions of the Regulation Action in Question,” and (3) “Costs and Benefits.”<sup>139</sup> Are agencies following the template?

READABILITY. How “readable” are executive summaries? Paraphrasing the Obama Order,<sup>140</sup> the Executive Summary Guidance instructs that “regulations should be written clearly and simply” and directs that the executive summaries be “straightforward.”<sup>141</sup> The study uses a common automated readability scoring method to provide a quantitative measure of readability.<sup>142</sup> Admittedly, such methods give only a preliminary indicator of comprehensibility, but testing methods that involve human readers are not practicable for a large number of documents.<sup>143</sup> Is there any evidence that the Executive Summary Guidance has improved readability of executive summaries among those agencies that had an executive summary practice in place before the Guidance? How readable are the executive summaries produced by agencies for which the practice is new? Are executive summaries more readable than other parts of the rulemaking documents in which they appear?

Like the Obama Order it implements,<sup>144</sup> the Guidance formally applies only to executive departments and agencies.<sup>145</sup> Nevertheless, some independent agencies routinely submit to OIRA review and even those who do not may still be attentive to presidential initiatives and priorities. Thus, the study also looked at the executive summary practice of independent agencies. Before discussing the results, a description of how the dataset was created, and an overview of the rulemaking documents in the four-year period of the study, are provided.

#### A. *The Dataset*

The dataset was created by extracting from the Federal Register all documents and associated metadata in the proposed rule and final

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<sup>139</sup> *Id.*

<sup>140</sup> Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816 (2012).

<sup>141</sup> Exec. Summ. Guidance, *supra* note 46, at 1.

<sup>142</sup> *See infra* notes 203–10 and accompanying text.

<sup>143</sup> *See infra* notes 197–203 and accompanying text.

<sup>144</sup> Exec. Order No. 13,563, 3 C.F.R. 215.

<sup>145</sup> The Obama Order defines its applicability by referring back to section 3(b) of the Clinton Order, *id.* § 7(a), 3 C.F.R. at 217, which in turn refers to definitions of “agency” and “independent regulatory agency” in the Paperwork Reduction Act, 44 U.S.C. § 3502(1) (2012). Exec. Order No. 12,866 § 3, 3 C.F.R. 638, 641 (1993), *reprinted in* 5 U.S.C. § 601 app. at 802, 803 (2012).

rule categories, published between February 1, 2010, and January 31, 2014, inclusive. This initial extraction generated 25,116 rulemaking documents. Then, numerous adjustments to the extracted data were made. Some of these adjustments corrected data entry errors in the metadata.<sup>146</sup> Many other corrections were required because the Federal Register's categories include a wide range of documents beyond actual notices of proposed or final rules.<sup>147</sup> Using the "Type of Action" field, the Authors culled documents that seemed unlikely to fall within the scope of the Guidance. This adjustment did not eliminate issues of under-inclusiveness<sup>148</sup> or over-inclusiveness,<sup>149</sup> but it yielded the most accuracy attainable without viewing and categorizing each document by hand. The final dataset contained 19,758 proposed or final rulemaking documents.

It proved impossible reliably to determine how many rulemakings these documents represented. The touchstone for linking documents related to a specific rulemaking is supposedly the Regulatory Identifier Number ("RIN"), a unique identifier that the Regulatory Information Service Center ("RISC") assigns to each "regulatory action."<sup>150</sup> Unfortunately, only 62% of the documents (12,345 out of 19,758) have an entry in the RIN metadata field.<sup>151</sup> This subset of

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<sup>146</sup> Metadata (data about data) are simply the descriptions of categories of data. "Agency" and "Department" are examples of metadata in the rulemaking database. An example of a data entry error is entering "Homeland Security" in the "Agency" field and "Coast Guard" in the "Department" field.

<sup>147</sup> These other documents include both: (1) those in the proposed rule category, which are "[d]ocuments that affect other documents previously published in the proposed [or final rules] category," such as purely procedural notices (*e.g.*, extension of comment period, public hearing date), information collection requests, petitions for rulemaking and rehearing, and issuances of guidance, *see* FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, *supra* note 106, at 1-1-3; and (2) a bewildering array of more esoteric documents (*e.g.*, proposed methodologies, summary presentation of rules, notices of temporary deviations, concept releases, requests for comments, and notices of Adequacy).

<sup>148</sup> For example, the dataset as adjusted did not include any documents whose "Type of Action" simply listed "Request for comment" because this phrase, without more, could apply to an information collection request, a guidance document, or a petition for rulemaking as well as a proposed rule.

<sup>149</sup> For example, punctuation was difficult to interpret. In a "Type of Action" listed as "Notice of proposed rulemaking; notice of public hearing," it was unclear whether the semicolon should be interpreted as an "and" (*i.e.*, both an NPRM and an associated notice of public hearing), or as equivalent to a colon (*i.e.*, the mere procedural announcement of a public hearing connected with an earlier published NPRM).

<sup>150</sup> Mike Carlson, *Anatomy of a RIN*, LEGAL SOLUTIONS BLOG (Apr. 5, 2011), <http://blog.legalsolutions.thomsonreuters.com/legal-research/anatomy-of-a-rin/>.

<sup>151</sup> RINs were missing for both executive and independent agency rulemaking documents. The Regulatory Information Service Center ("RISC") has explained:

Using the RIN to research rulemaking documents in the Federal Register can be



documents has 4828 unique RINs. All documents in the dataset do have a docket number assigned by the originating agency; logically, this should be another method to link documents within a specific rulemaking. The 7413 documents without a RIN have 5713 unique docket numbers. Combining these approaches yields a total of 10,451 rulemakings. Note, however, that the docket-number approach produces a far higher proportion of rulemakings (77% of documents) than the RIN approach (39% of documents). Hence, the Authors had low confidence in the accuracy of the rulemakings figure and do not use it in the study.

Finally, terminology is important in understanding the results:

“Proposed Rule” documents include NPRMs, advanced notices of proposed rulemaking, supplemental notices of proposed rulemaking, and certain “corrections” to any of these.<sup>152</sup>

“Final Rule” documents include final rules; direct, interim, temporary, and emergency rules; and certain “corrections”; but exclude guidance documents.

“Agency” is used to mean: (1) cabinet departments (including all their constituent rulemaking entities); (2) freestanding entities such as the Environmental Protection Agency (“EPA”); (3) independent regulatory commissions; and (4) the miscellaneous boards, authorities, councils, offices, and other appellations for federal entities who issued a proposed or final rule document in the period studied.<sup>153</sup>

“Unit” is used for a discrete rulemaking entity within a cabinet department (*e.g.*, Federal Aviation Administration within the Department of Transportation) or other agency (*e.g.*, Office of Water within EPA).<sup>154</sup>

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helpful, but it will not be a perfect process. Many agencies do not put the RIN on the document published in the Federal Register and sometimes print a document with the wrong RIN. Therefore, you may get some desirable results from such research, but with lots of potential for error. There has been an effort for years to get agencies to publish their documents with the RIN, but they do not always obtain a RIN for documents until later when they send one to OMB for review or report published actions to a rulemaking in the Unified Agenda.

*Id.* (quoting message from RISC to the author).

<sup>152</sup> The Federal Register Handbook calls for corrections to “previously published rule[s]” to “[f]ollow the preamble requirements for a rule.” OFFICE OF THE FED. REGISTER, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK: CORRECTIONS TO A RULE 2 (2d supp. 2004). Corrections that were labeled “technical” or “administrative” were excluded.

<sup>153</sup> The term “Agency” corresponds to the first parsed (by semicolon) value in the “agency\_names” metadata field of the Federal Register.

<sup>154</sup> The term “Unit” corresponds to the Federal Register metadata field “Agency.”

“OIRA-Compliant Agencies” refers to the cabinet departments plus any independent agency or regulatory commission that submits their rules to OIRA for review subject to Executive Order 12,866.<sup>155</sup>

“OIRA-Independent Agencies” refers to independent agencies and regulatory commissions that do not submit their rules to OIRA for review.

The unmodified term “summary” is not used because, since the 1976 ACFR rulemaking, all rule documents in the Federal Register must have a short summary that appears as the first descriptive text after the document title and originating agency.<sup>156</sup> These are referred to as “summary abstracts” (reflecting how they are labeled in the Federal Register metadata) to avoid confusion with the “Executive Summaries” that are the primary focus of the study.

Table 1 provides an overview of the dataset. Fifty-one percent of the documents were published pre-Guidance, while 49% are post-Guidance. Eighty-nine percent of the documents originate from OIRA-compliant agencies.

TABLE 1. OVERVIEW OF RULEMAKING DOCUMENTS  
FEBRUARY 1, 2010, TO JANUARY 31, 2014, (INCLUSIVE)

	Proposed Rules		Final Rules	
	Pre-Guidance	Post-Guidance	Pre-Guidance	Post-Guidance
<b>OIRA-Compliant</b>	3527	3357	5451	5321
<b>OIRA-Independent</b>	529	379	623	571
<b>All Agencies</b>	4056	3736	6074	5892

Counterintuitively, of the total 19,578 documents in the four-year period, the proportion of final rule documents far exceeds that of proposed rule documents (61% versus 39%). The explanation appears to be that a substantial subset of final rule documents (29%) is labeled

<sup>155</sup> Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 802 (2012). Other researchers have taken a similar approach in including these independent agencies as OIRA-compliant. *See, e.g.,* Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?*, 43 PRESIDENTIAL STUD. Q. 443, 451 (2013) (omitting from “independent” category Pension Benefit Guarantee Corporation, the Equal Employment Opportunity Commission, and any other independent agency that voluntarily submits rules to the OIRA). The Federal Register does not have a field for whether an agency is “executive” or “independent.”

<sup>156</sup> *See* 1 C.F.R. § 18.12(a)–(b) (2015).

“direct,” “temporary,” and/or “emergency” final rules.<sup>157</sup> Proposed rule documents do not exist in most of these cases.<sup>158</sup>

### B. Incidence of Executive Summaries

Table 2 shows how frequently agencies provided executive summaries in rulemaking documents before and after OIRA Executive Summary Guidance. Figure 1 shows these data as percentages. The good news is that the incidence of executive summaries increased substantially after the Guidance, from 0.5% to 5.8% (considering all agencies and all documents). As would be expected, most of this increase came from OIRA-compliant agencies.<sup>159</sup> OIRA-independent agencies show some increase, but their use of executive summaries lags considerably behind OIRA-compliant agencies.<sup>160</sup>

TABLE 2. INCIDENCE OF EXECUTIVE SUMMARIES  
PRE- AND POST-GUIDANCE

ALL AGENCIES				
	Proposed Rules		Final Rules	
	Pre-Guidance	Post-Guidance	Pre-Guidance	Post-Guidance
Executive Summary	24	273	27	281
No Executive Summary	4032	3463	6047	5611
Total	4056	3736	6074	5892
OIRA-COMPLIANT AGENCIES				
	Proposed Rules		Final Rules	
	Pre-Guidance	Post-Guidance	Pre-Guidance	Post-Guidance
Executive Summary	22	267	20	274
No Executive Summary	3505	3090	5431	5047
Total	3527	3357	5451	5321

<sup>157</sup> This percentage is not out of line with other reports of the incidence of these variant types of final rulemaking documents. See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 902 n.33 (2008) (noting other studies). Of the 3495 rule documents in this subset, the largest category is labeled “temporary,” “temporary emergency,” or “interim temporary.” The next largest is “interim,” then “direct” or “interim direct,” then a small set of “emergency.”

<sup>158</sup> When direct final rules are published, they include a statement that the rule will become effective on a particular date unless an adverse comment is received within a specified period. *Id.* at 903. If the agency receives adverse comments, it will withdraw the rule and start a conventional notice-and-comment process. See *id.* Of the 747 rule documents labeled “direct” or “interim direct” in this dataset, sixty-eight are also labeled “withdraw” or “withdrawal.” Interim final rules are effective immediately, but with post-promulgation opportunity for comment. *Id.* Of the 819 documents in this subcategory, only two are also labeled “withdraw” or “withdrawal.”

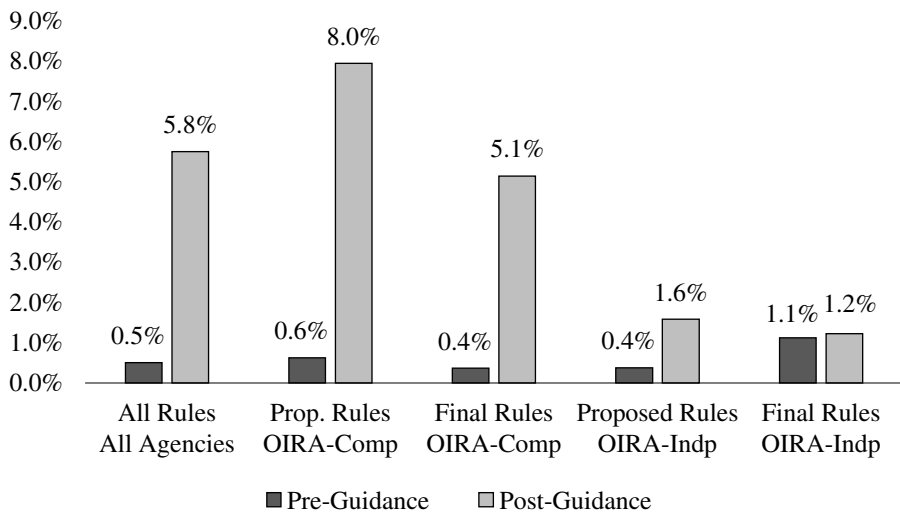
<sup>159</sup> See *infra* Table 4 (logistic regression of incidence) and accompanying text.

<sup>160</sup> The logistic regression in Table 4, *infra*, further examines the relationship between issuance of the Executive Summary Guidance and agency behavior.

**OIRA-INDEPENDENT AGENCIES**

	<b>Proposed Rules</b>		<b>Final Rules</b>	
	<b>Pre-Guidance</b>	<b>Post-Guidance</b>	<b>Pre-Guidance</b>	<b>Post-Guidance</b>
<b>Executive Summary</b>	2	6	7	7
<b>No Executive Summary</b>	527	373	616	564
<b>Total</b>	529	379	623	571

FIGURE 1. PERCENTAGE OF RULE DOCUMENTS WITH EXECUTIVE SUMMARIES



In the post-Guidance period, OIRA-compliant agencies provided executive summaries in proposed rule documents substantially more often than in final rule documents.<sup>161</sup> This matters for present purposes because executive summaries in proposed rule documents potentially facilitate participation. In final rule documents, they potentially facilitate compliance. In the same period, OIRA-independent agencies provided executive summaries slightly more often in proposed rule than in final rule documents.

In the pre-Guidance period, eight agencies<sup>162</sup> (six OIRA-compliant; two OIRA-independent) included an executive summary in at least one rulemaking document, and there was one executive summary in a multiple-agency rule document.<sup>163</sup> These eight agencies are

<sup>161</sup> The difference between proposed and final rule documents is significant ( $p < 0.001$ ). See also *infra* Table 4 (logistic regression of incidence) and accompanying text.

<sup>162</sup> Agriculture, Education, EPA, Health & Human Services (“HHS”), Transportation (“DOT”), Federal Communications Commission, Postal Service, and the Securities & Exchange Commission.

<sup>163</sup> The multiple-agency rule involved DOT and EPA.

referred to as “prior-practice agencies.” In this group, only DOT and EPA had an appreciable number of executive summaries: twenty-one and thirteen respectively. For both, this represented slightly less than 1% of their total rulemaking documents in the period.

In the post-Guidance period, twenty-five agencies (twenty-one OIRA-compliant; four OIRA-independent) included an executive summary in at least one rulemaking document. Every cabinet department is represented in this group. In five instances, the executive summary appeared in a multiple-agency rule document.<sup>164</sup> The Department of the Interior (“DOI”), not a prior-practice agency, was the most prolific post-Guidance producer, with 159 executive summaries representing 37% of its rule documents.<sup>165</sup> Virtually all of these originated from the Fish and Wildlife Service in its Endangered Species Act rulemakings. The Department of Health and Human Services (“HHS”) was the second most prolific, with 103 summaries representing 32% of its rule documents.<sup>166</sup> A substantial portion of these documents originated from the Center for Medicare and Medicaid Services in rulemakings under the Affordable Care Act. DOT had the third highest number of summaries (59; 2.5% of rule documents) with EPA fourth (49; 2.8% of rule documents).<sup>167</sup> Among OIRA-independent agencies, the Federal Communications Commission (“FCC”)—the most prolific prior-practice agency in this group—continued to lead with four executive summaries representing 1.3% of its rulemaking documents. The Nuclear Regulatory Commission, with no prior practice, was second, with three executive summaries representing 5.9% of its rulemaking documents.

At first blush, the bad news about incidence is that more than 93% of OIRA-compliant agency rule documents and 98% of OIRA-independent agency rule documents still, even after the Guidance, do not contain an executive summary. However, the bare numbers do not tell the full story. The Guidance does not attempt to establish a universal executive-summary practice. Rather, it focuses only on executive summaries for “lengthy or complex rules.”<sup>168</sup> “Lengthy”

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<sup>164</sup> The multiple-agency rules involved DOT and EPA; Treasury, Labor, and HHS; Interior and Commerce; and Treasury and HHS.

<sup>165</sup> Two more rule documents containing executive summaries were published jointly with Commerce.

<sup>166</sup> One more rule document containing an executive summary was jointly published with Treasury; another with Treasury and Labor.

<sup>167</sup> DOT and EPA jointly published another rule document containing an executive summary.

<sup>168</sup> Exec. Summ. Guidance, *supra* note 46, at 1.

seems fairly straightforward, although there is a question whether the relevant measure is length of the new regulatory text per se, or of the new text plus explanatory preamble. The former may be the literal meaning, but the latter is the better interpretation. The purpose of the executive summary is to “promote public understanding” and give “members of the public . . . a clear sense of the content” of regulatory requirements.<sup>169</sup> Even experts often struggle to understand the meaning and import of new rules if given only the bare text of changes to the Code of Federal Regulations without any assistance from the explanatory preamble. Therefore, as a more relevant measure of length in terms of accessibility, this study used the number of Federal Register pages in the rule document.<sup>170</sup> Complexity is both more ambiguous and more difficult to measure. As a proxy, this study used whether the agency designated the proposed or final rule as “significant.”<sup>171</sup>

When viewed through the lens of “lengthy or complex” rule documents, the results are mixed. As Table 3 shows, the mean length of OIRA-compliant agency rule documents without an executive summary is substantially shorter than the mean length of documents containing a summary: eight pages versus forty-nine pages. For OIRA-independent agencies, the means are fifteen pages versus fifty-three pages. However, as the standard deviations reveal, there is large variation in page length. Moreover, “substantially shorter” is a relative judgment. Federal Register pages are three columns of small print. At 900–1100 words each, these pages are roughly four times as long as a standard double-spaced memorandum page. Hence, for OIRA-compliant agencies the median rule document without an executive summary is 2700–3300 words (or 11–13 memo pages) long. For OIRA-independent agencies, the median length is twice that. Most people would balk at calling these “short” documents. Recall, though, that all of these documents contain a summary abstract.<sup>172</sup> The extent to which these short opening summaries contribute to comprehensibility is discussed in section D below.<sup>173</sup>

With respect to “complex” rules, a high proportion (45%) of rule documents with an executive summary are designated “significant” rules by OIRA-compliant agencies (45% versus 7% of documents

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<sup>169</sup> *Id.*

<sup>170</sup> This parameter is part of the Federal Register metadata.

<sup>171</sup> This parameter is also part of the metadata from the Federal Register.

<sup>172</sup> See *supra* note 156 and accompanying text.

<sup>173</sup> See *infra* Part II.D.

without an executive summary). Still, less than one-third of significant rule documents contain an executive summary. For OIRA-independent agencies, executive summaries appeared in less than 2% of rule documents designated “significant.”

TABLE 3. DOCUMENT LENGTH AND “SIGNIFICANCE” IN RULE DOCUMENTS WITH AND WITHOUT EXECUTIVE SUMMARIES (POST-GUIDANCE)

	OIRA-Compliant		OIRA-Independent	
	With Executive Summary	Without Executive Summary	With Executive Summary	Without Executive Summary
<b>Number of Federal Register pages</b>				
<b>Mean</b>	49	8	53	15
<b>Standard deviation</b>	73	21	75	31
<b>Minimum</b>	1	1	1	1
<b>Median</b>	29	3	29	6
<b>Maximum</b>	595	782	332	636
<b>N</b>	541	8137	13	937
	<b>Designated “Significant”</b>			
<b>Percent</b>	45%	7%	15%	12%
<b>N</b>	246	587	2	111

To further examine the relationship between these various factors and the presence of an executive summary, a logistic regression was performed. The results appear in Table 4. In each model, the dependent variable is an executive summary dummy variable, which was regressed on various agency and document variables.

TABLE 4. LOGISTIC REGRESSION OF INCIDENCE OF EXECUTIVE SUMMARY (POST-GUIDANCE)

	(Model 1)	(Model 2)	(Model 3) <sup>174</sup>
<b>Compliant Agency</b>	14.187*** (5.107)		88.210** (179.633)
<b>Number of Agency Rule Documents</b>	0.999*** (0.0004)		0.999* (0.0004)
<b>Prior-Practice Agency</b>	1.905 (1.217)		1.206 (0.648)
<b>Final Rule</b>		0.642*** (0.087)	0.633*** (0.084)
<b>Significant Rule</b>		5.339** (3.694)	3.561* (2.487)
<b>Rule Document Length</b>		1.030 (0.019)	1.037** (0.018)
<b>R<sup>2</sup></b>	0.087	0.209	0.265

Note: Odds-ratio estimates are provided. Robust standard errors are in parentheses and are clustered at the agency level. \*, \*\*, and \*\*\* denote significance at the 10%, 5%, and 1% levels, respectively. Intercept terms have been omitted. All regressions are estimated using logit. N is 9,628.

Model 3 indicates that after the Guidance:

- An OIRA-compliant agency was eighty-eight times more likely to include an executive summary in a rule document than an OIRA-independent agency. This group of agencies could be expected to be more attentive to OIRA.<sup>175</sup> Agencies that had some experience with producing executive summaries prior to the Guidance were no more likely than a non-prior-practice agency to produce an executive summary after the Guidance.
- Volume of rulemaking had a small but significant effect on whether an agency expends resources to provide an executive summary. Every additional rule document an agency produced made it 0.999 times less likely that the document would include an executive summary.

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#### Model 3. Coefficients

	Odds Ratio	Robust Std. Error	z	P >  z	[95% Conf. Interval]	
<b>executive_summary</b>						
<b>compliant</b>	88.20996	179.6325	2.20	0.028	1.629724	4774.425
<b>agency_num_rules</b>	.9993595	.0003691	-1.73	0.083	.9986363	1.000083
<b>prior_practice ~n</b>	1.205502	.6480543	0.35	0.728	.4203188	3.45746
<b>final_rule</b>	.632955	.08359	-3.46	0.001	.4886079	.8199459
<b>significant</b>	3.561406	2.486556	1.82	0.069	.9063933	13.9935
<b>page_length</b>	1.036838	.0183656	2.04	0.041	1.001459	1.073466
<b>_cons</b>	.0007998	.0013957	-4.09	0.000	.0000262	.0244574

<sup>175</sup> See *supra* notes 46 & 145 and accompanying text.



- A proposed rule document was 1.58 times more likely to have an executive summary than a final rule document.<sup>176</sup> From the perspective of increasing participation, it is desirable for an agency to concentrate resources on providing executive summaries in documents on which public comment is sought (i.e., proposed rule documents).
- Length of the rule document appears to matter. Every additional Federal Register page of rule document length made it 1.037 times more likely that the document would have an executive summary. A document about a significant rule was 3.561 times more likely to include an executive summary than a document about a non-significant rule. Both participation and compliance goals are served by devoting agency resources to providing executive summaries in long and complex (or significant) rules. Although agencies were more likely to provide executive summaries in significant than in non-significant rule documents, recall that two-thirds of even significant rules have no executive summary.

The remaining analysis examines characteristics of the executive summaries themselves that are likely to affect comprehensibility.

### C. *Length and Format of Executive Summaries*

The Executive Summary Guidance recognizes that agencies may increase the comprehensibility of executive summaries by:

**Controlling length.** The recommended length of no more than three to four double-spaced pages, except for “unusually complex or lengthy regulatory actions,”<sup>177</sup> translates to 750–1000 words.

**Using a standard, easy-to-find location.** The executive summary should “generally” be at the beginning of the preamble.<sup>178</sup>

**Standardizing organization by “sign-posting”.** The Guidance provides a suggested template with three titled sections: (1) “Purpose of the Regulatory Action,” (2) “Summary of the Major Provisions of the Regulatory Action [i]n Question,” and (3) “Costs and Benefits.”<sup>179</sup>

**Using graphics.** For economically significant rules, costs and benefits should be presented in the form of a table.<sup>180</sup>

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<sup>176</sup> Converting from final rule odds (as expressed in Table 4 *supra*) to proposed rule odds is a simple inversion:  $1 / 0.633 = 1.58$ .

<sup>177</sup> Exec. Summ. Guidance, *supra* note 46, at 2.

<sup>178</sup> *Id.* at 1.

<sup>179</sup> *Id.* at 2.

<sup>180</sup> *Id.*

Table 5 reports the level of compliance with these recommendations after the Guidance went into effect. OIRA-compliant agencies generally did well in controlling length. The median executive summary was about two double-spaced pages; the mean, though considerably higher, is still comfortably within the recommended three to four pages.<sup>181</sup> Executive summary length and rule document length (Table 3) are moderately correlated ( $r = 0.46$ ).

TABLE 5. LENGTH AND FORMAT OF EXECUTIVE SUMMARIES  
(POST-GUIDANCE)

	OIRA-Compliant		OIRA-Independent	
	Proposed Rule	Final Rule	Proposed Rule	Final Rule
<b>Number of Words</b> <sup>182</sup>				
<b>Mean</b>	853	808	618	1407
<b>Standard Deviation</b>	793	850	406	1351
<b>Minimum</b>	60	81	125	166
<b>Median</b>	584	528	667	1021
<b>Maximum</b>	5712	6147	1179	3532
<b>Format</b>				
<b>Exec. Summary at Start of Preamble</b> <sup>183</sup>	53.2%	60 %	66.7%	16.7%
<b>Standard Titled Sections</b> <sup>184</sup>	37.8%	48%	0	0
<b>Cost-Benefit Table</b>	19.5%	18.5%	0	0
<b>N</b>	267	274	6	7

OIRA-compliant agencies' conformance with the format recommendations was much spottier:

- At least 40% of the time, executive summaries did not appear at the start of the preamble.<sup>185</sup>
- The standard format was followed less than half the time, and significantly<sup>186</sup> less often in proposed rule documents than in final rule documents. Distinctive, agency-specific patterns were evident in how executive summaries were structured. For example, the DOI's Fish and Wildlife Service—which provided

<sup>181</sup> *Id.* This page conversion uses the same rule of thumb, 250 words per double-spaced memo page, as in the analysis of “lengthy or complex” documents. *See* p. 1388 *supra*. OIRA does not specify how many words constitute a page. The difference between mean length of proposed rule and final rule executive summaries is not statistically significant.

<sup>182</sup> Words in tables or other graphics were not included in the word count.

<sup>183</sup> To be coded as conforming, the executive summary had to be the first content under the “Supplemental Information” section (*i.e.*, not preceded by a list of acronyms or table of contents).

<sup>184</sup> To be coded as conforming, the titles could omit the roman numerals but had to have substantially the same text as the Executive Summary Guidance template. *See supra* note 179 and accompanying text.

<sup>185</sup> The difference between proposed and final rules was not statistically significant.

<sup>186</sup> Using a two-sample proportion test,  $p < 0.05$ .

more executive summaries than any other entity—often featured a unique set of headings: “Why we need to publish a rule,” “The basis for our action,” and “We will seek peer review.”<sup>187</sup> Certain agencies (e.g., DOT) often included multiple footnotes.<sup>188</sup> Others adopted a minimalist approach. For example, an executive summary of the Army Corps of Engineers typically comprised a brief statement of purpose and authority totaling fewer than one hundred words.<sup>189</sup>

- How often cost-benefit data were provided in table form for economically significant rules is harder to determine because the available Federal Register metadata does not separately identify the subset of significant rules that are economically significant.<sup>190</sup> A search of the historical OIRA review database on RegInfo.gov for the two-year period in question shows 23% of reviewed rules as economically significant.<sup>191</sup> This proportion is close to the incidence of a cost-benefit table in OIRA-compliant agencies’ executive summaries.<sup>192</sup>

In the very small number of cases in which OIRA-independent agencies provided executive summaries, the Guidance template had little impact on format.<sup>193</sup>

Of course, the template and its directions on length and structure are recommended, not mandatory.<sup>194</sup> Still, the deviations are nota-

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<sup>187</sup> See, e.g., Fish and Wildlife Serv., *Endangered and Threatened Wildlife and Plants; Endangered Status for the Diamond Darter and Designation of Critical Habitat: Executive Summary*, FED. REG. (July 6, 2012), <https://www.federalregister.gov/articles/2012/07/26/2012-17950/endangered-and-threatened-wildlife-and-plants-endangered-status-for-the-diamond-darter-and#h-8>.

<sup>188</sup> See, e.g., EPA & Nat’l Highway Traffic Safety Admin., *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, FED. REG. (Oct. 15, 2012), <https://www.federalregister.gov/articles/2012/10/15/2012-21972/2017-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-and-corporate-average-fuel> (1413 footnotes).

<sup>189</sup> See, e.g., Defense Dep’t, *Department of the Army, Corps of Engineers: Executive Summary*, FED. REG. (Apr. 4, 2012), <https://www.federalregister.gov/articles/2012/04/04/2012-8113/departement-of-the-army-corps-of-engineers#h-8>.

<sup>190</sup> See Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. 638, 641 (1993), reprinted in 5 U.S.C. § 601 app. at 802, 803 (2012) (defining economically significant as “[h]av[ing] an annual effect on the economy of \$100 million or more,” or having materially adverse effects on economic sectors, jobs, public health or safety, or government entities).

<sup>191</sup> See *Historical Reports*, REGINFO.GOV, <http://www.reginfo.gov/public/do/eoHistoricReport> (last visited Aug. 23, 2015).

<sup>192</sup> *Supra* Table 5.

<sup>193</sup> *Supra* Table 5.

<sup>194</sup> See Exec. Summ. Guidance, *supra* note 46, at 2. Content, on the other hand, was at least minimally directed: “These summaries should separately describe major provisions and pol-

ble,<sup>195</sup> particularly in the case of agencies, such as the DOI's Fish and Wildlife Service, that did not have a prior executive summary practice. This resistance to standardization accords with observations made during efforts to normalize agency rulemaking practices on Regulations.gov.<sup>196</sup> Further research would be needed to determine the actual effect of cross-agency variation, but a reasonable hypothesis is that consistency in location and format aid in comprehensibility, at least for readers who are not well-versed in rulemaking and regulatory programs.

#### D. *Readability of Executive Summaries*

Human testing is the most reliable way to determine how difficult documents are to read and understand, and several methodologies for assessing comprehensibility are used with human testers.<sup>197</sup> These methods can give a rich picture of comprehensibility, but they have limited practicability for long documents or large numbers of documents.<sup>198</sup> Several readability formulas exist that can be applied by machine to prepared text,<sup>199</sup> but these formulas have important limitations.<sup>200</sup> They look at factors such as word length and sentence length;<sup>201</sup> they cannot determine whether content is unambiguous, coherent, well-organized, or well-structured.<sup>202</sup> Still, they are widely

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icy choices." *Id.* at 1. The present study did not attempt to determine whether executive summaries contained the required content.

<sup>195</sup> See *supra* Table 5.

<sup>196</sup> See COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING (U.S.), *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING: A REPORT TO CONGRESS AND THE PRESIDENT* 24–25 (2008), <http://scholarship.law.cornell.edu/facpub/1237/>.

<sup>197</sup> See Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 537–40 (1984–1985). For example, cloze testing involves removing selected words (e.g., every fifth word) from a sample of the text to be tested and asking readers to fill in the missing words. *Id.* at 538. Based on the Gestalt theory of closure—where the brain tries to fill in missing pieces—it derives readability from the percentage of correct insertions. *Id.*

<sup>198</sup> Researchers are working on novel solutions to this problem, including crowdsourcing human comprehensibility testing through sites such as the Legal Information Institute, and natural language processing methods that use machine learning algorithms. See Michael Curtotti et al., *Citizen Science for Citizen Access to Law* 13, 16 (forthcoming 2015) (unpublished manuscript) (on file with Authors); Michael Curtotti & Eric McCreath, *A Right to Access Implies a Right to Know: An Open Online Platform for Research on the Readability of Law*, 1 J. OPEN ACCESS L. 1, 11–12 (2013), <http://ojs.law.cornell.edu/index.php/joal/article/view/16/17>.

<sup>199</sup> WILLIAM H. DUBAY, *THE PRINCIPLES OF READABILITY* 42–54 (2004), <http://www.im pact-information.com/impactinfo/readability02.pdf>.

<sup>200</sup> *Id.* at 19.

<sup>201</sup> *Id.* at 42–54 (providing a comprehensive review of the research establishing that these two variables accurately predict text difficulty).

<sup>202</sup> *Id.* at 19.

used in practice, have been intensively studied and statistically validated, and are reasonably good as initial screening tools for identifying problematic text.<sup>203</sup>

The set of pre- and post-Guidance summaries were analyzed using three of the most popular readability formulas—the Flesch-Kincaid Grade Level formula, Simple Measure of Gobbledygook (“SMOG”), and the Coleman-Liau Index—applied through the text analysis tool KoRpus. Flesch-Kincaid, originally developed for the U.S. Navy to use in assessing readability of technical manuals, is probably the most widely used assessment—in part because Microsoft Word and other word processing programs have incorporated it and the related Flesch Reading Ease formula.<sup>204</sup> Some states have adopted Flesch-Kincaid as the legal measure of readable consumer documents.<sup>205</sup> SMOG is often used for assessing consumer-oriented health information.<sup>206</sup> Some argue it is preferable to Flesch-Kincaid for testing more complicated documents.<sup>207</sup> It generally yields a higher grade level than Flesch-Kincaid,<sup>208</sup> and did so in the present

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<sup>203</sup> *Id.* at 19–20, 57. William DuBay, whose 2004 report provides a thorough (and readable) review of the development, research, and controversies around readability formulas, concludes:

The formulas have survived 80 years of intensive application, investigation, and controversy, with both their credentials and limitations remaining intact. . . . The variables used in the readability formulas show us the skeleton of a text. It is up to us to flesh out that skeleton with tone, content, organization, coherence, and design.

*Id.* at 57.

<sup>204</sup> See Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIAC L. REV. 147, 148–49 & n.7 (2007).

<sup>205</sup> See *id.* at 148, 148–49 n.7 (collecting examples). See also Grant Richardson & David Smith, *The Readability of Australia's Goods and Services Tax Legislation: An Empirical Investigation*, 30 FED. L. REV. 475, 478 (2002) (using the Flesch Reading Ease Index to assess Australian tax statutes); David Smith & Grant Richardson, *The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation*, 20 FISCAL STUD. 321, 326 (1999) (same).

<sup>206</sup> See, e.g., Amy S. Hedman, *Using the SMOG Formula to Revise a Health-Related Document*, 39 AM. J. HEALTH EDUC. 61, 61 (2008).

<sup>207</sup> See, e.g., P.R. Fitzsimmons et al., *A Readability Assessment of Online Parkinson's Disease Information*, 40 J. ROYAL C. PHYSICIANS EDINBURGH 292, 294 (2010). Some researchers have challenged the use of readability formulas on legal texts, noting that the formulas have not been validated on such materials. See Curtotti & McCreath, *supra* note 198, at 8–10. These challenges, however, have been made in the context of assessing comprehensibility of statutes and regulations—text that is highly condensed, distinctively styled and structured, and in general “significantly different from normal English usage.” See *id.* at 8–9, 30–35. The rulemaking preambles and summaries we examine here are *narratives about* such legal texts. Although surely a specialized type of writing, they generally follow normal conventions of grammar, punctuation, and usage.

<sup>208</sup> See Hedman, *supra* note 206, at 62.

study. Coleman-Liau, devised to help the Department of Education assess the readability of textbooks for public schools, differs from the other two by analyzing characters, rather than syllables.<sup>209</sup> Characters are more easily machine-recognized than syllables.<sup>210</sup> Coleman-Liau usually gives a lower score than Flesch-Kincaid when applied to more complex documents,<sup>211</sup> and did so in the present study.

Table 6 shows mean readability scores of executive summaries using all three tests. The results of all three point in the same direction and, as expected, Flesch-Kincaid routinely yielded grade scores in between SMOG and Coleman-Liau. For these reasons, the rest of this Article reports only results from the Flesch-Kincaid analysis.<sup>212</sup>

TABLE 6. MEAN READABILITY GRADE-LEVEL SCORES OF EXECUTIVE SUMMARIES, PRE- AND POST-GUIDANCE; THREE TESTS

	SMOG			FLESCH-KINCAID			COLEMAN-LIAU		
	Pre-Guidance	Post-Guidance	Change	Pre-Guidance	Post-Guidance	Change	Pre-Guidance	Post-Guidance	Change
<b>A. All Agencies</b>									
Proposed	17.2	16.5	-.7*	15.9	15.3	-.6	14.5	14.0	-.5**
Final	16.7	16.2	-.5	15.3	14.8	-.5	13.9	13.8	-.1
All	16.9	16.4	-.5**	15.6	15	-.6*	14.2	13.9	-.3*
<b>B. OIRA-Compliant Agencies</b>									
Proposed	17.1	16.5	-.6	15.8	15.2	-.6	14.5	13.9	-.6
Final	16.9	16.2	-.7**	15.6	14.8	-.8*	13.9	13.8	-.1
All	17.0	16.3	-.7**	15.7	15	-.7**	14.2	13.9	-.3
<b>C. OIRA-Independent Agencies</b>									
Proposed	18.3	17.5	-.8	17.4	16.7	-.7	15.6	14.6	-.1
Final	16.2	17.7	1.5	14.6	16.8	2.2	13.8	14.9	1.1
All	16.7	17.6	.9	15.3	16.7	1.4	14.2	14.8	.6

Note: \*, \*\*, and \*\*\* denote significance at the 10%, 5%, and 1% levels, respectively. Two-sided t-tests were used to determine significance of the difference in pre-Guidance and post-Guidance mean grade level scores.

As with readability tests themselves, the grade-level results must be used with care. The grade an individual has completed does not necessarily translate to his or her actual reading level.<sup>213</sup> Average U.S.

<sup>209</sup> Meri Coleman & T.L. Liau, *A Computer Readability Formula Designed for Machine Scoring*, 60 J. APPLIED PSYCHOL. 283, 283–84 (1975).

<sup>210</sup> See *id.* at 283.

<sup>211</sup> See *Advanced Text Analyser—Help Topics: Readability Tests*, USINGENGLISH.COM, <http://www.usingenglish.com/members/text-analysis/help/readability.html#cl> (last visited Nov. 9, 2014).

<sup>212</sup> “What is important is not how the formulas agree or disagree on a particular text, but their degree of consistency in predicting difficulty over a range of graded texts.” DUBAY, *supra* note 199, at 55.

<sup>213</sup> *Id.* at 7.

high school graduates read at the ninth grade level, while college graduates prefer to read general materials at the tenth grade level.<sup>214</sup> At the same time, the level of motivation and interest in the subject matter can significantly affect reading ability.<sup>215</sup> The commonly recommended standard for content intended for general use and comprehension is between the seventh and ninth grade levels.<sup>216</sup> This is based on information, generated by the latest Department of Education National Adult Literacy Survey, that 80% of U.S. adults read below the tenth grade level.<sup>217</sup> The average newspaper is written at the eleventh grade level, which is considered the highest tolerable level for those reading at the ninth grade level.<sup>218</sup>

The most striking finding from Table 6 is that executive summaries are now being written at a grade level not even close to the suggested seventh to ninth grade level for general comprehensibility. All the mean scores substantially exceed the recommended grade level, even for college graduates. These observations hold true regardless of the test used, the type of agency, the type of rule document, or the timeframe (pre- or post-Guidance). Of particular importance to the issue of public participation, executive summaries in proposed rules tend to be even less readable than those in final rules.<sup>219</sup>

Figure 2 shows the distribution of Flesch-Kincaid grade-level scores in post-Guidance rule documents. The distribution for OIRA-independent agencies is included, but keep in mind that the very small number of documents limits the conclusions that can be drawn from this category.

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<sup>214</sup> *Id.*

<sup>215</sup> See Warren Fass & Gary M. Schumacher, *Effects of Motivation, Subject Activity, and Readability on the Retention of Prose Materials*, 70 J. EDUC. PSYCHOL. 803, 803–07 (1978); George R. Klare, *A Second Look at the Validity of the Readability Formulas*, 8 J. READING BEHAV. 129, 139–42, 147 (1976).

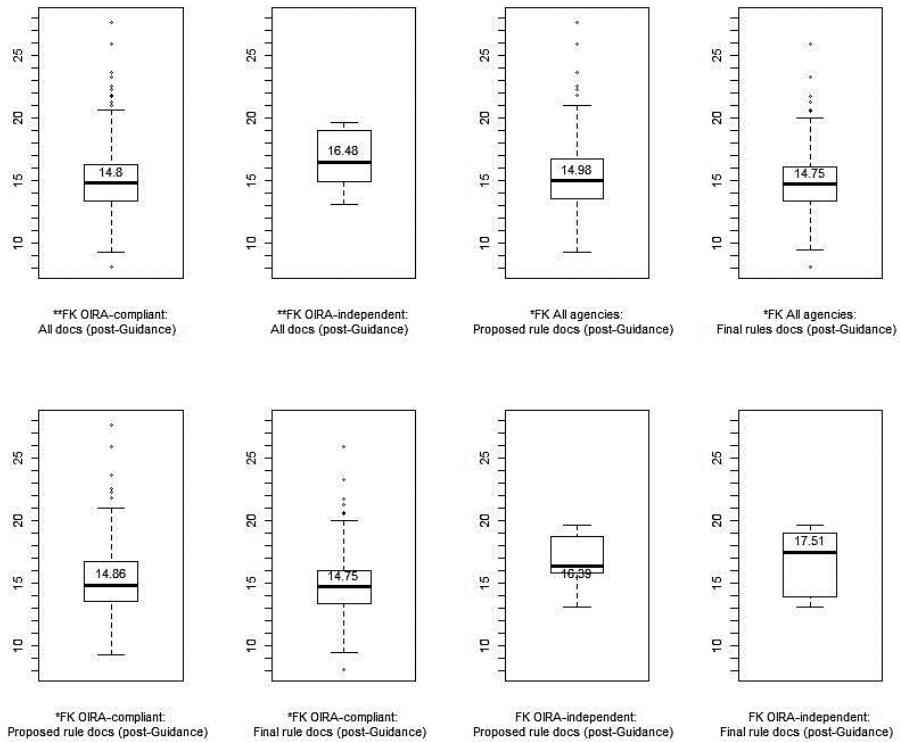
<sup>216</sup> WILLIAM H. DUBAY, WHAT IS PLAIN LANGUAGE? 1 (2004), [http://qpc.co.la.ca.us/cms1\\_033658.pdf](http://qpc.co.la.ca.us/cms1_033658.pdf) [hereinafter DUBAY, WHAT IS PLAIN LANGUAGE?]; William H. DuBay, *Know Your Readers*, PLAIN LANGUAGE AT WORK NEWSL., <http://www.impact-information.com/impactinfo/literacy.htm> (last visited Oct. 19, 2014) [hereinafter DuBay, *Know Your Readers*]; *Clear and to the Point: Guidelines for Using Plain Language at NIH*, LITERACY ASSISTANCE CTR. 15, <http://www.champ-program.org/static/Guidelines%20for%20Using%20Plain%20Language.pdf> (last visited Mar. 4, 2015).

<sup>217</sup> DUBAY, WHAT IS PLAIN LANGUAGE?, *supra* note 216, at 1; DuBay, *Know Your Readers*, *supra* note 216.

<sup>218</sup> DuBay, *Know Your Readers*, *supra* note 216.

<sup>219</sup> See also *infra* Table 10 (multiple linear regression of Flesch-Kincaid grade-level scores) and accompanying text.

FIGURE 2. DISTRIBUTION OF FLESH-KINCAID GRADE-LEVEL SCORES (POST-GUIDANCE)



In the boxplots of Figure 2, the number within each rectangle is the median grade level, with the rectangle demarcating the middle two quartiles (50%) of the data. For OIRA-compliant agencies, the shortness of the box means that half of rule documents score within a fairly limited range of variation. Proposed rule documents are more variable than final rule documents. The short horizontal lines (or “whiskers”) indicate the minimum and maximum values, excluding potential outliers (beyond 1.5 IQR,<sup>220</sup> shown as individual points). Note that there are more potential outliers in the upper range of the grade-level score—which accounts for the means in Table 6 being higher than the medians shown here. A potentially positive observation is that the first quartile extends down into the more readable ranges of the grade-level score. This means that there are about 135 proposed and final rule documents that could be examined in more detail in the fu-

<sup>220</sup> The 1.5 x IQR rule is a measure of spread used with the median (just as standard deviation is the measure used with the mean). The IQR, or interquartile range, is the middle two quartiles (the height of the box). Calculating  $\pm 1.5 \times \text{IQR}$  identifies the range beyond which data points are potential outliers.



ture better to understand what conditions enable creation of more readable executive summaries.

As Table 6 shows, there is some evidence of a small, but statistically significant, improvement in readability after the Guidance issued.<sup>221</sup> To understand this more fully, the study first considered only the prior-practice agencies (i.e., agencies with at least one executive summary in the two years analyzed pre-Guidance). Table 7 shows these results.

TABLE 7. MEAN FLESCH-KINCAID GRADE-LEVEL SCORES OF PRIOR-PRACTICE AGENCIES PRE- VS. POST-GUIDANCE

	No. of Pre- Guidance Exec. Summ.	Pre- Guidance F-K Mean	No. of Post- Guidance Exec. Summ.	Post- Guidance F-K Mean
<b>All Prior-Practice Agencies</b>	51	15.6	246	15.3
<b>Individual Prior-Practice Agencies</b>				
<b>Agriculture*</b>	3	17.6	20	15.4
<b>Education*</b>	1	18.2	6	15.9
<b>Environmental Protection Agency*</b>	13	16.7	49	15.5
<b>Federal Communications   Commission*</b>	4	15.9	4	15.1
<b>Health and Human Services</b>	3	14.1	103	15.2
<b>Postal Service*</b>	2	23.0	2	16.5
<b>Securities and Exchange   Commission</b>	3	17.0	2	19.1
<b>Transportation</b>	22	15.0	60	15.2

Note: \* Denotes agencies with a lower mean grade-level score post-Guidance.

At the group level, the prior-practice agencies showed a very modest (0.3 grade level) improvement in readability (*i.e.*, decrease in grade-level score) post-Guidance. At the individual agency level, the picture is more complex. Five agencies, marked with asterisks in Table 7, showed appreciably lower grade-level means after the Guidance issued. Most of these agencies, however, had very low numbers of executive summaries in either the pre- or post-Guidance period, or in both periods. EPA is the interesting exception. With a modest number of executive summaries before the Guidance and a sizable number after, the mean grade-level score of its executive summaries dropped from 16.7 pre-Guidance to 15.5 post-Guidance. (The other agency with a robust executive-summary practice both pre- and post-Guidance—DOT—showed a slight increase in mean grade-level score.)

<sup>221</sup> See *supra* Table 6 (under “Change” columns).

To learn what might account for EPA's improvement, the performance of its constituent rulemaking units ("Offices" in Table 8) was examined separately. As Table 8 shows, the mean Flesch-Kincaid grade-level scores vary by originating office. Although the numbers are not large from any office except Air and Radiation, executive summaries from the Chemical Substances and Pollution Prevention offices averaged a considerably lower grade-level score (14.0) compared with the next lowest office (15.7). In the future, it would be worth investigating whether different drafting or editing practices explain one unit's appreciably greater success in writing readable executive summaries.

TABLE 8. MEAN FLESCH-KINCAID GRADE-LEVEL SCORES OF EPA AND EPA UNITS (POST-GUIDANCE)

	No. of Executive Summaries	F-K Mean
<b>EPA - Offices</b>		
Air & Radiation	36	15.7
Chemical Substances & Pollution Prevention	8	14.0
Water	4	16.1
Enforcement & Compliance Assurance	1	17.4
<b>EPA - All Offices</b>	49	15.5

The fact that several prior-practice agencies showed improvement after issuance of the Guidance<sup>222</sup> suggests the possibility that experience with writing executive summaries produces more readable summaries over time. To explore this possibility, the mean post-Guidance Flesch-Kincaid grade-level scores of the group of prior-practice agencies in Table 7 was compared with the mean of the non-prior-practice group. As shown in Table 9, the results do not suggest that experience helps. Indeed, the mean for the group of less experienced agencies was lower (14.8) than for the prior-practice group (15.3)—a difference quantified in the regression analysis reported in Table 10 below. In addition, the mean score of each of the four most prolific post-Guidance executive summary producers—DOI, HHS, DOT, and EPA was compared with the mean of the remaining, less-productive agencies. Again, experience appears not to help, although the DOI—more specifically, the Fish and Wildlife Service, which accounts for the bulk of Interior's executive summaries—seems to merit further study, as its grade-level mean was lower than that of any other agency analyzed.

<sup>222</sup> See *supra* Table 7.

TABLE 9. EFFECT OF EXPERIENCE ON FLESCH-KINCAID GRADE-LEVEL SCORES (POST-GUIDANCE)

	No. of Exec. Summ.	Post-Guidance F-K Mean
<b>Prior-Practice Agencies</b>	246	15.3
<b>Non Prior-Practice Agencies</b>	308	14.8
<b>Most Prolific Post-Guidance Agencies</b>		
<b>EPA</b>	49	15.5
<b>Health and Human Services</b>	103	15.2
<b>Interior</b>	161	14.6
<b>Transportation</b>	60	15.2
<b>All Other Agencies</b>	181	15.2

Finally, the study looked at whether readability improved over time, as agencies presumably acquired more experience writing executive summaries. Examining mean grade-level scores by month over the twenty-four-month post-Guidance period revealed no trend of improvement.

To determine how various agency and rule characteristics affected Flesch-Kincaid grade-level scores in the post-Guidance period, a linear regression was performed. The results are reported in Table 10.

TABLE 10. MULTIPLE LINEAR REGRESSION OF FLESCH-KINCAID  
GRADE-LEVEL SCORES OF EXECUTIVE SUMMARIES  
(POST-GUIDANCE)

	(Model 1)	(Model 2)	(Model 3)	(Model 4) <sup>223</sup>
<b>Compliant agency</b>	-1.500 (1.049)		-1.310 (0.980)	-1.189 (1.029)
<b>No. of Agency Rule Documents</b>	0.0001 (0.0002)		-0.0003* (0.0002)	-0.0004** (0.0002)
<b>No. of Executive Summaries</b>	-0.003 (0.003)	-0.0009 (0.003)	-0.0006 (0.003)	-0.0005 (0.003)
<b>Prior-Practice Agency</b>		1.250*** (0.250)	1.479*** (0.215)	1.598*** (0.256)
<b>Final Rule</b>		-0.460** (0.215)	-0.451** (0.216)	-0.424** (0.199)
<b>Significant Rule</b>		0.447 (0.329)	0.422 (0.370)	0.279 (0.397)
<b>Rule Document Length</b>		-0.0004 (0.003)	-0.0009 (0.003)	-0.001 (0.003)
<b>Time Fixed Effects</b>	No	No	No	Yes
<b>R<sup>2</sup></b>	0.016	0.088	0.101	0.140

Note: Robust standard errors are in parentheses and are clustered at the agency level. \*, \*\*, and \*\*\* denote significance at the 10%, 5%, and 1% levels, respectively. Intercept terms have been omitted. All regressions are estimated using OLS. To control for time fixed effects, a full set of year\*month dummies are included in Model 4. *N* is 455.

The results in Model 4 indicate that:

- An executive summary produced by a prior-practice agency was likely to have a Flesch-Kincaid score of 1.598 grade levels *higher* than one produced by an agency that began writing executive summaries only after the Guidance issued. This suggests that the comprehensibility rationale of the Guidance had little impact on agencies with an existing executive summary practice; these agencies did not perceive the Guidance to require any fundamental change in *how* they write executive summaries. This is consistent with the results in the earlier regression,<sup>224</sup> that prior-practice agencies were no more likely

<sup>223</sup>

#### Model 4. Coefficients

grade	Coef.	Std. Error	T	P >  t	[95% Conf. Interval]	
<b>Compliant</b>	-1.189342	1.029486	-1.16	0.251	-3.237316	.8586332
<b>num_of_rules_by~n</b>	-.0003837	.0001785	-2.15	0.035	-.0007388	-.0000287
<b>num_of_ES_per_d~t</b>	-.0005008	.0031665	-0.16	0.875	-.0068	.0057984
<b>final_rule</b>	-.423906	.1992442	-2.13	0.036	-.8202662	-.0275459
<b>Significant</b>	.2790243	.3971636	0.70	0.484	-.5110607	1.069109
<b>page_length</b>	-.0007176	.002618	-0.27	0.785	-.0059256	.0044904
<b>prior_practice_~n</b>	1.598087	.2555843	6.25	0.000	1.089649	2.106526

Note: Coefficients for dummy time fixed effects are not presented because of space restrictions.

<sup>224</sup> *Supra* Table 4.

than non-prior-practice agencies to provide summaries after the Guidance.

- Appearing in a proposed rule document *added* 0.424 to the executive summary's grade-level score, as compared with an executive summary in a *final* rule document. Hence, the participation-positive finding that agencies provided an executive summary more often in proposed rule documents<sup>225</sup> is undercut by the fact that these proposed rule executive summaries are less readable than those in final rule documents. This disparity merits further study.<sup>226</sup> In particular, it would be helpful to understand how agencies prepare executive summaries and whether there are differences in practice between the proposed rule and the final rule stages that could explain why final rule executive summaries were likely to be more readable.
- Every additional rule document an agency published reduced the grade-level score by a small but significant amount (0.0004). If "translating" rulemaking material into shorter, plainer language is more effortful, this is an unexpected result. In fact, this result is in direct contrast with the earlier finding that busier rulemaking agencies were less likely to include an executive summary.<sup>227</sup> Still, the amount of the effect is quite small.
- Neither the length of the rule document nor whether the rule is significant has a discernible relationship to the grade-level score. This is actually good news, as one might reasonably expect that executive summaries in lengthy and complex (i.e., "significant") rules would be even less readable than those in shorter or non-significant rules. Less positive is the observation that experience in writing executive summaries (measured by number of executive summaries written) appears to have no effect on readability.

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<sup>225</sup> *Supra* Table 4.

<sup>226</sup> Unlike the preponderance of final rule documents over proposed rule documents in the entire dataset, *see supra* Table 1; *supra* notes 157–58 and accompanying text, the subset of documents containing executive summaries is almost evenly divided between proposed (273) and final (281). Therefore, the greater readability of final rule executive summaries is unlikely to be accounted for by a large group of potentially easier to explain (and thus more readable) direct final or interim final rules.

<sup>227</sup> *Supra* Table 4.

*E. Readability of Executive Summaries Versus the Rest of the Preamble*

Finally, the study compared the readability of executive summaries with the readability of other parts of the rulemaking document. Given their average Flesch-Kincaid grade-level scores, executive summaries will not be very comprehensible to ordinary readers—but perhaps they are still more readable than the rest of the document.

First, executive summaries were compared with the remainder of the preamble text. Table 11 shows an unexpected result—executive summaries are substantially *less* readable than the rest of the preamble. *This is true regardless of the type of agency or the type of document.*

TABLE 11. MEAN FLESCH-KINCAID GRADE SCORES OF EXECUTIVE SUMMARIES VS. BALANCE OF PREAMBLE (POST-GUIDANCE)

**ALL AGENCIES**

	<b>Executive Summary</b>	<b>Balance of Preamble</b>	<b>Difference</b>
<b>Proposed</b>	15.3	13.6	+1.64**
<b>Final</b>	14.8	13.7	+1.12**
<b>All</b>	15.0	13.7	+1.38**

**OIRA-COMPLIANT AGENCIES**

	<b>Executive Summary</b>	<b>Balance of Preamble</b>	<b>Difference</b>
<b>Proposed</b>	15.2	13.6	+1.61**
<b>Final</b>	14.8	13.7	+1.12**
<b>All</b>	15.0	13.6	+1.37**

**OIRA-INDEPENDENT AGENCIES**

	<b>Executive Summary</b>	<b>Balance of Preamble</b>	<b>Difference</b>
<b>Proposed</b>	16.7	13.8	+2.9**
<b>Final</b>	16.8	16.1	+0.7
<b>All</b>	16.7	14.9	+1.8**

Note: \*\* denotes significance at the 5 % level.<sup>228</sup>

Next, the executive summaries were compared with the summary abstracts, the shorter summaries that appear at the start of every Federal Register rule document. The results, shown in Table 12, are again striking: the summary abstracts are less readable than the executive summaries by an even greater margin than the difference between the executive summary and the rest of the preamble. Recall that the summary abstract is the *only* summary available in 93% of OIRA-compli-

<sup>228</sup> Paired *t*-tests were used, which compare the score of the executive summary of a given document with the score of the rest of the preamble of the same document.

ant agency rule documents and 98% of OIRA-independent agency rule documents.<sup>229</sup>

TABLE 12. MEAN FLESCH-KINCAID GRADE SCORES OF SUMMARY ABSTRACTS VS. EXECUTIVE SUMMARIES (POST-GUIDANCE)

ALL AGENCIES			
	Summary Abstract	Executive Summary	Difference
Proposed	18.5	15.3	+3.2**
Final	19	14.8	+4.2**
All	18.7	15.0	+3.7**
OIRA-COMPLIANT AGENCIES			
	Summary Abstract	Executive Summary	Difference
Proposed	18.3	15.2	+3.1**
Final	18.9	14.8	+4.1**
All	18.6	15.0	+3.6**
OIRA-INDEPENDENT AGENCIES			
	Summary Abstract	Executive Summary	Difference
Proposed	23.1	16.7	+6.4**
Final	24.5	16.8	+7.7*
All	23.8	16.7	+7.1**

Note: \*\* denotes significance at the 5% level.<sup>230</sup>

F. Discussion

In future studies, more sophisticated and fine-grained analyses could be done on the dataset. For example, the most readable quartile of executive summaries, summary abstracts, and preambles could be examined for clues about when and how agencies produce more comprehensible text. But the basic picture seems clear: even with a history at least as long as that of ACUS itself, plain-language efforts still have not produced rulemaking documents that most of the public can use in writing meaningful comments.

The preambles are very long and written at a level most college graduates would find challenging. More sobering is the unexpected discovery that when agencies try to summarize these materials, what readers gain in shorter length is offset by *substantially* less readable text. Apparently, when rule writers try to compress content, they use more complex sentences and more jargon—and the greater the compression, the greater the loss in clear and simple expression.

<sup>229</sup> See *supra* Figure 1 and related discussion.  
<sup>230</sup> Paired *t*-test were used, which compare the score of the executive summary of a given document with the score of the preamble of the same document.

In particular, OIRA's effort to use executive summaries as a way to "promote public understanding" and give "members of the public . . . a clear sense of the content" of proposed and final rules<sup>231</sup> is a regulatory misfire. More agencies are indeed providing executive summaries more often, and the practice is more common in long rules and in proposed rules. However, the executive summaries in proposed rules are less likely to follow a standard format—and are written at a higher grade level—than those in final rules. In general, experience does not seem to help agencies write more readable executive summaries. Executive summaries are significantly less readable than the preambles they are supposedly explaining, and the most that can be said in their favor is that the summary abstracts (which would otherwise be a reader's only guide to the content of the rule) are even worse.

### III. WHERE FROM HERE?

*"It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend."*

—F.A.R. Bennion (1990)<sup>232</sup>

*"[T]he Committee is of the opinion that the need for, and intended effect of, even the most complex and technical regulation can be explained in words that can be understood by a person who is not an expert in the subject matter."*

—Administrative Committee of  
the Federal Register (1976)<sup>233</sup>

Almost exactly forty-five years after its Consumer Bulletin Recommendation, ACUS again recognized the relationship between public rulemaking participation and comprehensible rulemaking documents in its recommendations on the use of social media:

When soliciting input through a social media platform, agencies should provide a version of the NPRM that is "friendly" and clear to lay users. This involves, for example, breaking preambles into smaller components by subject, summarizing those components in plain language, layering more complete

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<sup>231</sup> Exec. Summ. Guidance, *supra* note 46, at 1.

<sup>232</sup> F.A.R. BENNION, BENNION ON STATUTE LAW 10 (3d ed. 1990).

<sup>233</sup> 1976 Final Rule, *supra* note 2, at 56,624.



versions of the preamble below the summaries, and providing hyperlinked definitions of key terms.<sup>234</sup>

Experience under OIRA's Executive Summary Guidance suggests that the odds of this recommendation being successfully implemented are very low—unless something changes.

Simply adding more mandates to write comprehensible rulemaking documents (or at least comprehensible shorter versions of those documents) is clearly not the answer. Agencies are now, and have for some time been, subject to multiple directives from Congress, the White House, and the Federal Register to write preambles and summaries that can be understood by people who are not experts in the area. The Plain Language Action and Information Network is a cross-agency group of federal employees who have been working to raise awareness and provide training materials on comprehensible writing for almost twenty years.<sup>235</sup> Their website, PlainLanguage.gov, contains a wealth of resources. Moreover, it is hard to imagine that the problem is a lack of instructional resources on clear and simple writing. Similarly, the U.S. General Services Administration's Office of Citizen Services and Innovative Technologies offers frequent blog posts and online workshops on plain language on their informative, easy-to-read platform.<sup>236</sup>

To avoid simply doing the same thing over and over and expecting a different outcome,<sup>237</sup> agencies and their overseers need a better understanding of why those who write rule preambles and summaries are not now writing clearer, simpler documents. Here are some possible explanations that could be investigated:

- ***Rule documents are drafted by people who write like lawyers (or engineers, or economists, or scientists).*** Our educational system tends to associate more advanced writing with more complex vocabulary and sentence structure. Professional education adds exponentially to this tendency. Professions are communities of practice defined, in important part, by shared specialized vocabulary and language structures that can make communication more

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<sup>234</sup> ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269, 76,271 (Jan. 17, 2012).

<sup>235</sup> See *About Us*, PLAIN LANGUAGE ACTION & INFO. NETWORK, <http://www.plainlanguage.gov/site/about.cfm> (last visited Apr. 1, 2015).

<sup>236</sup> See *About*, DIGITALGOV, <http://www.digitalgov.gov/about/> (last visited Apr. 1, 2015).

<sup>237</sup> The definition of insanity famously, but perhaps erroneously, attributed to Albert Einstein. See Michael Becker, *Einstein on Misattribution: "I Probably Didn't Say That"*, BECKER'S ONLINE J. (Nov. 13, 2012), <http://www.news.hypercrit.net/2012/11/13/einstein-on-misattribution-i-probably-didnt-say-that/>.

efficient within the group—but that also function (intentionally or not) to exclude outsiders.<sup>238</sup>

- ***Rule documents are drafted by people who are experts.*** Although related to the first possibility, this explanation focuses on an identified cognitive weakness of experts: they are singularly bad at placing themselves in the position of a novice.<sup>239</sup> Experts tend greatly to underestimate the needs of someone unfamiliar with their area of specialty.<sup>240</sup> Hence, it is especially hard for them to produce explanations that are comprehensible to non-experts.<sup>241</sup>

- ***Rule documents are drafted by people who already have too many mandates with which to comply and plain-language is low on the priority list.*** Precisely because higher education and the acquisition of expertise ingrain habits of more complex writing, drafting (or redrafting) in plain language is time consuming and hard. As one of dozens of requirements with which rule writers must comply, plain-language mandates are the last thing anyone is worrying about. Neither OIRA, the Federal Register, nor a reviewing court is going to send a rule back to an agency for failure to write preambles or summaries that can be understood by ordinary readers.

- ***Rule documents are drafted by people who do not believe that broader rulemaking participation would add value to the process.*** This is related to the previous possibility but has a slightly different motivational twist. For many agencies, Internet-facilitated public comments have not been a good thing. Mass comment campaigns by advocacy groups and grassroots-based comment blitzes—such as the one that overwhelmed the Federal Communications Commission in the net neutrality rulemaking<sup>242</sup>—have made it easy for rule writers to associate more public

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<sup>238</sup> See Cynthia R. Farina et al., *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1190, 1192–94 (2012) (discussing rulemaking as a community of practice).

<sup>239</sup> See Pamela J. Hinds, *The Curse of Expertise: The Effects of Expertise and Debiasing Methods on Predictions of Novice Performance*, 5 J. EXPERIMENTAL PSYCHOL.: APPLIED 205, 206 (1999).

<sup>240</sup> *Id.*; see also Pamela J. Hinds et al., *Bothered by Abstraction: The Effect of Expertise on Knowledge Transfer and Subsequent Novice Performance*, 86 J. APPLIED PSYCHOL. 1232, 1241–42 (2001).

<sup>241</sup> Hinds et al., *supra* note 240, at 1241–42.

<sup>242</sup> See Jacob Kastrenakes, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, THE VERGE (Sept. 16, 2014, 6:06 PM), <http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made>.

participation with more work, not more useful information.<sup>243</sup> Here, the failure of most recent plain-language efforts to emphasize the relationship between comprehensibility and meaningful participation is especially unfortunate. In fact, we simply do not know how broader rulemaking participation would evolve if individuals and small entities directly affected by new regulations could actually understand what an agency was proposing and why.<sup>244</sup>

• ***Rules are too technical and judicial review is too demanding for rulemaking documents to be written in plain language.*** This “explanation” is included principally to take it off the table. Even if it were true that most rules are highly technical (an empirical claim that should be proved, not assumed) and that preambles written to be understandable by non-experts could not contain the information required to survive judicial review (a dubious proposition, at best), this does not explain why agencies are not at least producing easy-to-read summaries.

What is needed now is evidence, not speculation. If, for example, a study of rule-writing practices were to conclude that professional acculturation makes it difficult for time-pressed rule writers to create explanations that non-experts can understand, then an appropriate recommendation might be to give other types of agency staff the responsibility of writing summaries and user-friendly versions of the NPRM. These people might be a cadre of trained drafters and editors, as in Canada.<sup>245</sup> Or perhaps a larger role could be carved out for the kinds of communications professionals that agencies increasingly employ to create their web content and manage their social media presence.<sup>246</sup>

When the Authors talk to professional or academic groups about CeRI’s RegulationRoom project, someone in the audience often asks for proof that the effort involved in “translating” rulemaking documents, and otherwise supporting informed par-

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<sup>243</sup> See Farina et al., *supra* note 44, at 130–31.

<sup>244</sup> The RegulationRoom project has shown that, in carefully selected rulemakings and with adequate technical and human support, rulemaking newcomers can effectively engage the issues and make thoughtful, relevant comments. See FARINA & NEWHART, *supra* note 26, at 15–17.

<sup>245</sup> The Canadian Institute for the Administration of Justice holds regular national conferences for the “legislative drafting community,” which is understood to include drafting of regulations. See *Mandate*, CAN. INST. ADMIN. OF JUST., <http://www.ciaj-icaj.ca/en/legal-drafters/mandate> (last updated Sept. 4, 2014).

<sup>246</sup> Kendrick Daniel, *Hiring for Your Digital Needs*, DIGITALGOV (Feb. 9, 2015), <http://www.digitalgov.gov/2015/02/09/hiring-for-your-digital-needs/>.

ticipation by affected individuals, small businesses, and other historically missing stakeholders, is justified by “new” information that such commenters provide. The Authors answer this question by talking about the kinds of situated knowledge that these new voices can—and do—contribute.<sup>247</sup> But surely the assumption behind the question should not go unchallenged. The status quo, in which only the expert or well-resourced can comprehend rulemaking documents,<sup>248</sup> is accepted because it is familiar, not because it is right or inevitable. ACUS is uniquely positioned to mount the kind of sympathetic, yet searching, examination of current agency practices that could uncover the reasons why more plain-language mandates are not producing more understandable rulemaking documents. With this knowledge may come the ability to recommend changes that actually work to give all “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . .”<sup>249</sup>

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<sup>247</sup> See Dmitry Epstein et al., *The Value of Words: Narrative as Evidence in Policy Making*, 10 EVIDENCE & POL’Y 243, 247–55 (2014); Farina et al., *supra* note 238, at 1196–97.

<sup>248</sup> See Farina et al., *supra* note 238, at 1192–94.

<sup>249</sup> 5 U.S.C. § 553(c) (2012).