The Plain Writing Act of 2010 – It's The Law! (Well, Sort Of)

By Keith Paul Bishop on December 7, 2011

In an earlier post, I wrote about the ambiguity that inheres in the use of the word "shall". In researching the topic, I discovered that last fall, President Barack Obama signed the "Plain Writing Act of 2010" into law. Ironically, the Act requires that "each agency *shall* use plain writing in every covered document of the agency that the agency issues or substantially revises." (Apparently, Congress didn't feel that the Act itself should use plain writing.) A few months later, the President issued Executive Order No. 13563, Improving Regulation and Regulatory Review. The order states that "[our regulatory system] must ensure that regulations are accessible, consistent, written in plain language, and easy to understand."

The Plain Language Action and Information Network (PLAIN) is a group of federal employees in various agencies that have developed guidelines for plain language. I'm pleased to say that PLAIN also favors the use of "must" over "shall" which it decries as officious and obsolete:

Besides being outdated, "shall" is imprecise. It can indicate either an obligation or a prediction. Dropping "shall" is a major step in making your document more user-friendly. Don't be intimidated by the argument that using "must" will lead to a lawsuit. Many agencies already use the word "must" to convey obligations. The US Courts are eliminating "shall" in favor of "must" in their Rules of Procedure. One example of these rules is cited below.

Instead of using "shall", use:

- "must" for an obligation
- "must not" for a prohibition
- "may" for a discretionary action
- "should" for a recommendation

Apparently, the Securities and Exchange Commission either disagrees or didn't read the guidelines. I note, for example, that the SEC's recently adopted amendments to Form PF states "This form shall be filed . . . ".

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It turns out that the Plain Writing Act is not only toothless, it's gumless. In fact, it specifically excludes regulations from documents covered by the act. Also, Congress made it clear that the federal courts were not to become an English version of *L'Académie française* by providing quite plainly: "There shall be no judicial review of compliance or noncompliance with any provision of this Act". Therefore, finding 40 *immortels* on the federal bench is about as likely as Diogenes finding an honest man. Finally, Congress provided that "No provision of this Act shall be construed to create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action."

So, my existential question is if a law confers no rights, is not enforceable and not subject to judicial review, is it a law?

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