

Comment of Consultative Group Member Nina Mendelson

Dec. 6, 2022 (corrected)

Thank you to the consultants for an excellent set of tentative recommendations and rationales. I agree with the comments already submitted by Alan Morrison and Peter Strauss.

I urge the consultants to make a stronger statement on text that is incorporated by reference into agency regulations, however. The report's rationale emphasizes the importance of public access to "legal materials," arguing they should be both easy to locate online and free of charge. The report acknowledges that IBR text is a "particularly striking exception" to these norms.

In my view, however, the report should go further. Of agency legal materials, regulatory text that is not government-published and instead only incorporated by reference is a high scorer – even *the* high scorer - on every relevant measure of concern identified by the report. First, the text has the same force of law as any agency regulation. Even when incorporated text simply articulates one path a regulated entity may take to comply, it binds the government and regulatory beneficiaries to accept that choice. The force of law here is obviously greater than an agency brief, interpretive statement, or settlement, examples for which the report urges disclosure and ready public access. Meanwhile, agencies have incorporated this regulatory text while accepting access terms determined by the private drafting organizations, including where to find the text, if it can be found at all, what price must be paid, and which terms a reader must accept. As I and others have written, these texts, even today, are strewn across numerous differently-managed private websites. Meanwhile, readers may either have to pay a significant access fee or agree to onerous terms, including a promise not to "use" the text, indemnification clauses, forum selection clauses, and agreement that the private organization may revoke access altogether. Some private texts made legally binding through incorporation by reference are now out of print and cannot be read at any price. While the text is not formally secret, these barriers to access make the text effectively inaccessible, especially to those who lack financial resources or professional support.

The report's decision not to tackle IBR issues as part of this broader project is understandable given ACUS's previous report and recommendation. Nonetheless, given the report's priorities—and that more than 10 years have elapsed since ACUS's earlier action--the report could, at a minimum, more strongly recommend that ACUS revisit that recommendation. On page 3 of the report, for example, in lieu of the 4th through 6th sentences of the paragraph beginning, "We likewise have not waded . . .," the report could state something like the following: "Over ten years ago, ACUS facilitated a study of IBR, and the Conference adopted a formal recommendation. Given the passage of time, subsequent experience with IBR rules, and the importance of the concerns discussed in this report, we recommend that ACUS revisit the IBR issue to enable a more complete and dedicated consideration than we can provide here."