

Comment from Consultative Group Member Courtney E. Mallon on *Disclosure of Agency Legal Materials*
June 28, 2022

ACUS has asked for assistance in determining what types of agency records it should consider to be “agency legal materials” for the purposes of this project. A suggestion was made that items Incorporated by Reference into the Code of Federal Regulations should be included. Pros and cons of this suggestion were discussed at the June 6th Consultative Group Meeting. However, what was not discussed, or at the very least not highlighted to the extent it might have been, is that the issue of the availability of materials incorporated by reference has the potential to bleed over into the broader issue of the use of copyrighted materials elsewhere in the rulemaking process—specifically during the notice and comment period. Commenters on notices of proposed rulemaking sometimes attach copies of articles, photos, webpages, etc. Where agencies have reason to believe that these materials are protected by copyright, we will restrict these materials, not making them publicly available on Regulations.gov. (Generally, in these instances, the metadata will be made available on Regulations.gov, which will include a citation, and sometimes an abstract.) While it is possible to bifurcate and distinguish the post-implementation rule materials, it might also be better to reserve all aspects of the use of copyrighted materials in the rulemaking process for another project. Neither I in my individual capacity, nor the U.S. Coast Guard, have a position as to whether materials incorporated by reference should fall inside or outside the scope of this project. This comment is merely for consideration in making your determination.