CAUSE of ACTION
INSTITUTE
Pursuing Freedom & Opportunity through Justice & Accountability℠

January 3, 2018

VIA SEC.GOV

Securities and Exchange Commission
ATTN: Secretary
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Sec. & Exch. Comm'n, Freedom of Information Act Regulations, 83 Fed. Reg. 291 (Jan. 3, 2018) (RIN 3235-AM25; SEC File No. S7-09-17)

Dear Secretary,

I write on behalf of Cause of Action Institute ("CoA Institute")[1] with respect to the Securities and Exchange Commission's ("SEC") proposed rule implementing revised Freedom of Information Act ("FOIA") regulations.[2] Although the SEC primarily intends its revisions to enact changes required by the FOIA Improvement Act of 2016, the agency also has indicated that it seeks, as a general matter, to "clarify, update, and streamline the language of several procedural provisions."[3] For example, relevant to this comment, the SEC has proposed revisions to its fee procedures and fee schedule, including "add[itional] and clarif[ying] fee-related definitions[.]"[4] CoA Institute accordingly offers the following comments on an important deficiency in the agency's proposed rule and respectfully requests the SEC to revise its rule to ensure that its regulation accurately reflects the statutory language.

I. Comments

a. § 200.80(g)(2)(vi) – *Representative of the News Media*

The SEC has failed to implement a definition of "representative of the news media" that is consistent with the FOIA statute.[5] In 2015, the U.S. Court of Appeals for the District of Columbia

[1] CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute routinely requests records under the FOIA, engages in extensive FOIA litigation, and has specific expertise with respect to the history, purpose, and application of the FOIA. *See* CAUSE OF ACTION INST., *About*, http://www.causeofaction.org/about (last visited Jan. 3, 2018).

[2] Sec. & Exch. Comm'n, Freedom of Information Act Regulations, 83 Fed. Reg. 291 (Jan. 3, 2018) (to be codified at 17 C.F.R. pt. 200).

[3] *Id.* at 292.

[4] *Id.* at 293; *id.* at 294 ("These proposed changes include: . . . (2) adding and clarifying certain fee-related definitions.").

[5] *Id.* at 299 (Proposed § 200.80(g)(2)(vi): "*Representative of the news media* or *news media requester* is any person or entity that is organized and operated to publish or broadcast news to the public and that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."). The statutory definition does not include an "organized or operated" standard. 5 U.S.C. § 552(a)(4)(A) ("[T]he term 'a representative of the news media' means any person or entity that gathers information of

Circuit issued an opinion in *Cause of Action v. Federal Trade Commission* that clarified the application of this statutory definition.[6] The SEC should revise its proposed rule to ensure that its fee definitions conform to statutory and judicial authorities.

Specifically, the proposed rule, while incorporating the language of the new statutory definition, fails to eliminate the outdated requirement that a news media requester be "organized and operated to publish or broadcast news to the public."[7] This so-called "organized and operated" standard was created in guidance issued by the White House Office of Management and Budget ("OMB") in 1987.[8] In *Cause of Action*, the D.C. Circuit clarified that the outdated OMB standard no longer applies because Congress provided a complete statutory definition of a "representative of the news media" in the OPEN Government Act of 2007: "Congress . . . omitted the 'organized and operated' language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an 'organized and operated' requirement to the statutory definition."[9]

Rather than combine the "organized and operated" standard with the new statutory definition, the SEC should strike the former from its FOIA regulations.[10] CoA Institute accordingly requests that the SEC adopt the following definition of "representative of the news media," which tracks the statutory definition:

> **§ 200.80 Securities and Exchange Commission records and information.**
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> [. . .]
>
> (g) *Fees.*
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> [. . .]
>
> (2) *Definitions.* For purposes of this section:
>
> [. . .]
>
> (vi) *Representative of the news media* or *news media requester* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. [. . .]

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potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.'").

[6] 799 F.3d 1108 (D.C. Cir. 2015).

[7] 83 Fed. Reg. at 299.

[8] Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

[9] *Cause of Action*, 799 F.3d at 1125.

[10] Any reliance on the OMB fee guidelines is inapposite, particularly in light of the Department of Justice's model FOIA regulations, which specifically reject the old OMB standard. *See* DEP'T OF JUSTICE, *Template for Agency FOIA Regulations*, http://bit.ly/2oG7tKf (last visited Jan. 3, 2018).

b. Eliminating "Case-by-Case" Fee Category Determinations

In addition to deleting the "organized and operated" standard, the SEC should incorporate the *Cause of Action* court's direction that the news media requester fee category determination focus "on the nature of the *requester*, not its request."[11] To illustrate, "[a] newspaper reporter . . . is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information."[12] Although case-by-case inquiry into the articulated purpose of a request, the potential public interest in requested material, or even the ability of a requester to disseminate sought-after records rather than information in general may be appropriate in determining the eligibility of nascent news media requesters (*i.e.*, new entities that lack a track record), still "the [FOIA] statute's focus [is] on requesters, rather than [their] requests."[13]

The SEC's regulations should reflect this focus. The SEC should therefore delete the last sentence of its proposed definition of a news media requester, which would direct "[t]he Office of FOIA Services [to] determine whether to grant a requester news media status on a case-by-case basis based upon the requester's intended use of the requested material."[14] At a minimum, the SEC must clarify that such case-by-case analysis is the exception to the rule and may only be adopted in the limited circumstance of determining the proper categorization of a nascent news media requester.

c. Additional Matters

There are two other elements of the DC Circuit's *Cause of Action* decision that should be considered with respect to the news media requester fee category. First, with respect to the requirement that a news media requester use "editorial skills" to turn "raw materials" into a "distinct work," CoA Institute directs the SEC to the *Cause of Action* court's clarification that "[a] substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same document would be—and its composition can involve 'a significant degree of editorial discretion.'"[15] Although the mere dissemination of raw records would not meet the "distinct work" standard, even a simple press release commenting on records would satisfy this criterion. The SEC's regulations should embrace this standard.[16]

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[11] *Cause of Action*, 799 F.3d at 1121.

[12] *Id.*

[13] *Id.*

[14] 83 Fed. Reg. at 299 (Proposed § 200.80(g)(2)(vi)).

[15] *Id.* at 1122.

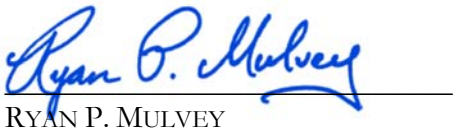
[16] The *Cause of Action* court also addressed three related issues. First, the court articulated that the FOIA does not "require that a requester gather[] information 'from a range of sources' or a 'wide variety of sources.'" *Id.* at 1122. "[N]othing in principle prevents a journalist from producing 'distinct work' that is based exclusively on documents obtained through FOIA." *Id.* Second, with respect to the news media requester category dissemination requirement, the court provided a non-exhaustive list of the methods an agency must consider, including: "newsletters, press releases, press contacts, a website, and planned reports." *Id.* at 1124. Finally, the court addressed the so-called "middleman standard," rejecting the government argument that "a public interest advocacy organization cannot satisfy the [FOIA] statute's distribution criterion because it is 'more like a middleman for dissemination to the media than a representative of the media itself[.]'" *Id.* at 1125. The *Cause of Action* court rejected that argument because "there is no indication that Congress meant to distinguish between those who reach their ultimate audiences and those who partner with others to do so[.]" *Id.* These important clarifications should be considered for incorporation into a revised rule.

Second, the *Cause of Action* court insisted that the statutory definition of "representative of the news media" captures "alternative media" and evolving news media formats.[17] The court thereby provided a useful clarification about the interplay between evolving media and the news media dissemination requirement when it affirmed the *National Security Archive v. Department of Defense* rule that "posting content to a public website can qualify as a means of distributing it[.]"[18] Although "[t]here is no doubt that the requirement that a requester distribute its work to 'an audience' contemplates that the work is distributed to more than a single person," "the statute does not specify what size the audience must be."[19] With this in mind, the SEC should indicate that any examples of news media entities it may include in its regulations are non-exhaustive.

II. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes. If you have any questions, please do not hesitate to contact me at [redacted].

Sincerely,



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COUNSEL

[17] *Id.* at 1123; *see also* 5 U.S.C. § 552(a)(4)(A) ("These examples [of news-media entities] are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.").

[18] *Cause of Action*, 799 F.3d at 1123.

[19] *Id.* at 1124.