

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 20, 2017

Via Regulations.gov

Commodity Futures Trading Commission
Attn: Christopher Kirkpatrick, Secretary of the Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Commodity Futures Trading Comm'n FOIA Regulations, 82 Fed. Reg. 28001 (June 20, 2017) (RIN 3038-AE57)

Dear Mr. Kirkpatrick,

I write on behalf of Cause of Action Institute (“CoA Institute”) with respect to the Commodity Futures Trading Commission’s (“CFTC”) recent interim final rule implementing revised Freedom of Information Act (“FOIA”) regulations.¹ These revised regulations will be effective on July 20, 2017. CoA Institute offers its feedback on an important deficiency in the CFTC’s rulemaking.

CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.² 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 and disseminates its analysis of those records to the interested public by various means, including a frequently visited website, newsletters, press releases, news articles, Twitter, and Facebook. CoA Institute engages in extensive FOIA litigation and its lawyers have specific expertise with respect to the history, purpose, and application of the FOIA. CoA Institute routinely confronts the issues addressed in these comments. It respectfully requests the CFTC re-issue its final rule to ensure that the regulation accurately reflects the statutory language.

I. Comments

a. Appendix B to Part 145 – Representative of the news media

The CFTC has failed to implement a definition of “representative of the news media” that is consistent with the FOIA statute.³ In 2015, the U.S. Court of Appeals for the District of

¹ Commodity Futures Trading Comm’n, Revisions to Freedom of Information Act Regulations, 82 Fed. Reg. 28,001 (June 20, 2017) (to be codified at 17 C.F.R. pt. 145).

² See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last accessed Mar. 2, 2017).

³ Appendix B to Part 145(c)(3) (“Only duplication fees will be charged to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”). 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

Columbia Circuit issued an opinion in *Cause of Action v. Federal Trade Commission* that clarified the application of this statutory definition.⁴ The CFTC should withdraw and revise its rule to ensure that its fee definitions conform to statutory and judicial authorities.

Specifically, the final rule fails to address an outdated definition that requires a news media requester to be “organized and operated to publish or broadcast news to the public[.]”⁵ This so-called “organized and operated” standard was created in guidance issued by the White House Office of Management and Budget in 1987.⁶ In *Cause of Action*, the D.C. Circuit clarified that the outdated standard no longer applies because Congress provided a 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.”⁷

CoA Institute accordingly requests that the CFTC adopt the following definition of “representative of the news media,” which tracks the statutory definition:

Appendix B to Part 145

(c) *Applicability of fees.* Fees shall be charged even if no records are ultimately furnished to the requester. Fees apply to various types of requests as follows.

[. . .]

(3) *Representative of the news media.* Only duplication fees will be charged to 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. No charge will be made for the first 100 pages duplicated or for search or review time.

b. Additional Matters

There are 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, the CFTC should incorporate the direction that the news media requester fee category determination focus “on the nature of the *requester*, not its request.”⁸ 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.”⁹ Although a case-by-case inquiry into the articulated

media’ means 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.”).

⁴ 799 F.3d 1108 (D.C. Cir. 2015).

⁵ Appendix B to Part 145(c)(3).

⁶ Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

⁷ *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d at 1125.

⁸ *Id.* at 1121.

⁹ *Id.*

purpose of a request, the potential public interest in the requested material, or even the ability of a requester to disseminate the sought-after records rather than information in general may be appropriate in determining the eligibility of a nascent news media requester (*i.e.*, a new entity that lacks a track record), nevertheless “the [FOIA] statute’s focus [is] on requesters, rather than [their] requests.”¹⁰ The CFTC’s regulations should reflect this focus.

Second, 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 CFTC 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.’”¹¹ 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 CFTC’s regulations should embrace this standard.¹²

Third, the *Cause of Action* court insisted that the statutory definition of “representative of the news media” captures “alternative media” and evolving news media formats.¹³ 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[.]”¹⁴ 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.”¹⁵ With this in mind, the CFTC should indicate that the examples of news media entities it has included in its regulations are non-exhaustive.

¹⁰ *Id.*

¹¹ *Id.* at 1122.

¹² 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.

¹³ *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.”).

¹⁴ *Cause of Action*, 799 F.3d at 1123.

¹⁵ *Id.* at 1124.

Mr. Kirkpatrick
June 20, 2017
Page 4

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 james.valvo@causeofaction.org.

Sincerely,



R. JAMES VALVO, III
COUNSEL & SENIOR POLICY ADVISOR