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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW., Suite CC-5610 (Annex T)
Washington, DC 20580

January 23, 2017

Submitted via regulations.gov

Re: Fee Schedule Rulemaking, 16 CFR 4.8, Project No. 122102

To Whom It May Concern:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”) appreciates this opportunity to comment on the proposed updates to the Federal Trade Commission’s (“FTC”) regulations implementing the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), which were published on December 22, 2016 (the “Proposed Rule”).¹

There are two aspects of the Proposed Rule that RCFP wishes to comment on, as they are inconsistent with both the text of FOIA and its recent interpretation by the U.S. Court of Appeals for the District of Columbia Circuit in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015).

I. Definition of “representative of the news media”

First, Section 4.8(b)(2)(iii) of the Proposed Rule sets forth an incorrect definition of “representative of the news media.” FOIA defines a “representative of the news media” as

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*.

5 U.S.C. § 552(a)(4)(A) (emphasis added). The Proposed Rule, however, defines a “representative of the news media” as

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 *the public*.

¹ The Reporters Committee takes no position on any portion of the Proposed Rule not specifically addressed herein.

(emphasis added). The Proposed Rule’s departure from the statutory text is unwarranted; it should be revised to mirror the language of FOIA. In *Cause of Action* the D.C. Circuit rejected the FTC’s argument that a public interest group did not qualify as a “representative of the news media” under 5 U.S.C. § 552(a)(4)(A) because it did not show that it would distribute the requested records to a sufficiently large number of persons. 799 F.3d at 1123–24. In making clear the importance of the precise words Congress chose in defining a “representative of the news media,” the Court stated:

There 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. But beyond requiring that a person or entity have readers (or listeners or viewers), *the statute does not specify what size the audience must be.*

Id. at 1124 (emphasis added).

The language of the Proposed Rule appears to be an attempt to impermissibly narrow the scope of who may qualify as a “representative of the news media” by requiring requesters to show that they distribute work to “the public”—a different requirement than what Congress set forth in FOIA. As *Cause of Action* made clear, the import of the phrase “the public,” as opposed to, “an audience” is not academic; this language has a real effect on requestors’ ability to access government records. The Reporters Committee accordingly recommends that “the public” in Section 4.8(b)(2)(iii) be replaced with “an audience” to ensure the FTC’s regulations conform to the law.

II. Public Interest Fee Waivers

Second, Section 4.8(e)(2)(i)(C) of the Proposed Rule places impermissible limitations on the conditions pursuant to which a public interest fee waiver will be granted. FOIA states that a fee waiver must be granted

if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

In *Cause of Action*, the FTC had denied a request for a public interest fee waiver because its regulations at the time required “a requester to show that the information it seeks would increase the understanding of the public ‘*at large*.’” 799 F.3d at 1115 (citing 16 C.F.R. § 4.8(e)(2)(i)(C)) (emphasis added). The Court explicitly rejected the assertion that FOIA requires such a showing:

The statute requires only that the disclosure be likely to contribute significantly to “public” understanding. 5 U.S.C. § 552(a)(4)(A)(iii). Nor does the statute require a requester to show an ability to convey the

information to a “broad segment” of the public or to a “wide audience.” To the contrary, we have held that “proof of the ability to disseminate the released information to a broad cross-section of the public is not required.” . . . FOIA does not require that a requester be able to reach a “wide audience.” Rather, as the Second Circuit has held, “the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”

Cause of Action, 799 F.3d at 1116 (emphasis added) (some citations omitted).

The FTC has apparently interpreted *Cause of Action* to mean that deleting “at large” from its regulations is sufficient to bring it in line with the law. Compare 16 C.F.R. § 4.8(e)(2)(i)(C) with Proposed Rule at § 4.8(e)(2)(i)(C). While it is entirely appropriate for the “at large” language to be removed, it is not enough. The pre-*Cause of Action* language contained in the Proposed Rule that states that “public understanding” does not mean the understanding of “a narrow segment of interested persons . . .” should also be deleted. As the Court in *Cause of Action* made clear, it is entirely sufficient if the requested records will increase the understanding of an audience of persons interested in the subject, even if that group is “narrow” as compared to the public at large. See 799 F.3d at 1116.

III. Conclusion

The Reporters Committee appreciates the FTC’s efforts to update its regulations for complying with FOIA. We believe incorporating the comments set forth herein will assist the FTC in fulfilling its obligation to provide public access to its records in accordance with FOIA.

Sincerely,

The Reporters Committee for Freedom of the Press