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April 2, 2014

THE HONORABLE TOM VILSACK  
SECRETARY OF AGRICULTURE  
U.S. DEPARTMENT OF AGRICULTURE  
1400 INDEPENDENCE AVENUE SW, ROOM 200-A  
WASHINGTON DC 20250

Re: Enforcement of Horse Protection Act

Dear Secretary Vilsack:

Please be advised our firm has been retained by the Performance Show Horse Association ("PSHA"), The Celebration, SHOW and various owners and trainers in connection with issues of concerns to the PSHA and its members regarding the enforcement of the Horse Protection Act ("HPA") and the regulations previously adopted by the United States Department of Agriculture under the authority granted it by the HPA.

As you are aware, the USDA has oversight of Horse Industry Organizations, including SHOW, and inspections of the Tennessee Walking Horse industry. To enforce the law, the USDA has developed the Designated Qualified Person ("DQP") program. 9 C.F.R. § 11.7. The USDA has established, by regulation, the qualifications for DQPs and the requirements for organizations which certify DQPs. 9 C.F.R. § 11.7(a) and (b). DQPs are required to physically inspect every horse before it may be shown, exhibited or sold to determine if it is in violation of the HPA or regulations. 9 C.F.R. § 11.20 (b)(2).

However, despite the clear requirements of the HPA and regulations, it now appears the USDA has begun a process to undermine, if not disqualify, DQPs previously certified by SHOW, Inc. in a manner totally inconsistent with the statute, regulations and past practices. Specifically, the Veterinary Medical Officer ("VMO") for the SHOW DQPs training on March 8, 2014, advised the SHOW DQPs as follows:

1. VMOs advised SHOW DQPs that there would be a new interpretation of the "scar rule" (established in 9 C.F.R. § 11.3) and "any change" to the pastern area would now be called a violation;
2. VMOs could pick up a horses foot and if it even "looked" abnormal they would call it out on a scar violation without even touching the pastern; and
3. The use of the thermography would enable the VMOs to issue a scar violation without even picking up a horse's foot.

The first two changes to the scar rule noted above are inconsistent with existing regulation. The USDA has previously been informed of almost the exact same concerns and has dismissed them summarily. The third is entirely new. It is clear the scar rule criteria have been established by the USDA via rulemaking. No mention is made of thermography in the rules or statute. Thus, when the USDA engages in de facto rulemaking by announcing a change in a validly enacted regulation without engaging in rulemaking, it does so in clear violation of the statute and the Administrative Procedures Act.

In addition, the establishment of thermography as a separate ground for issuance of a citation for violation of the scar rule is similarly contrary to the existing regulation. It is also inconsistent with advice made available to participants in horse shows, the public and Congress on the USDA's website. In "Questions and Answer: Animal Care's Use of Thermography, the USDA has advised:

**"Q. Has thermography replaced any of the other methods of inspection?"**

**A.** Thermography has not replaced any of the other methods of inspection. The technology is used as an additional diagnostic tool that can provide objective and scientific data during the inspection process. For example, if a thermographic image indicates an area of excessive heat, VMOs can further evaluate the area to determine if there is evidence of inflammation, a foreign substance, pressure shoeing, or other violations of the HPA."

[http://www.aphis.usda.gov/publications/animal\\_welfare/content/printable\\_version/faq\\_useofthermo.pdf](http://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/faq_useofthermo.pdf) (available March 24, 2014).

The expanded use of thermography is a significant concern to the PSHA and its members. While thermography has been mentioned in the Industry going back to some of the original Senate/Congressional comments in the 70's, it has not been utilized by the USDA to target specific areas for review. It is also not clear that thermography as it is being used by the USDA has the appropriate scientific requirements to allow the targeting for which it is identifying.

As admitted by the USDA in the Q&A referenced above, thermography is not an objective inspection protocol – it is only an aid to the inspections. Thermography cannot determine if a targeted area is a scar or a callus or some other change in the skin. For the USDA to suggest that an area is a "precursor to a scar" or is "suspicion of a scar" is totally disingenuous and proves that the USDA is predisposed to determine a violation even before performing the required HPA inspection. As the USDA is fully aware, by its own words, "The "scar rule" allows for normal changes in the skin that are due to friction. These changes would allow thickening of the epithelial layer of the skin in the pastern area (much like the callus on a workman's hands) and the moderate loss of hair in the pastern area caused by the friction generated by action devices."

We respectfully request your office look into the current situation. To the extent that VMOs continue to declare scar violations without following the regulations, the USDA's defined protocol and its own training, they should be removed from any further horse inspections as

The Honorable Tom Vilsack

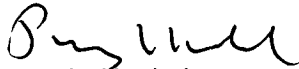
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they are finding purported "violations" which materially affect the industry and impact the value of an owner's horse.

Timing is critical with the arrival of the horse show season. We are ready and willing to come to Washington to meet with appropriate agency representatives to address the current situation in order to restore the integrity of the horse inspection system which is at the heart of the HPA.

Very truly yours,



Phillip L. Kunkel  
Attorney