November 29, 2010

Dr Chester A Gipson
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Dear Dr Gipson:

I am writing this letter in response to the recent OIG Audit and the response filed by the USDA. First let me say that Pride commends the USDA's hard work and efforts to uphold the Horse Protection Act. Pride is in total support of the USDA's determination to make sure that everyone is in compliance at all times. We are also very pleased with the working relationship with the USDA that we have enjoyed in our short but very productive existence as a Horse Industry Organization. I want to emphatically state that Pride is 110% in support of upholding the Horse Protection Act and has made every effort to do so at the shows that we have affiliated to date. We are dedicated to continuing to work with the USDA to enforce the HPA throughout the Tennessee Walking Horse Industry. With that being said it is also Pride's goal to ensure that the Tennessee Walking Horse Industry grow and prosper for all horse enthusiasts who desire to show compliant horses in the future as the Horse Protection Act originally intended, including padded Tennessee Walking Horses.

I have reviewed the OIG Audit and the USDA Response in detail over the last month and have compiled the following preliminary response to the Audit. As the USDA is aware the Audit and Response are very lengthy and contains a large amount of information, data, opinion and innuendo. Due to the size of the documents and I want to inform you that Pride will be filing an official detailed response to the Audit and the USDA Response. I would ask that the USDA give us time to complete this response prior to making any decisions concerning the Audit. I feel that adequate time needs to be given for all parties affected by this Audit to respond.

After reviewing the Audit I have come to the following preliminary conclusions. First, Pride agrees that every effort should be made to continue to enforce the HPA. PRIDE does agree that the USDA has not adequately enforced the HPA. The USDA has continued to pick the low hanging fruit by only attending affiliated shows and continues to ignore the growing number of wildcat shows. The Audit clearly states in 2007 that the USDA attended 30 of 463 sanctioned shows and mentions no unsanctioned shows. The Audit mentions that the DQPs do not write tickets because it would hurt the shows profits. What it does not mention is the fact that these shows are put on for nonprofit organizations such as the Lions Club, Band Boosters, Shriners and other charities. The Audit states that DQPs have a conflict of interest. PRIDE believes that this issue has already been addressed by making changes to our current programs. This Audit data is three years old. At least two of the major HIOs did not exist at the time of this Audit. The Audit states that when the USDA attended shows that the DQPs found 50% of the violations, but the Audit failed to put any weight on the fact that further down in the Audit the VMOs openly admitted that they coerced DQPs into writing tickets. Also if the DQPs wrote the tickets instead of the VMOs then the facts show that the DQPs in fact did their jobs. The Audit states that the VMOs find the environment hostile at many horse shows. The fact remains that no VMO has ever been attacked at a horse show. Many times the VMOs create the hostile environment themselves by the attitude that they have when they arrive at the shows. PRIDE does not know of any incidence of an arrest being made because of hostility towards the VMOs. Protests and riots go on in this country everyday because of people's passions for certain issues. The walking horse industry has voiced their disagreement with the USDA but has never resorted to violence in any way. The Audit states that the DQP program is not working and that the USDA should abolish it and use accredited vets to inspect the shows. PRIDE would emphatically disagree. Compare the number of industry tickets to the number of USDA prosecuted violations and it is clear that the USDA should work closer

with the industry instead continuing the heavy handed approach to enforcement. Also the HPA already gives the show managers the rights to use veterinarians to inspect their shows. The industry cannot continue to bear the cost of additional government bureaucratic processes. It already costs these horse shows more to enforce the HPA than the profit that they make for their charities. PRIDE agrees that the USDA fails to check their own suspension lists while attending horse shows. This is not an industry problem but a USDA personnel problem. PRIDE has already addressed many of these issues. Pride is run as a business by business people making business decisions. Pride is determined to enforce the Horse Protection Act fairly and consistently for every exhibitor, owner and trainer at all shows we affiliate. We are also dedicated to educating the Industry on how to show compliant horses, how to run a professional business, and how to care for the welfare of their horses, among many other topics. Our goal is to create an environment that nurtures professional trainers of these beautifully talented animals and rids ourselves of the many years of being labeled “rednecks with toothbrushes”. Pride has made it clear in all discussions with the industry that the “days of old” are over. As you are aware Pride worked with the USDA in every step of the certification process to ensure that the USDA had no issues with our leadership team.

If you dissect the Audit and Response further you find that it is littered with misstated facts and false information. The Audit starts by saying that the DQP program has failed to enforce the HPA. The facts state differently. The USDA data for industry compliance proves this to be false. The Audit continues to say that self regulation does not work and has continued to be ineffective. Again the numbers prove this to be false. Also the big advantage of self regulation is that information concerning upcoming shows is readily available to the USDA. If it were not for the HIOs and their affiliation programs the USDA would be hunting for “wildcat” shows similar to the illegal dog fighting and chicken fighting industry. No one in the Tennessee Walking Horse Industry wants to see an increase in “wildcat” shows. Over the last 5 years there has already been a huge increase in “wildcat” shows and this will continue exponentially if the HIOs and the USDA do not have some serious and constructive conversations about why this is happening soon. The Audit states that the USDA should abolish the DQP program, use accredited vets for inspection and force the shows to bear the additional costs. Not only would this be cost prohibitive but this would also force many shows to not affiliate with any HIO and continue to create more wildcat shows. If you read the Audit it continues to talk about sanctioned shows. This Audit fails to address the issue of non affiliated shows and the fact that the USDA is forcing more and more shows to not affiliate. The Audit states that the USDA should make sure HPA violators do not participate in shows while on suspension. PRIDE already addresses this issue by further penalizing anyone caught violating their suspension. The Audit states that the USDA needs to seek more funding to better enforce the HPA. PRIDE would contend that the money is not the issue but in fact the approach the USDA has taken to enforcing the HPA. The Audit states that the regulations should be revised to ensure that a horse that is disqualified as being sore does not participate in all classes at a particular horse show or event. PRIDE has voluntarily taken this approach to enforcement but wants to remind the USDA that until this person is prosecuted they are not a violator of the HPA. Even the worst criminals in this country are afforded due process. The OIG Audit pointed out some issues in the USDA’s enforcement of the HPA. Unfortunately many of the findings and conclusions are based upon invalid data or opinion. PRIDE would ask the USDA and the OIG to make public all backup data for this Audit. PRIDE would like to review the data so that we may make our response based on the facts. Please let me know when we can expect to receive this information from the USDA.

The OIG ask the USDA to take the following actions:

1. **To abolish the DPQ program and use accredited vets to inspect shows and force the industry to bear the cost.** The USDA responded by not agreeing to this proposal but in fact continuing the DQP program. The USDA has decided to move the DQPs under their direct control instead of under the control of the HIOs. PRIDE would agree with the

OIG that the USDA has failed to enforce the HPA and by giving the USDA more control and less oversight is only going to make the issue worse. The USDA's plan is to basically outsource VMOs and rename them DQPs. This would result in the industry having no say in who becomes a DQP and would allow the USDA free reign on who they license as DQPs. There would be no checks in place to keep the USDA from licensing radical Humane Society to inspect these shows. The USDA feels that 14 hours of training makes someone an expert in the HPA. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

2. **Seek the necessary funding for adequate oversight of the HPA.** PRIDE would contend that the law only allows for $500,000 for enforcement of the HPA. PRIDE would also contend that before any additional monies are allotted to the USDA for enforcement that it be earmarked for unaffiliated shows only. Until the USDA agrees to enforce the HPA uniformly across all horse shows and all breeds no additional monies should be approved. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

3. **Revise the Regulations so that independent USDA accredited veterinarians and APHIS veterinarians can directly issue violations, as DQPs currently do.** The USDA can already issue violations directly. The issue is that HIO DQPs are a part of a private organization with private rules and regulations. There is no requirement for due process in this environment. The USDA does not have this same right. The HPA states emphatically that no one can receive a penalty unless they receive a hearing before the Secretary. Due process is guaranteed to everyone by the Constitution of the United States. The USDA's plan to force the HIOs to adopt a mandatory penalty structure violates the Constitution of the United States by forcing the HIOs to circumvent an individuals right to due process. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

4. **Revise its Regulations to allow discipline for any inspector who does not examine horse according to the USDA standards.** PRIDE would contend that no vet is going to agree to inspect horses as a part of this program if they are going to be scrutinized by the USDA. The USDA has been asked to publish their inspection protocol and hold their own individual VMOs accountable to these standards. The USDA refuses to publish a standard and refuses to hold a VMO accountable when they deviate from the standard even when it is clearly documented and videoed. It is not in the best interest of the HPA to give the USDA additional authority when they do not properly use the authority already given to them. The USDA continues to threaten the HIOs with Letters of Warnings when DQP findings don't agree with a VMO even though the DQP followed the approved inspection protocol and the VMO did not. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

5. **Develop and implement protocols to more consistently negotiate penalties with individuals who are found to be in violation of the HPA**. The USDA completely ignored the OIG recommendation by stating they had developed a penalty protocol that they are mandating to the HIOs for 2011. There are two issues with the recommendation and the USDA response. First no one is guilty until they have their trial before the Secretary. Secondly the OIG stated negotiate on each case not mandate a penalty protocol that does not leave any room for negotiation. Again this response violates the Constitutions guaranteed right of due process and it is attempting to force the industry to bear the burden of the administrative process of prosecution of these alleged violations. This is the USDA's response due to the clear fact that they have not successfully prosecuted the vast majority of alleged HPA violations. For example they are attempting to mandate a penalty for a unilateral sore horse even though the OGC has clearly stated

that it will not prosecute these violations. The USDA cannot force the industry to implement changes that it does not have the ability to do itself. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

6. **Develop and implement controls to ensure that no one participates in horse shows or events while on USDA suspension.** PRIDE has no issue with this OIG finding. PRIDE has an issue with the USDA labeling HIO violations as HPA violations. No one is in violation of the HPA until convicted in a court of law. PRIDE takes exception with the fact that the USDA has mandated that each HIO key information into a database labeled HPA violations when in fact this is not true. Matter of fact there is case law where the USDA has even stated that they do not recognize industry suspensions as USDA suspensions and therefore have subjected individuals to double jeopardy for the same violation. PRIDE has voluntarily complied with this USDA requirement as a token of good faith, but will reevaluate this position if the USDA continues its adversarial approach to enforcement of the HPA. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

7. **That USDA employees, vets, DQPs and Show Management check all individuals responsible for the condition of each horse against a database of suspended individuals.** Again the issue is not enforcing the suspensions but with the way the USDA has labeled the Database and the suspensions. PRIDE monitors their suspensions and enforces them strictly. PRIDE would also remind the USDA that at the end of the day it is not practical to hold the HIOs or Show Management responsible for suspension violations. It is the responsibility of the individual to not violate their suspension and they are to be held accountable. PRIDE strongly disagrees with the USDA's plan of action for this recommendation.

In conclusion I urge the USDA to not make any decisions on the Audit until we have had time to digest this information and submit a formal response. It is very obvious that the USDA is trying to address the issue that even though they have taken information on thousands of horses over the last 38 years they have only successfully prosecuted a very small number of these cases. The USDA readily admits that they have failed in this regard. It is very clear that the USDA plans to outsource the VMO position by directly licensing DQPs without industry input. This would do two things. First it would allow the USDA to license people who are only interested in putting the padded walking horse out of business. Secondly it would allow the USDA to shift the cost directly to the charitable horse shows circumventing the HPA which clearly limits the USDA's budget. The USDA has mandated penalties on a private organizations in attempt to penalize individuals without allowing them due process in order to address the fact that the majority these cases are not prosecutable in court such as the unilateral sore cases. Again the USDA is attempting to shift the cost and administrative process onto the industry in order to address the USDA's inadequate job of enforcement. The USDA is also attempting to force show management to affiliate with an HIO even though the HPA clearly allows a show to use a veterinarian to inspect their show. The USDA is doing this by attempting to hold a show liable for an individual showing at their show while on suspension by another organization or the USDA. It again is an attempt by the USDA to hold someone else accountable because of the USDA's inadequate enforcement. The USDA needs to hold the guilty parties accountable not a horse show or an HIO. The USDA is also attempting to label HIO violations as HPA violations in attempt to label individuals repeat offenders in an effort to levy larger penalties on individuals without due process of law. It is very clear that the USDA is not attempting to protect the horse industry but in fact to put it out of business. The original Horse Protection Act was intended to stop people from gaining an unfair economical advantage over others and falsely inflating the value of their horses through "soring". I would conclude that the industry along with the USDA has taken great strides over the last 37 years to accomplish what the HPA intended. Most people only can talk about what the horses of the early 1970's. I saw those horses in person up close. There is no comparison to the horses of

today. Yes there are still instances of abuse and we need to deal with them, but the USDA Response seems to want to throw the baby out with the bath water. The original intent was to protect the true value of the Tennessee Walking Horse and its very natural “Big Lick”. The Act was written around the padded Tennessee Walking Horse to protect it not eliminate it. I am asking the USDA to carry out the original intent of the HPA and protect the padded Tennessee Walking Horse. I believe the USDA can work with Pride to help this industry make the constructive changes required to create a new positive working environment that will allow the Tennessee Walking Horse Industry flourish and become a part of this great country’s economic recovery. Thank you for your time and consideration.

Sincerely,

(b)(6)

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November 30, 2010

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RE: Petition for Rulemaking - Response

Drs. Gipson and Cezar,

Attached please find the Response of Show, Inc. To Petition For Rulemaking previously filed by Humane Society of the U.S., The American Society for the Prevention of Cruelty to Animals, the American Horse Protection Associations, Inc., Friends of the Sound Horses, Inc. and Senator Joseph D. Tydings.

Please let me or [redacted] (b)(6) know if you need anything further at this time.

Very truly yours,

DEAL, COOPER & HOLTON, PLLC.

[redacted] (b)(6)

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enclosure

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BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
ANIMAL AND PLANT HEALTH INSPECTION SERVICE

RM NO. _____

RESPONSE OF SHOW, INC., TO PETITION FOR RULEMAKING

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FOIA 11-158 AC. 000007

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 4

II. INTEREST OF RESPONDENT 6

III. RESPONSE TO ACTION REQUESTED BY PETITIONERS 6

IV. LEGAL BACKGROUND 7

A. THE HORSE PROTECTION ACT AND ITS REGULATIONS 7

B. RESPONSIBILITY FOR ENFORCEMENT OF HPA 9

C. THE HIO CERTIFICATION PROCESS AND HIO SYSTEM OF REGULATION 9

D. POTENTIAL LIABILITY FOR SHOW MANGERS 11

E. STANDARDS REQUIRED FOR AGENCY ACTION TO BE UPHELD 13

V. FACTUAL BACKGROUND 15

A. HISTORY OF SHOW, INC. 15

B. *NON-FACTUAL* BACKGROUND ESPOUSED BY PETITIONERS 18

1. CURRENT REGULATIONS CAN EFFECTUATE PURPOSES OF THE ACT 18

a. Pressure Shoeing 18

b. Stewarding Practices 19

c. Scar Rule 21

C. SHOW ENFORCEMENT OF HPA AND HPR HAS EFFECTUATED THE PURPOSE OF THE ACT 22

D. SHOW DQPs DO NOT HAVE CONFLICTS OF INTEREST AND AND CONSISTENTLY ENFORCE THE HPA AND ITS REGULATIONS 23

VI. SHOW'S REPSONSE TO PETITIONERS' REQUESTED ACTIONS 25

A. SCARRED HORSES SHOULD NOT BE PERMANENTLY DISQUALIFIED . 25

B. USDA REQUIREMENT OF MINIMUM PENALTIES IS UNCONSITITIONAL, UNLAWFUL, IN EXCESS OF USDA'S AUTHORITY UNDER THE ACT AND DOES NOT EFFECTUATE THE PURPOSE OF THE ACT 29

1. IMPOSITION OF MANDATORY PENALTIES ARE UNCONSTITUTIONAL, UNLAWFUL AND IN EXCESS OF USDA'S AUTHORITY UNDER THE ACT 29

2. IMPOSITION OF MANDATORY PENALTIES DO NOT EFFECTUATE PURPOSES OF THE ACT 32

C. PETITIONERS' PROPOSED INCORPORATION OF 2010 POINTS OF EMPHASIS INTO HPA REGULATIONS 34

1. DISMISSAL FROM SHOW, EXHIBITION, SALE OR AUCTION IS ALREADY ADDRESSED BY THE HPRs 35

2. HORSES DISMISSED FROM ARENA MUST REPORT DIRECTLY TO INSPECTION 36

3. DIGITAL IMAGING FINDINGS 36

4. INSPECTION FINDINGS 39

5. USDA DISQUALIFICATIONS AND HIO SUSPENSIONS 39

6. USDA REQUIREMENT THAT HIO ISSUE LETTERS OF WARNING (LOWs) TO DQPs VIOLATES CONSITUTIONAL DUE PROCESS 43

7. PETITIONERS' REQUEST REGARDING FALSE INFORMATION AND SWAPPING OF HORSES IS ALREADY ADDRESSED BY HPA AND HPR 44

8. IMPOSITION OF MANDATORY PENALTIES ARE UNCONSITUTIONAL, UNLAWFUL AND IN EXCESS OF USDA'S AUTHORITY UNDER THE ACT 45

D. PERMANENT DISQUALIFICATION OF REPEAT OFFENERS IS UNCONSTITUTIONAL, UNLAWFUL AND IN EXCESS OF THE DEPARTMENT'S STATUTORY AUTHORITY 45

VII. CONCLUSION 47

FOIA 11-158 AC. 000009

I. INTRODUCTION

The Petition for Rulemaking attempts to paint the entire Tennessee Walking Horse Industry and all organizations involved in the self-regulation process as ill-intentioned animal abusers who have made no effort to comply with the requirements of the Horse Protection Act ("HPA") and/or its Regulations ("HPR"). Petitioners would have the Department and public believe that no one involved in the industry has any regard for this great breed of horse, much less having the best interest of the horse at heart. Petitioners hurl inaccurate, slanderous, hyperbole in "support" of their positions but offer very little, if any, empirical evidence. As set out hereinafter, Petitioners would have this Department seek rulemaking to construct a system of enforcement which has absolutely no regard for the law or the constitutional rights of those it seeks to regulate. Furthermore, a careful, reasoned analysis of many of Petitioners' requests reveals that the scheme proposed by Petitioners does not effectuate the purposes of the Horse Protection Act and does not promote the best interest of the horse. The scheme proposed by Petitioners would, in fact, increase the number of incidents of "soring". This Respondent does not know, or care, what the Petitioners' true motives are for their current actions, but it is clear that it is not to effectuate the purpose of the Act or to protect the best interest of the horse.

Petitioners' ask this Department to seek rulemaking which is in direct contravention to the express authority granted to the Secretary under the HPA. The scheme proposed in the Petition would so tightly intertwine the USDA in the daily management of the certified Horse Industry Organizations ("HIOs") that each and every HIO would be nothing more than an extension of the USDA, and therefore, a "state actor" for purposes of due process considerations and liability under §1983. Such a scheme would not only unconstitutionally

deprive those affected of their property and liberty interests, but would undoubtedly expose both the HIOs and the Department to liability under § 1983.

Instead of acknowledging the great strides that Respondent SHOW has made in effectuating the purposes of the Act in its eighteen (18) months of existence, Petitioners choose, instead, to espouse inaccurate, slanderous statements concerning SHOW and its enforcement actions. Petitioners refuse to recognize that in its short eighteen (18) months of existence, SHOW has done more to effectuate the Act and to "Find and Eliminate the Sore Horse" than all other HIOs and the USDA have combined in the thirty-plus (30+) plus years of HPA enforcement. SHOW's inspections are, without question, the most comprehensive, consistent inspections ever implemented by an HIO. For Petitioners to paint this Respondent with the same broad brush is inaccurate at best and ill-intentioned at worst.

As set out herein below, SHOW does not disagree with all the suggestions put forth in the Petition for Rulemaking. In fact, SHOW has already incorporated some of the suggested changes into its rulebook and/or protocol. However, many of Petitioners' requests are simply unconstitutional, unlawful and expose this Respondent to extensive legal liability. Consequently, SHOW has no choice but to oppose same.

II. INTEREST OF RESPONDANT

Respondent SHOW, Inc., ("SHOW") is a corporation existing under the laws of the State of Tennessee with its principle place of business in Shelbyville, Tennessee. SHOW is a Horse Industry Organization (HIO) certified by the USDA which became actively involved in the inspection of Tennessee Walking Horses on April 1, 2009. SHOW was founded on the principles of "Sound Horses, Honest Judging, Objective Inspections and Winning Fairly" and

encourages integrity within the Tennessee Walking Horse industry to "protect our horses and assure the future of real competition."[1]

SHOW inspects both pleasure and performance horses. In 2009, SHOW inspected 33,137 horses and, to date, has inspected 23,897 in 2010.

III. RESPONSE TO ACTION REQUESTED BY PETITIONERS

Petitioners request "immediate regulatory changes" involving five (5) issues. As set out in detail herein below, Respondent SHOW does not disagree with incorporation of some of the 2010 Points of Emphasis and has, in fact, previously incorporated some of them into its rulebook and protocol. Additionally, SHOW does not disagree that HIOs which fail to address "instances of non-compliance" should be decertified after a full and complete hearing as required by the Horse Protection Act Regulations.

However, the remaining requested actions simply do not comport with the law nor protections guaranteed by the Constitution, and furthermore, expose HIOs to extensive liability. Each requested action is addressed in detail herein below.

IV. LEGAL BACKGROUND

A. THE HORSE PROTECTION ACT AND ITS REGULATIONS

The Horse Protection Act (hereinafter "HPA") was enacted in 1970 to eliminate what Congress perceived to be widespread soring of Tennessee Walking Horses in order to enhance the horse's performance in the show ring. Congress professed that soring created an unfair competitive advantage which artificially inflated the value of some horses, thereby affecting Interstate Commerce. CONG. REC. 39895, 39896 (Dec. 18, 1969). The authority conferred by Congress centers only on the showing, selling, transporting and/or exhibiting of this breed and does not extend to activities which may be conducted away from the show, sale, transport and/or

[1] *See* http://www.showhio.com

exhibition. 15 U.S.C. § 1824. Specifically, the HPA does not grant government officials the authority to regulate any activity associated with these animals unless it takes place at a show, sale and/or exhibition or in the course of transport. *See* 15 U.S.C. § 1821, *et seq.*

Pursuant to the HPA, authority for enforcement of the Act rests with the United States Department of Agriculture (hereinafter the "USDA") – specifically, the Animal and Plant Health Inspection Service (hereinafter "APHIS") division. 15 U.S.C. § 1822. In an effort to limit the number of horses subjected to soring, Congress placed potential liability for the entry, showing, exhibiting, selling or transport of a horse found to be "sore" on the following:

(1) individuals who actually attempt to enter, show, exhibit, sell or transport a horse found to be "sore", 15 U.S.C. § 1824(1-2);

(2) owners of horses who "allow" their horse(s) to be entered, shown, exhibited, transported or sold while in a "sore" condition, *See* 15 U.S.C. § 1824(2)(D); and

(3) event managers who fail to disqualify a horse found to be "sore" from their respective shows, exhibitions and/or sales, 15 U.S.C. § 1823(a-b).

See also Am. Horse Protection Assoc. v. USDA, Civil Action No. 01-00028 (D.D.C July 9, 2002)(order dismissing challenge to USDA decision to enter into Operating Plan with HIOs).

Under the HPA regulations (hereinafter "HPR"), "[s]ore when used to describe a horse means:

(1) An irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse,

(2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(3) Any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(4) Any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

9 C.F.R. § 11.1.

Additionally, under HPR 11.3, termed the "scar rule", for a horse not to be considered "sore",

(a) the anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair. Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3.

B. RESPONSIBILITY FOR ENFORCEMENT OF HPA

The HPA is clear that primary responsibility for enforcement of the Act rests with the USDA. The Act authorizes representatives of the Department, known as "Veterinary Medical Officers" (hereinafter "VMOs"), to "inspect any horse show, horse exhibition, or horse sale or auction" to determine if a horse is "sore". 15 U.S.C. § 1823(e).

If an alleged violation is found to have occurred, the violator may be subject to either criminal or civil penalties under the Act. 15 U.S.C. § 1825. Section 1825 sets out the maximum

penalties (both criminal and civil) which may be imposed for violations of the HPA. However, the clear language of the HPA states:

> **"No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary . . . ."**

15 U.S.C. § 1825 (emphasis added).

Consequently, under the HPA, **ONLY** the USDA has authority to issue **ANY** penalty for violations of the Act.

C. THE HIO CERTIFICATION PROCESS AND HIO SYSTEM OF REGULATION

While Congress delegated primary enforcement responsibilities for the HPA to the USDA, it mandated that the USDA "prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter." *See* 15 U.S.C. § 1823©. In response, the USDA promulgated regulations which set up procedures whereby private organizations, referred to as Horse Industry Organizations (hereinafter "HIOs"), could be certified by the Department, and who could in turn, hire and certify inspectors, known as Designated Qualified Persons (hereinafter "DQPs") to inspect horses for compliance with the HPA and the organization's rulebook. 9 C.F.R. § 11.7.

Horse Industry Organizations ("HIOs") are in fact just that – private, industry-led organizations set up for the purpose of self-regulation. HIOs are private organizations, not state actors. As such, HIOs set up their own systems of administration and adopt their own rulebooks which control events which they affiliate. HIOs function as any other private and/or voluntary organization such as homeowner associations, athletic associations, etc. Courts have traditionally

refused to exercise jurisdiction over such private organizations unless there is evidence of "fraud, bad faith, corruption, or other misconduct in the promulgation or application of the bylaws" of the organization. *Holder v. Celsor*, 914 S.W.2d 496 (Tenn. Ct. App. 1995).

HIOs have no authority to issue penalties under the HPA. Any penalty levied by an HIO is the result of a violation of that HIO's rules. Any corresponding penalty levied against a violator by an HIO is a private, non-state action, and therefore, not subject to the due process requirements imposed upon state actors. *See Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992)(analyzing various tests to determine if conduct at issue is "fairly attributable to the state").

Petitioners have alleged that "HIOs are permitted to create and enforce their own penalty schemes, and if USDA believes those effectuate the purposes of the Act and regulations, it will not initiate a Federal case against the violator." *Petition for Rulemaking* at p.10. Petitioners' statement is simply inaccurate. Respondent SHOW is certain that Petitioners are very familiar with the *McConnell* and *Derickson* cases in which both Appeals Courts found the exact opposite to be true. *McConnell v. USDA*, 2006 WL 2430314 (C.A. 6); *Derickson v. USDA*, 546 F.3d 335 (6th Cir. 2008). In fact, Respondents in both the *McConnell* and *Derickson* cases had served HIO-imposed penalties which had been deemed "acceptable" by the USDA through the applicable Operating Plans, and yet, the USDA chose to bring a federal case in both instances. *Id.* In *Derickson*, the Sixth Circuit Court of Appeals held that even when the USDA has entered into an Operating Plan which delineates penalties to be imposed by an HIO for an alleged violation and the Respondent has, in fact, served that HIO-imposed penalty, it "does not limit APHIS's ability to impose legal sanctions" against an alleged violator. *Derickson*, 546 F.3d at 346. Consequently, Petitioners' statement that the USDA will forego a federal case if an HIO Imposes an acceptable penalty against a violator is simply untrue.

D. POTENTIAL LIABILITY FOR SHOW MANAGERS

In addressing the requirements placed upon show management, the express language of the HPA states

> (a) Disqualification of horses
> The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.
>
> (b) Prohibited Activities
> The management of any horse sale or auction shall prohibit the sale or auction or exhibition for the purposes of sale of any horse (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.
>
> (c) Appointment of inspectors; manner of inspections
> The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter.
> . . .
> Appointment of person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

U.S.C. § 1823(a – c).

To avoid liability under the Act, show managers may either retain certified inspectors through a certified HIO **OR** be "responsible for identifying all horses that are sore or otherwise in violation of the Act or regulations" prior to the horse(s) "participating or competing in any horse show, horse exhibition, horse sale, or horse auction." 9 C.F.R. § 11.20. Any horse "found to be sore or otherwise in violation of the Act or regulations during actual participation in the show or exhibition, must be removed from further participation prior to the tying of the class or

the completion of the exhibition." Further, "[a]ll horses tyed first" must be re-inspected for compliance with the Act and regulations. *Id.*

Additionally, under HPR 11.24, at shows containing Tennessee Walking Horses or racking horses, for each horse disqualified or excused from being shown, management is required to submit the following information "[w]ithin 5 days following the conclusion of any horse show, horse exhibiting, or horse sale, or auction":

(1) the dates and place of the horse show, horse exhibition, horse sale, or horse auction;

(2) the name and address of the sponsoring organization;

(3) the name and address of the horse show, exhibition, horse sale or horse auction management;

(4) the name and address of the DPQ, if any, employed to conduct inspections and the name of the horse industry organization or association certifying the DQP;

(5) the name and address of each show judge; and

(6) a copy of each class or sale sheet, containing the names of horses, owners, exhibitor number and class or sale number assigned to each horse, and the name and address of the person paying the entry fee and entering the horse in the horse show, horse exhibition, or horse sale or auction.

9 C.F.R. § 11.24 (incorporating reporting requirements of 9 C.F.R. § 11.22(a)(1 – 6).

"If no horses are excused or disqualified, the management shall submit a report so stating." 9 C.F.R. § 11.24(a).[2]

Consequently, under the HPA and HPR, show management has absolutely **NO** authority to issue any penalty to an alleged violator. Instead, show management has two (2) choices, it may:

[2] Additionally, under 9 C.F.R. § 11.24(b), for events which do NOT contain Tennessee Walking Horses or racking horses, within 5 days of the conclusion of the event, management "shall inform the Regional Director . . . of any case where a horse was excused or disqualified by management or its representatives . . . ."

(1) retain the services of a certified HIO (which has **NO** authority under the Act to impose state-sanctioned and/or HPA penalties, as discussed in the preceding section);

OR

(2) be "responsible for identifying all horses that are sore or otherwise in violation of the Act or regulations" prior to the horse(s) "participating or competing in any horse show, horse exhibition, horse sale, or horse auction".

9 C.F.R. § 11.20.[3]

E. STANDARDS REQUIRED FOR AGENCY ACTION TO BE UPHELD

The instant Petition for Rulemaking asks the USDA to "[e]nhance restrictions on inhumane practices and ensure uniform enforcement of the Act via the following immediate regulatory changes:

1. Permanently disqualify scarred horses from participating in all horse showing activities;
2. Require HIOs to adopt a minimum penalty structure for HPA violations;
3. Incorporate certain Points of Emphasis into the Horse Protection Regulations;
4. Permanently disqualify individuals who have repeatedly violated the Act from participating in all horse showing activities; and
5. Decertify HIOs after their failure or refusal to correct instances of non-compliance."

Pet. For Rulemaking at p.8.

However, under 5 U.S.C. § 706 of the Administrative Procedures Act, any agency action may be found to be unlawful and set aside if such action is determined to be:

(A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

[3] *See also Aphis Tech Note – The Horse Protection Act: Responsibilities of Horse Show Management* (July 2010).

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. 5 U.S.C. § 706(2). "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Manf. Assc. V. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). An agency promulgating an administrative rule must "plainly 'articulate its findings and the reasons for its policy choices, so that a court may ascertain whether it engaged in balanced, informed decision-making.'" *Fleming Co., Inc. v. USDA*, 322 F.Supp.2d 744, 763 (E.D. TX June 4, 2004) *quoting Tex. Power & Light Co. v. FCC*, 784 F.2d 1265, 1269 (5th Cir. 1986). A court will examine whether "in light of all the information available" a "reasonable person" would be lead "to make the judgment the Agency has made." *Professional Drivers Council v. Bur. Of Motor Carrier Safety*, 706 F.2d 1216, 1217, 1221 (D.C. Cir. 1983).

As set out in detail herein below, some of the actions requested by Petitioners do not conform to the requirements of 5 U.S.C. § 706 and would, therefore, necessarily be set aside as unlawful.

V. FACTUAL BACKGROUND

A. HISTORY OF SHOW, INC.

Respondent SHOW, Inc., ("SHOW") was certified as a Horse Industry Organization (HIO) by the USDA and on April 1, 2009, became actively involved in the inspection of pleasure and performance Tennessee Walking Horses. SHOW was founded on the principles of "Sound Horses, Honest Judging, Objective Inspections and Winning Fairly" and encourages integrity within the Tennessee Walking Horse industry to "protect our horses and assure the future of real competition."[4] Additionally, SHOW has taken on as its objective the principles set forth in the AAEP White Paper designed to end a "culture of abuse" within the industry.

As part of the 2009 dissolution of the former National Horse Show Commission ("NHSC"), SHOW agreed – with the approval of the USDA – to initially retain the NHSC DQPs and to take on the financial commitments of the former NHSC including the lease of office space and office equipment. However, since that time, and as a result of additional training, review and a goal of eliminating all conflicts of its DQPs, SHOW has retained only two (2) of the thirty-five (35) DQPs which were initially licensed by the NHSC.

Since becoming an activated HIO in April 2009, the strategic goal and mantra of SHOW has been to "FIND AND ELIMINATE THE SORE HORSE." SHOW has demonstrated its commitment to this strategic goal in all it has done during its eighteen (18) months of existence. To that end, SHOW has implemented a strategic plan which has included the following changes to its program to accomplish this goal, including, but not limited to, the following:

(1) retained the services of an AAEP veterinarian as its President;

(2) retained and selected only DQPs who have no conflicts of interest;

(3) instituted a rigorous DQP training program which has been praised by USDA

[4] *See* http://www.showhio.com

employees and others;

(4) implemented the most comprehensive inspection process in the industry (to such an extent that the USDA has incorporated several aspects into their own inspections);

(5) modified its hearing process to ensure that every ticket would be accounted for and no special treatment would be allowed, no matter the violator;

(6) developed a 3 year strategic plan;

(7) restricted those allowed into the inspection area;

(8) restricted those allowed into the holding area;

(9) monitors application of lubricants in warm-up area;

(10) hoof testing of all pleasure horses

(11) monitoring of warm-up area;

(12) monitoring of trailer area;

(13) provided cameras to all DQPs;

(14) videotaping of ALL inspections;

(15) initiated a Hotline to report alleged acts of non-compliance;

(16) instituted a protocol and penalty for a "bad image" horse which is not contained within the HPA or any other HIO's penalty matrix;

(17) conducted seminars to educate trainers and owners on their responsibilities and to inform them of what is expected of them when presenting a horse for inspection before SHOW;

(18) conducted seminars in conjunction with Dr. Tracey Turner, USDA consultant and private equine practitioner, and [redacted], past president American Farriers Association and private farrier in New York;

(19) invited industry experts to observe its inspection process and make suggestions; and

(20) instituted initiatives and penalties for judges to ensure horses which enter the ring are compliant.

As a result of the initiatives it has implemented, SHOW has been more successful at "finding and eliminating the sore horse" than any other HIO and/or the USDA. While SHOW is disappointed in the statistics from an industry perspective, the hard numbers prove that SHOW is clearly effectuating the purpose of the HPA and its regs. In the eighteen (18) months since becoming an active HIO, SHOW has

(1) suspended 126 trainers for one (1) year for a finding of bilateral sensitivity – more than any other HIO or the USDA in its history;

(2) suspended 2 individuals for swapping horses – never before found or prosecuted by any other HIO or the USDA;

(3) issued a lifetime suspension for pressure shoeing – never before found or prosecuted by the USDA; and

(5) issued a lifetime suspension for use of a cruel device to aid in checking a horse found to be bilaterally sensitive and bad image – never before found or prosecuted by any other HIO or the USDA.

The consistency of SHOW's inspection process has also overcome one of the most common criticisms levied against the HIO system – that HIO inspections are less stringent when the USDA is not present at an event to observe their DQPs' performance.

B. *NON*-FACTUAL BACKGROUND ESPOUSED BY PETITIONERS

1. CURRENT REGULATIONS CAN EFFECTUATE PURPOSES OF THE ACT

The "facts" espoused by the Petitioners in Section V., of their Petition rely on slanderous, unsupported hyperbole in an effort to elicit an overzealous response from the USDA and the general public. The Petitioners use such words and phrases as: "rampant", "wholly inadequate self-regulating enforcement", "commonly", "commonplace", and "widespread" to describe what they claim to be the state of enforcement and soring practices within the industry. However, Petitioners choose to ignore the statistics which directly contradict their claims as well as the fact that the adoption of the current regulations was based upon uncontradicted scientific evidence.

a. Pressure Shoeing

Petitioners claim that "[p]ads are used to conceal soring mechanisms, such as tacks, screws, or hardened acrylic . . . because the Regulations permit the stacks which conceal the illegal devices." *Pet. for Rulemaking* at p.12. Petitioners go on to claim that "pressure shoeing of both padded and flat shod horses remains widespread." *Id.* at 13. Petitioners offer no empirical evidence in support of their outrageous claims and choose to ignore even the USDA data to contrary. The fact is that in the history of the HPA, only three (3) violations for pressure shoeing have been detected by either an HIO or the USDA to this Respondent's knowledge. One (1) pressure shoeing violation and subsequent lifetime suspension was levied by SHOW HIO in July of 2010, a previous violation was detected by the now-defunct National Horse Show Commission in 1993 and one (1) other by the now defunct NHSC in 2006. Whether or not one believes the HIO system is a success, the Petitioners' unsupported, slanderous claims concerning pressure shoeing ignores the fact that USDA VMOs have checked thousands of horses since the adoption of the Act without finding and prosecuting one single violation for pressure shoeing - including examinations by VMOs with the use of digital radiography in recent years.

Petitioners claims concerning pressure shoeing do not comport with the requirements of candor toward the tribunal nor the requirements for the bringing of meritorious claims and contentions required by Rules 3.1 and 3.3 of the District of Columbia's Rules of Professional Conduct. The attorneys filing the instant Petition are "required to inform themselves about the facts of their clients' cases and the applicable law and determine that they can make a good faith argument in support of their clients' position." R. Prof. Conduct 3.1 cmt.

For the USDA to rely on Petitioners' unsupported allegations which are, in fact, directly contradicted by the USDA's own data would clearly be "arbitrary and capricious" and "an abuse

of discretion" under 5 U.S.C. § 706 requiring that any action taken in reliance on such information would be found to be "unlawful and set aside."

b. Stewarding Practices

Petitioners also claim in their Brief that "Stewarding Practices" designed to distract a horse during the inspection process are "commonplace" and "are not prohibited under the Regulations." *Pet. for Rulemaking* at p.14. However, both statements concerning "stewarding practices" are unsupported and untrue.

For a second time, Petitioners refuse to recognized decades of data from the USDA documenting the fact that only one (1) violation and subsequent penalty for "stewarding" has ever been levied by an HIO and/or the USDA since the adoption of the HPA in 1970. The only stewarding violation and corresponding penalty was levied by SHOW HIO in July 2009 for the use of a device designed to inflict pain on a horse which was subsequently found to be bi-laterally sensitive and a bad image. To this Respondent's knowledge, neither the USDA nor any other HIO has ever levied a penalty for any such violation in the thirty (30) years of HPA enforcement.

As with the Petitioners unfounded allegations concerning pressure shoeing, Petitioners allegations concerning "stewarding" do not comport with the requirements of candor toward the tribunal nor the requirements for the bringing of meritorious claims and contentions required by Rules 3.1 and 3.3 of the District of Columbia's Rules of Professional Conduct. The attorneys filing the instant Petition are "required to inform themselves about the facts of their clients' cases and the applicable law and determine that they can make a good faith argument in support of their clients' position." R. Prof. Conduct 3.1 cmt.

Further, the allegation that any such stewarding practices "are not prohibited by the Regulations" is simply inaccurate. HPR 11.21(4) directly addresses the issue of "stewarding". HPR 11.21(a)(4) states, in part:

> [t]he DQP shall not be required to examine a horse if it is presented in a manner that might cause the horse not to react to a DQP's examination, or if whips, cigarette smoke, or other actions or paraphernalia are used to distract a horse during examination. All such incidents shall be reported to the show management and the DQP licensing organization."

9 C.F.R. § 11.21(a)(4).

Clearly, the Regulations have directly addressed any potential "stewarding practices". Petitioners and their attorneys have simply chosen to ignore them. *See* R. Prof. Conduct 3.1 and 3.3.

Finally, Petitioners have completely failed to provide any empirical evidence in support of their proposed rulemaking concerning "stewarding practices." Any proposed additional rulemaking on this issue is not only unwarranted as it is currently addressed in the HPRs, but is also incapable of withstanding a challenged under 5 U.S.C. §706 as same would be "unsupported by substantial evidence" and "arbitrary and capricious".

c. Scar Rule

Petitioners also make slanderous, unfounded allegations that trainers "commonly" use such devices as overweight chains "in conjunction with other soring techniques – such as chemical burns." *Pet. For Rulemaking* at p.12. However, Petitioners offer no evidence in support of their allegations.

The "scar rule" violations referred to Petitioners result from HPR 11.3 which requires that a horse's pasterns "be free from bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring, including, but not

limited to, excessive loss of hair." The "scar rule" was adopted in 1979 and "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 a callous on the workman's hand) and the moderate loss of hair in the pastern area caused by the friction generated by an action device." 43 FED. REG. 18519(1978). Petitioners admit, albeit in a footnote, that the "USDA's decision to adopt a six-ounce weight limit on action devices, based on conclusions in the Auburn study that action devices weighing less than six ounces were 'not likely' to sore horses, was upheld by the District of Columbia Court of Appeals in 1990. *Am. Horse Protection Ass'n. V. Yeutter*, 917 F.2d 594 at 598 (D.C.Cir. 1990). The Court stated, "We continue to believe that properly conducted inspections are an effective means of detecting a horse with sore pasterns. *Id.*" In the instant Petition for Rulemaking, Petitioners have offered no evidence contrary to the Auburn study and have provided no basis for overturning previous Court rulings on this issue. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999)(holding that expert evidence must be found to be relevant and reliable by considering (1) whether expert's theory can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error; (4) existence and maintenance of standards and controls; and (5) degree of acceptance in scientific community).

Petitioners have offered no evidence to contradict the scientific data upon which the current "scar rule" was based (*i.e.*, the Auburn Study). Instead, Petitioners hurl allegations with no supporting evidence and request revision to the current Regulations. The lack of evidence, much less evidence which can withstand a *Daubert* challenge, renders Petitioners' allegations and requested relief concerning this issue unfounded. *See* 5 U.S.C. § 706.

C. SHOW ENFORCEMENT OF HPA AND HPR HAS EFFECTUATED THE PURPOSE OF THE ACT

Petitioners next allege that the current "HIO/DQP program is a prime example of a woefully inadequate self-regulation scheme", and further, that "in many cases have consistently, intentionally, and egregiously failed to enforce the Act." *Pet. For Rulemaking* at p.15. However, Petitioner fail to prove any evidence whatsoever that SHOW HIO has failed in its responsibilities under the HPA/HPR or in its goal to find and eliminate the sore horse.

In fact, the evidence shows that SHOW has been more effective at effectuating the purpose of the Act than any other HIO and/or the USDA. USDA data proves the following:

- SHOW has penalized 126 violators for bi-lateral sensitivity in its 18 months of existence, placing each violator on one (1) year of suspension;
- SHOW has issued one of only 3 penalties in the history of the HPA for pressure shoeing, issuing a lifetime suspension for the violator, none of which were issued by the USDA;
- SHOW has issued the ONLY penalties in the history of the HPA for horse swapping, issuing a one (1) suspension for each violator;
- SHOW has issued the ONLY penalty in the history of the HPA for use of a device designed to distract a horse during inspection which was subsequently found to be bi-laterally sensitive and bad image, issuing lifetime suspensions for the violators;

Clearly, SHOW has done more in its eighteen (18) months of existence to effectuate the purposes of the Act than has been accomplished by all other HIOs and/or the USDA, to date. For Petitioner to allege that <u>all</u> HIO programs are created equal and paint <u>all</u> HIOs as "woefully inadequate" is not only offensive to this Respondent but is misleading and untruthful.

D. SHOW DQPs DO NOT HAVE CONFLICTS OF INTEREST AND CONSISTENTLY ENFORCE THE HPA AND ITS REGULATIONS

Next, Petitioners allege that "[c]onflicts of interest are rampant throughout all levels in the industry and ultimately facilitate soring". *Pet. For Rulemaking* at p.15. Shockingly, Petitioners have the audacity to go further yet and make the bold allegation that "[t]hree DQPs *currently* working for SHOW HIO are documented to have a history of HPA violations, and one has been subject to at least four separate HPA-related suspensions." *Id.* at 16. As support for these allegations, Petitioners rely on the "Declaration of Lori Northrup" signed "under PENALTY OF PURJURY" by Ms. Northrup. *See Exhibit G to Pet. for Rulemaking.*

However, Ms. Northrup's allegations are simply untrue and together with Petitioners' allegations concerning same should be stricken from the record. Such bald-faced inaccuracies are, at a minimum, untrue and misleading and in the worst case an intentional attempt to mislead the Agency and the public concerning the only HIO which is clearly effectuating the purposes of the Act. Ms. Northrup, the Petitioners and their attorneys all had a duty to verify the accuracy of the allegations contained in their pleadings.[5] Regardless of the motivation, such conduct should not be condoned and the language should be stricken.

The truth is that SHOW has instituted the most comprehensive DQP screening and training program in the industry. SHOW rules prevent the licensing of any DQP with a conflict of interest. SHOW also has incorporated in its Rulebook all the required matters stated in the Regulations, most if not all of the "conflict" issues raised by the Petitioners as well as in the OIG Audit. Furthermore, DQP conflicts of interest have been address by HPR 11.7(d)(7)(i-ii) which prevents a DQP from participating at an event at which he is functioning as a DQP and from

[5] *See* R. Prof. Conduct 3.1 and 3.3.

inspecting "any horse owned by a member of the DQP's immediate family or the DQP's employer".

In fact, Ms. Northrup, the very same individual who made the slanderous allegations against SHOW, has, by invitation by SHOW officials, observed the SHOW inspection process first-hand and has been extremely complimentary. Following her observation of SHOW DQPs at the 31st Annual Spring horse show in May, 2010, Ms. Northrup complimented the overall inspections and condition of the horses. She stated she was very impressed and witnessed many changes for the better. In addition Ms. Northrup later complimented SHOW to Dr. Gipson for the pressure shoeing violation it found and ticketed in July of 2010.

Petitioners also criticize the appointment of committee members by SHOW who have previous HPA violations. However, Petitioners have failed to provide **any** evidence whatsoever that these individuals have in any way thwarted SHOW's efforts to find and eliminate the sore horse and effectuate the purpose of the Act. To the contrary, the evidence proves that SHOW is more effective at achieving these goals than other HIOs and/or the USDA. Clearly, these "statistics" hurled by Petitioners are nothing more than a "red herring" and yet another attempt to incite an unjustified response.

VI. SHOW'S RESPONSE TO PETITIONERS' REQUESTED ACTIONS

Herein below, Respondent SHOW responds to each of Petitioners' "Request Actions".

A. SCARRED HORSES SHOULD NOT BE PERMANENTLY DISQUALIFIED

Petitioners first allege that "[p]ermanent disqualification of scarred horses is required to eliminate repeated soring practices and to promote humane treatment of horses." *Pet. for Rulemaking* at p.20. As purported support for its request for "permanent disqualification",

Petitioners allege (1) the need for deterrent purposes (2) horse swapping and (3) increased inspection efficiency. *Id.* at p. 19 – 21.

As stated hereinabove, the "scar rule" requires that a horse's pasterns "be free from bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring, including, but not limited to, excessive loss of hair." 9 C.F.R. § 11.3. 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 a callous on the workman's hand) and the moderate loss of hair in the pastern area caused by the friction generated by an action device." 43 FED. REG. 18519(1978).

Petitioners' request for permanent disqualification of "scarred" horses fails to take into account several factors which render the request unlawful, unenforceable, not in the best interest of the horse and contrary to the purposes of the Act. Petitioners' request fails to consider the following:

1. The permanent disqualification of horses was considered and rejected during the initial adoption of HPR 11.3 known as the "scar rule." During the rulemaking process, the USDA specifically recognized "that such a scarred horse could be restored to a satisfactory condition with proper care, rest and time", and consequently rejected any changes to the "scar rule or its intent."

2. The restoration of horses previously found to be "out on scar rule" is supported by reliable, credible data. Horses determined to be in violation of HPR 11.3 by either DQPs and/or VMOs have later been determined to be compliant by both DQPs and VMOs given proper "care, rest and time." Interestingly enough Petitioners raise the horse Star as having received a scar

ticket in 2008 as the reason a hose should be permanently disqualified. However, Star was shown and checked by the USDA in 2010 and passed every time.

3. The horses' feet seen by DQPs and VMOs bear absolutely no relation to the condition of the pasterns seen in 1979 when the "scar rule" was adopted. Respondent would submit that not even Petitioners herein would dispute that the condition of horses' pasterns today are vastly improved from conditions of 1979 and even a few years ago. What is considered by some inspectors to be a scar today may more closely resemble a pimple and may not even be visible to the naked eye. Several VMOs themselves have stated "(they) noticed a greater number of horses with no pathology changes this year than any other year in the past", these "horses are better than I have ever seen before and SHOW is doing an outstanding job", and the "horses are vastly improved over 2009."

4. Enforcement of the "scar rule" is fraught with inconsistency between not only DQPs but also between VMOs and AAEP certified veterinarians. The language of the scar rule allows for subjective evaluation by an inspector except for only the most clear-cut violations. As an example in May of 2010 a VMO rejected a horse named The Blue King (name changed for privacy purposes) for a scar violation. The horse was inspected by a renowned clinic in Kentucky and it was that veterinarians' opinion that he could not understand why the horse was turned down. The horse's "pasterns should serve as the poster child for what owners and trainers should strive for their horses to look like." In addition a senior APHIS official also complimented this same horse that (he) should be the standard for the TWH as he is so clean and compliant. In addition the existence and definition of "granuloma" as defined in HPR 11.3 creates disagreements between veterinarians. Whether a "granuloma" can be detected through palpation by a DQP and/or VMO is a source of controversy among experts in the field.

5. Permanent disqualification of a horse for a scar rule violation by an HIO would be implicating the HIO as a state actor and thereby requiring that due process be provided before such a taking could occur. Clearly, an individual has a property interest in his or her horse. An HIO is a non-governmental entity which cannot, under law, deprive an individual of his property without due process of law. For legal authority concerning due process deprivation, Respondent would refer to Sections VI.C. and VI.D. hereinafter and incorporates same herein as if set out in its entirety.

Further, the USDA would likely be held liable for the actions of HIOs in the imposition of such penalties and any corresponding deprivation of rights of the individuals affected. A governmental entity may be held liable for the actions of a private organization if (1) "the State creates the legal framework governing the conduct"; (2) if it delegates its authority to the private sector"; or (3) "if it knowingly accepts the benefits derived from unconstitutional benefits derived from the unconstitutional behavior." *Nat. Collegiate Athletic Assc. v. Tarkanian*, 488 U.S. 179, 192 (1988). Private parties may also be "found to be state actors if they were 'jointly engaged with state officials in the challenged action'" or there existed a "sufficiently close nexus between the State and the challenged action of the regulated entity." *Id.* at 192, 200. "In determining whether an ostensibly private organization is a state actor for purposes of the *Federal Constitutions' Fourteenth Amendment*, public entwinement in the organization's management and control will support a conclusion that the organization ought to be charged with a public character and judged by constitutional standards." *Brentwood Academy v. Tennessee Secondary School Athletic Assc.*, 531 U.S. 288 (2001).

The Agency's attempt to "entwine" itself in the activities of private organizations through the imposition of mandatory penalties would be "contrary to constitutional right, power, privilege or immunity" under 5 U.S.C. § 706(2)(B) and would, therefore, be set aside.

7. Permanent disqualification of scarred horses would certainly render the animals useless for their intended purpose – show and/or exhibition. Consequently, horses determined to be "out on scar rule" would likely have little or no value to their owners which would likely increase abandonment of the animals. Such an outcome cannot possibly be considered preferential to the recognized course of rehabilitation of the horse through "proper care, rest and time."

B. USDA REQUIREMENT OF MINIMUM PENALTIES IS UNCONSTITUTIONAL, UNLAWFUL, IN EXCESS OF THE USDA'S AUTHORITY UNDER THE ACT AND DOES NOT EFFECTUATE THE PURPOSE OF THE ACT

1. IMPOSITION OF MANDATORY PENALTIES ARE UNCONSTITUTIONAL, UNLAWFUL AND IN EXCESS OF USDA'S AUTHORITY UNDER THE ACT

Next, Petitioners argue the USDA should "promulgate HPA regulations which require minimum penalties set forth in Exhibit C." *Pet. for Rulemaking* at p.23. The Petition claims that "there is no minimum penalty for instances of pressure shoeing, stewarding practices, or the act of swapping horses or numbers – all of which are widespread practices in the industry." *Id.* at 22.

Once again, Petitioners' allegations are misguided at best and intentionally misleading at worst. SHOW's penalty structure contains specific penalties for various violations, including, but not limited to pressure shoeing, stewarding practices and swapping of horses. Also, Petitioners again allege these practices are "widespread" despite the fact that only three violations of pressure shoeing, one for stewarding practices each and two violations for horse swapping have ever been detected and penalized in the history of the HPA enforcement – all

(except 2 of the pressure shoeing) by SHOW within the last eighteen (18) months. Surely, Petitioners will concede that such a limited number of such violations in light of the thousands of horses inspected each year for the last 40 years (including those inspections conducted and/or supervised by USDA VMOs and/or investigators) does not constitute any "widespread" practice. Not coincidentally, Petitioners fail to provide any data whatsoever to support their allegations. One can presume that no data is cited in support of Petitioners' position because none exists.

As addressed in the preceding section, the imposition of any mandatory penalty by the USDA through an HIO cannot be upheld. Section 1825 of the Act specifically sets out the criminal and civil penalties which may be levied if an individual is found to be in violation of the Act.

Petitioners are surely aware that the Sixth Amendment provides for, among other things, the fundamental right to a trial by jury in criminal matters in order to prevent oppression by the government. *See Duncan v. State of Louisiana*, 391 U.S. 145 (1968). There simply can be no argument that a private organization, such as an HIO, is capable of providing the due process rights associated with the potential imposition of criminal penalties.

Section 1825(b) of the Act sets out the civil penalties which may be assessed for violations of the Act and its regulations. Section 1825(b) specifically states

> **"<u>No penalty</u> shall be assessed <u>unless</u> such person is given notice and opportunity for a <u>hearing before the Secretary</u> with respect to such violation"**

(emphasis added).

Section 1825(b) goes on delineate the factors the Secretary must consider in assessing a penalty as well as the appeal process to "the court of appeals of the United States." *Id.*

Clearly, pursuant to the express terms of the HPA, the Department cannot impose any penalty "unless such person is given notice and opportunity for hearing before the Secretary" and afforded an appeal to "the court of appeals of the United States." *Id.* This unequivocal language does not give the Secretary the authority to impose its penalties through any other means – including, but not limited to, through a private organization such as an HIO.

Any attempt by the Secretary to impose a "mandatory penalty" through the HIO system would be in excess of the express authority authorized to the Secretary by statute, and therefore, unenforceable. *See* 5 U.S.C. § 706(2)(C)(finding unlawful any agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

This issue has been addressed in the current HPR which states:

> The certified DQP organization shall assess appropriate penalties for violations, as set forth in the rule book of the certified program under which the DQP is licensed, **or** as set forth by the Department, and shall report all violations in accordance with Sec. 11.20(b)(3) of this part.

9 C.F.R. § 11.21 (emphasis added).

Webster's Dictionary defines "or" as a "coordinating conjunction introducing . . . an alternative." The clear language of the HPR 11.21 does not make any penalty issued by an HIO mandatory. The express language of this Section is to require the HIO to assess the penalty as set forth in its Rulebook. It does NOT require an HIO to issue an HPA penalty as mandated by the USDA which comports with the express language of the HPA which allows for imposition of a USDA penalty ONLY AFTER "**opportunity for a hearing before the Secretary with respect to such violation.**" 15 U.S.C. § 1825(b).

Furthermore, as discussed in the preceding section, an attempt by the USDA to impose "mandatory penalties" through the HIO system would result in said HIOs being considered "state actors" compelled to comply with due process requirements. Consequently, the USDA would be liable for the actions of the HIOs as there would exist a sufficiently "close nexus" and "entwinement" to compromise "the independence of the enforcing officer." *See Lugar v. Edmondsom Oil Co., Inc., et al.*, 457 U.S. 922 (1982).

The imposition of a "mandatory penalty" scheme would also subject individuals to the threat of double jeopardy. Under the Act, regulations and current case law, the Department has the authority to file a federal case even if an individual has served a HIO mandated penalty. *See McConnell v. USDA*, 2006 WL 2430314 (C.A. 6); *Derickson v. USDA*, 546 F.3d 335 (6th Cir. 2008).

2. IMPOSITION OF MANDATORY PENALTIES DO NOT EFFECTUATE THE PURPOSES OF THE ACT

The mandatory penalty structure which Petitioners now propose would not effectuate the purposes of the Act – the elimination of soring. In fact, just the opposite could occur if mandatory penalties were to be imposed. Soring could actually INCREASE under the scenario proposed by the Petitioners.

First, the HIOs, such as SHOW, who are actually effectuating the purpose of the Act through fair and consistent process, would, for all practical purposes, be destroyed. If the USDA requires mandatory penalties and the other items they are proposing as stated in the APHIS response to the OIG Audit, the HIOs would have no other independent responsibility other than to assign DQPs. This would be more than a close nexus under case law – the HIOs would be agents or subcontractors of the USDA itself. Therefore, owners and trainers would automatically gravitate to the HIOs who are involved in lax and/or ineffective enforcement of the Act and their

Rules in order to avoid receiving tickets which would result in the imposition of a "mandatory penalty." Trainers and owners and especially non-compliant trainers and owners would have no incentive to affiliate their events with HIOs who fairly and consistently follow the Act and its regulations. As a result, those HIOs who are actually doing their job through fair and consistent enforcement of their Rules would be penalized and likely driven out of existence.

Secondly, Petitioners have wholly ignored the existence of an entire segment of the industry which participates at non-affiliated events sometimes referred to as "outlaw shows." At these "outlaw shows" there is absolutely no inspection process as required by the HPA and its regulations. By failing, or refusing, to have mandatory inspections as required by HPA and its regulations, management of these shows are, by definition, in violation of the Act and Regs. *See* 15 U.S.C. § 1824. These shows number in the hundreds each year with thousands of horses shown with little to no inspection process.

The USDA has been aware of the existence of the "outlaw shows" for years but has wholly failed to address their existence or the undetected, undocumented violations which occur at these shows. In 2002, the USDA recognized that it needed to "devote its limited resources toward increasing its inspections at shows that are not affiliated with an HIO." *See Am. Horse Protection Assc. v. USDA*, Civil Action No. 01-00028 (D.C. July 9, 2002). However, since 2002, to this Respondent's knowledge, the USDA has attended no unaffiliated or "outlaw" shows prior to this year. Additionally, to this Respondents knowledge, the USDA has never pursued a case against the management of one of these unaffiliated/outlaw shows despite management's refusal to comply with 15 U.S.C. § 1824.

While this Respondent has no personal knowledge of what, if any, violations may be occurring at these unaffiliated/outlaw events, the evidence is clear that individuals currently

serving suspensions from SHOW HIO are participating at these events. By way of example, Respondent would refer to the following instances. Evidence documenting these violations has previously been provided to the USDA and Respondent will make same available again upon request by the Department. However, the names of the individuals involved have been withheld to protect their privacy:

1. Evidence of Violator who is currently serving a Lifetime suspension participating at unaffiliated/outlaw shows during 2010.

2. Evidence of Violator showing at an unaffiliated/outlaw show in Lewisburg, Tennessee, while serving a one (1) year suspension for a bi-lateral sensitivity violation from SHOW.

3. Evidence of Violator participating at an unaffiliated/outlaw show while serving a lifetime suspension levied by SHOW.

SHOW has no authority to further penalize these individuals for violation of their suspensions, and to SHOW's knowledge, the USDA has taken no action against them for violation of their suspensions.

The weakening of HIOs, such as SHOW, which are committed to consistent enforcement of the HPA and its Regs, and increasing the number of participants at unaffiliated/outlaw shows through the imposition of "mandatory penalties" would not effectuate the stated purpose of the Act – the elimination of soring. Consequently, the adoption of the proposed penalty scheme would not give effect to Congress' express intention, and therefore, could not be upheld. *See Chevron U.S.A., Inc. v. Nat. Resources Defense Council*, 467 U.S. 837 (1984)(holding that if Congress has clearly spoken on the issue, that intention is law and must be given effect).

C. PETITIONERS' PROPOSED INCORPORATION OF 2010 POINTS OF EMPHASIS INTO HPA REGULATION

Petitioners have also asked the Department to institute rulemaking for the purpose of incorporating the 2010 Points of Emphasis into the HPRs. *Pet. for Rulemaking* at p. 23. As addressed herein below, Respondent SHOW has already implemented some of the 2010 Points of Emphasis and agrees with the implementation of several of the others. However, some of the Points of Emphasis have no basis in veterinary science, or are improperly directed at the HIO when in fact it is the show managements responsibly as clearly identified in the HPR, and therefore, should not be adopted. Respondent SHOW's response to each request for rulemaking is contained hereinafter.

1. DISMISSAL FROM SHOW, EXHIBTION, SALE OR AUCTION IS ALREADY ADDRESSED BY THE HPRs

Petitioners request that HIOs be required to "dismiss a horse found in violation of HPA from participating in any remaining portion of the horse show, . . . (rather than just the individual class). *Exhibit D to Pet. for Rulemaking.* Petitioners also request that HIOs be required to "track horses appropriately so horses cannot enter into another class" and that DQPs be required to collect class sheets and entry forms" and maintain "these records for 1 year and make them available for yearly USDA audits. . . ." *Id.*

As Petitioners are surely aware, the dismissal of a horse found in violation of the HPA has already been addressed by HPR 11.20 which requires show management to dismiss a horse found to be in violation of the Act for the remainder of the event. Petitioners have not provided any empirical evidence that HPR 11.20 is ineffective at preventing horses found to be in violation from participating "in any remaining portion" of the event.

Next, Petitioners request that HIOs, rather than show management as specified in the HPR, be required to "track horses appropriately so horses cannot enter into another class." However, Petitioners fail to offer any explanation or suggestion as to what "appropriate" tracking might entail. Further, Petitioners fail to offer any evidence that horses found to be in violation of the HPA/HPR are in fact being allowed to re-enter another class at the same event. The only evidence of any such activity is SHOW's 2010 imposition of a one (1) year penalty for a violator's attempt to re-enter a horse found to be in violation of the HPA/HPR as a subsequent entry in a sale. Respondent SHOW is not aware of any other HIO and/or the USDA having issued any such penalty in the thirty-plus (30+) years of enforcement of the HPA/HPR.

Additionally, Petitioners request rulemaking to require HIOs to collect class sheets and maintain the records for one (1) year and make same available for the USDA yearly audit. *Id.* However, as Petitioners are surely aware, the requirement to collect such information and retain same has previously been addressed through HPR 11.22 for show management and 11.7 for HIOs. Petitioners have made no attempt to offer any evidence that the regulations in place regarding reporting requirements are in any way ineffective or that they do not effectuate the purpose of the Act. Consequently, additional rulemaking on this issue is unjustified.

2. HORSES DISMISSED FROM ARENA MUST REPORT DIRECTLY TO INSPECTION

Petitioners next request rulemaking requiring horses dismissed from the arena by a "judge, steward or rider of the horse" to report directly to the inspection area for follow-up inspection. *Id.* Respondent SHOW has previously implemented this rule for all SHOW-affiliated events. Additionally, SHOW officials provide an escort from the show ring back to the inspection area where the dismissed horse is re-inspected in accordance with SHOW protocol.

3. DIGITAL IMAGING FINDINGS

a. No Scientific Evidence Supports Allegation that 5 Degree Rotation of Coffin Bone Should be Considered "Sore"

Petitioners next request rulemaking to codify that a five (5) degree rotation of a horse's coffin bone should be considered "sore" and a violation of the HPA/HPR. However, Petitioners offer absolutely no evidence to support their allegation that a five (5) degree coffin bone rotation should be a HPA/HPR violation. Petitioners have offered no evidence whatsoever, much less evidence which would meet the requirements of *Daubert* and its progeny, to support their request.

To the contrary, studies which comply with the *Daubert* standard indicate that such a request is unjustified. *See Kumho Tire Co.*, 119 S.Ct. 1167, 1175 (delineating *Daubert* requirements for scientific evidence to be (1) tested; (2) subjected to peer review and publication; (3) known or potential rate of error; (4) existence of maintenance standards and controls; and (5) accepted within the scientific community).

In discussions with several equine practitioners from some large equine hospitals and universities, their opinion is that there is no reason a horse should be called noncompliant for any degree of coffin bone rotation without other clinical symptoms which are outlined in the HPA. The USDA supports their stance on a paper which is 28 years old. This paper states that there is a direct correlation between the ability of a horse to return to athletic competition and the degree of rotation of the coffin bone. However, according to the above referenced veterinarians, there has been dramatic improvement in "our ability to treat horses with laminitis and return to athletic soundness." In the last 28 years, "[a] horse that is suffering from acute laminitis or from an acute flare up of chronic laminitis will be lame and therefore unable to be shown. Horses that have chronic non active laminitis can be managed and shown successfully for years."

The very same veterinarians, in addition, the concept that a horse with 5 degree rotation is a "sore" horse is unwarranted and not based upon scientific evidence. There is no correlation, scientific or otherwise, between horses that have been sored and laminitis. There have been no standardized measurements established for normal gaited horses that are shod in compliance with USDA (Horse Protection Act) standards. There is no breed standard established. The HPA clearly states if a horse leads in a free and easy manner and palpates normally on the pastern area, this horse is compliant and should not be excused from any competition. Also, in order to accurately diagnose coffin bone rotation, perfect radiographs would have to be taken. This is virtually impossible in the field, much less in the inspection area at any horse show.

Finally, information would need to be solicited by all breeds on this particular request which Respondent is sure will suggest that many other breeds have five degree coffin bone rotation that is not deemed harmful to or a violation of any of their respective rules.

b. Petitioners' Request Regarding Packing Material Between Hoof and Pad Already Addressed by HPR

Petitioners also request rulemaking to prohibit "horses found with materials other than permitted materials within the package will be found in violation of the HPA." *Id.* Again, if Petitioners had taken the time to read the HPA and its corresponding regulations, they would have ascertained that this issue has already been addressed by HPR 11.2(13) which prohibit "any object or material between the pad and hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing or other substances to maintain adequate frog pressure of sole consistency."

Petitioners have offered no evidence that HPR 11.2(13) is ineffective at preventing the use of "materials other than permitted materials." Consequently, additional rulemaking on this issue is not justified.

4. INSPECTION FINDINGS

a. USDA has Authority to Institute a Federal Case at Any Time Based on Findings of VMOs, But has No Authority to Dictate HIO Penalties

Petitioners also request rulemaking to require that if a USDA representative finds a horse in violation of the HPA/HPR after a DQP has inspected the horse, all individuals who participated in the entry and/or showing of that horse will be subject to a federal case. Obviously, Petitioners have failed to acknowledge 15 U.S.C § 1825 which gives the USDA the ***exclusive*** right to assess penalties under the HPA and its regulations. This right has been acknowledged and upheld by various United States Courts of Appeal. *See Derickson v. USDA, 546 F.3d 335 (6th Cir. 2008); McConnell v. USDA, 198 Fed. Appx. 417 (6th Cir. 2006).* Consequently, no rulemaking is required to accomplish the USDA's ability to institute a federal case against alleged violator.

Additionally, Petitioners request that HIOs be required to apply the applicable penalty to the owner and trainer as well as any applicable disqualifications of the horse. *Id.* Further, Petitioners request that an HIO be required to "apply the appropriate penalty through the HIO" after a DQP is informed of a USDA representative's finding." *Id.* As discussed hereinabove, the USDA has absolutely no authority to institute mandatory penalties for HIOs and such action would constitute "state action" by an HIO and would be contrary to an alleged violator's constitutional rights. *See* Sections VI.A. and VI.B. herein above.

5. USDA DISQUALIFICATIONS AND HIO SUSPENSIONS

Under paragraph 5(a) of Exhibit D-1, Petitioners propose rulemaking to allow that a "violator on disqualification or suspension may only participate as a spectator at the horse show, horse exhibition, horse sale, or horse auction." *Ex. D-1 to Pet. for Rulemaking.* Respondent SHOW has previously instituted a protocol and rules to prevent individuals on suspension from

participating at events in any capacity other than as a spectator. SHOW requires that individuals currently on suspension who desire to attend an affiliated event must "check-in" with the event DQP. Such procedures allow the DQP(s) to monitor the activities of suspended individuals during the event to ensure their participation is only as a spectator.

In paragraphs 5(b) and (c) of Exhibit D-1, Petitioners seek rulemaking which far exceeds the USDA's authority under the Act. Specifically, Petitioners seek rulemaking that

> b. Violators are disqualified or suspended from showing, exhibiting, or entering any horse directly or indirectly through any agent, employee, family member, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, family member, corporation, partnership, or other device.
>
> c. "Participating" means engaging in any activity beyond the activities of spectator, and includes, without limitation" (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas or the areas where spectators are not allowed at any horse show, horse exhibition, horse sale or auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction."

Exhibit D-1, ¶5(b), 5(c) to Pet. for Rulemaking.

What Petitioners have failed to acknowledge is that Congress spoke directly to the issue of the activities of individuals serving a suspension in Section 1825(c) of the Act which states:

> ". . . any person convicted . . . under this chapter may be disqualified by order of the Secretary, <u>from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction</u> for a period of not less than one year for the first violation and not less than five years for any subsequent violation. <u>Any person who knowingly fails to obey</u>

an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation.

15 U.S.C. § 1825(c)(emphasis added).

Consequently, Congress has expressly spoken to what a person convicted of a violation of the Act may, and may not, do while under an Order of suspension from the Secretary. Petitioners' suggested rulemaking on this issue is an attempt to extend the Department's authority beyond that which was authorized by Congress.

Under the Act, the Secretary already possesses the authority to suspend a convicted individual "from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction." *Id.* Additionally, if the Secretary finds that an individual serving a suspension "knowingly fails to obey an order of disqualification" the Secretary has the authority to seek additional penalties of "not more than $3,000 for each violation."

Petitioners' request for rulemaking contained in paragraphs 5(b) and 5(c) of Exhibit D-2 to its Petition is clearly an attempt to extend the authority of the USDA beyond the express intent of Congress. Consequently, under 5 U.S.C. § 706, the proposed rulemaking would fail as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and as "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (2)(C).

Subparagraph 5(d) of Exhibit D-2 to the Petition for Rulemaking requests rulemaking to require HIOs to share their suspension lists with all other HIOS and require HIOs to "honor suspension and disqualification lists from other HIOs." Again, Petitioners' request for action is misplaced. As Petitioners are aware, all certified HIOs have for years "shared" their suspension lists with all other HIOs and have had agreements in place to "honor suspension and

disqualification lists from other HIOs". However, HIOs other than SHOW have allowed individuals currently on suspension to openly participate in their events in violation of their SHOW suspension. By way of example, Respondent would refer to the following instances. Evidence documenting these violations has previously been provided to the USDA and Respondent will make same available again upon request by the Department. However, the names of the individuals involved have been withheld to protect their privacy:

1. Photograph of Violator taken at the October 2009 SSHBEA Fall Horse Show while on suspension from SHOW.

2. Evidence of Violators' participation in Decatur, Alabama, a Kentucky HIO affiliated event, while serving USDA and SHOW suspensions.

3. Evidence of Violator leading a horse through inspection at a September 2010 Kentucky HIO affiliated event while on USDA suspension.

To this Respondent's knowledge, no action has been taken against any of these individuals by the USDA despite this evidence having been brought to the Departments attention.

The HIOs have voluntarily agreed to the action requested by the Petitioners in paragraph 5(d) of Exhibit D-2. However, as evidenced above, individuals continue to violate their suspensions with absolutely no repercussion from the USDA or other HIOs. Clearly, the USDA's time and effort would be better spent exercising its current authority under the Act to penalize individuals who violate their suspensions pursuant to 18 U.S.C. § 1825(c) and holding HIOs accountable for allowing those individuals to participate in their affiliated events.

6. USDA REQUIREMENT THAT HIO ISSUE LETTERS OF WARNING (LOWs) TO DQPs VIOLATES CONSTITUTIONAL DUE PROCESS

Petitioners have requested additional rulemaking that "[i]f the USDA recommends that HIO give a LOW to its DQP, the HIO will have 30 days to either issue the LOW to its DQP or provide sufficient justification, in writing explaining why the HIO did not issue the LOW." *Exhibit D-2, ¶6 to Pet. for Rulemaking*. Once again, Petitioners fail to take into account the implications of their request.

Petitioners' request that the USDA be given the ability to direct an HIO to discipline one of its employees is yet another attempt to circumvent the rights of not only those involved in enforcement of the HPA, but also the those against whom it is enforced. Allowing the USDA to become involved in the daily operations of the HIO by directing its employees (*i.e.*, the DQPs) is certainly a level of "entwinement" that would create conduct by DQPs which would easily be "attributable to the state" and generating a "sufficiently close nexus" thereby invoking due process considerations. *See Tarkanian*, 488 U.S. at 485.

Furthermore, the creation of such a framework to allow the USDA to discipline and/or penalize a DQP through the HIO would allow the USDA to potentially deprive a DQP of his license to inspect horses and thereby earn a living without giving him or her due process. The drafters of the current regulations recognized this distinction and have previously addressed the USDA's ability to disqualify a DQP for failure to perform his or her duties. Under HPR 11.7(e)(3), a DQP can be "disqualified by the Secretary . . . after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection or inspection because he has failed to perform his duties in accordance with the Act or regulation" or because he violated the Act himself. (emphasis added). Consequently, the USDA cannot circumvent a DQP's due process rights by requiring that such an unlawful act (*i.e.*, the

deprivation of a property right without due process) be committed through one of the HIOs. To do so would undoubtedly be construed as an illegal "state action" by the HIO exposing both the Department and the offending HIO to liability.

Our Supreme Court has been very clear that "public entwinement in the management and control of ostensibly separate trusts or corporations" will support a "conclusion that the organization ought to be charged with a public character and judged by constitutional standards." *Brentwood Academy*, 531 U.S. at 298. *See also Dennis v. Sparks*, 449 U.S. 24, 27 (1980)(holding private parties were state actors because they were "jointly engaged with state officials in the challenged action" and were "willful participants in joint action with State or its agents"). Without question, all HIOs would be found to be "state actors" if the Petitioners' proposed system of governance were adopted. Consequently, Petitioners' proposed scheme cannot withstand a challenge under 5 U.S.C. § 706(2)(B) as it is "contrary to constitutional right, power, privilege, or immunity."

7. PETITIONERS' REQUEST REGARDING FALSE INFORMATION AND SWAPPING OF HORSES IS ALREADY ADDRESSED BY HPA AND HPR

Petitioners next request rulemaking that anyone "who provides false information" or "who swaps horses" be "subject to criminal penalty." *Exhibit D-2, ¶7a-b to Pet. for Rulemaking.* No additional rulemaking is required to address these issues as both are expressly covered by the HPA and its Regulations as they now exist. Under 18 U.S.C. §1825(a)(2)(B) and HPR 11.2(e) the Department may bring a criminal proceeding against an individual for allegedly providing false information, which would necessarily include any allegation for "horse swapping." Consequently, the issues raised by Petitioners require no further action by the Department.[6]

[6] Given Petitioners' refusal to recognize rights guaranteed under the Constitution, out of an abundance of precaution, Respondent SHOW would remind Petitioners that ONLY a governmental entity has the right to impose criminal penalties. In the event Petitioners are of the misguided opinion that a private entity, such as an HIO, has

8. IMPOSITION OF MANDATORY PENALTIES ARE UNCONSTITUTIONAL, UNLAWFUL AND IN EXCESS OF USDA'S AUTHORITY UNDER THE ACT

Petitioners' final request for rulemaking contained within Exhibit D-2 is that "[m]ultiple or subsequent violations that incur suspension penalties must be served consecutively, according to the minimum penalty structure." *See Ex. D-2, ¶8 to Pet. for Rulemaking*. As set out in Section VI.A. and VI.B. hereinabove, the imposition of *any* mandatory penalty structure by the USDA to the HIOs is unconstitutional, unlawful and in excess of the USDA's statutory authority under the Act. Respondent SHOW reincorporates the arguments and legal authority cited in the preceding Sections hereinabove as if set out in their entirety herein.

However, this Respondent would point out that, although it strenuously disagrees with the USDA's ability to lawfully impose mandatory penalties, in its continuing efforts to "Find and Eliminate the Sore Horse", in March 2010 SHOW amended its rulebook to require all its suspensions to run consecutively.

D. PERMANENT DISQUALIFICATION OF REPEAT OFFENERS IS UNCONSTITUTIONAL, UNLAWFUL AND IN EXCESS OF THE DEPARTMENT'S STATUTORY AUTHORITY

Petitioners next request the USDA "promulgate a regulation requiring permanent disqualification of any individual or organization that has been assessed more than three violations of the Act." *Pet. for Rulemaking* at p.24. As set out in Section VI.A. and VI.B. hereinabove, the imposition of *any* mandatory penalty structure by the USDA to the HIOs is unconstitutional, unlawful and in excess of the USDA's statutory authority under the Act.

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the capacity to impose criminal penalties, this Respondent would remind them of the Sixth Amendment "provides for, among other things, a right to trial by jury in criminal matters." *People of the Virgin Islands v. Shallow*, 2010 WL 2195323, *2 (Apr. 28, 2010). *See also Duncan v. State of Louisiana*, 391 U.S. 145, 154 (holding trial by jury is fundamental right to American scheme of justice guaranteed by Sixth and Fourteenth Amendments recognizing obligation to extend due process of law to all persons).

Respondent SHOW reincorporates the arguments and legal authority cited in the preceding Sections hereinabove as if set out in their entirety herein.

Although Petitioners seem to have no apparent problem with treading on an individual's Constitutional Rights in any variety of ways, "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institution. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." *Dent v. West Virginia*, 129 U.S. 114, 121 (1889). "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity . . . ." *Phillips v. Vandygriff*, 711 F.2d at 1217, 1222 (5th Cir. 1983). "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes with the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972)(also establishing principle that government-imposed stigma that closes job opportunities is actionable under section 1983).

Based upon the foregoing, for Petitioners to request that a private organization such as an HIO could be required to deprive an individual of his right to practice his chosen profession for the entirety of his life is beyond the pale. Consequently, additional rulemaking on this issue is not justified.

VII. CONCLUSION

For the reasons stated hereinabove, Respondent SHOW asks the Secretary to deny Petitioners' request for rulemaking.

Respectfully submitted,

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