



**Executive Summary of Comments from The Humane Society of the United States, the Humane Society Legislative Fund, and the Humane Society Veterinary Medical Association Regarding Proposed Rule, “Horse Protection: Licensing of Designated Qualified Persons and Other Amendments”**

Tennessee Walking Horses, Racking Horses, and Spotted Saddle Horses are prized by some in the walking horse show industry for their ability to perform a distinctive high-stepping gait, referred to in the industry as the Big Lick. A cruel technique known as “soring,” which involves the use of chemical and mechanical injury to the horse’s front limbs, routinely is used to elicit the Big Lick from these horses. The Horse Protection Act, 15 U.S.C. § 1821, *et seq.* (“HPA”), was specifically enacted to prohibit this gruesome and inhumane practice; yet the abuse continues to dominate many of the most lucrative competitions in the industry.

In the decades since the HPA was passed, it has become clear that the current structure of the regulations implementing the HPA is inadequate to achieve the humane goals of the statute. For that reason, The Humane Society of the United States (“HSUS”) submitted a rulemaking petition on February 18, 2015 requesting that the United States Department of Agriculture, Animal and Plant Health Inspection Service (“APHIS”) promulgate several regulatory changes to eliminate soring. APHIS has now proposed regulatory changes that essentially would grant the principle requests contained in the HSUS petition by (1) overhauling the current industry-run inspection scheme, and (2) prohibiting the use of action devices and other methods of soring.

We commend APHIS for its proposal, and urge the agency to promulgate these important regulatory changes as soon as possible. As discussed in our comments, we are concerned with a few details of the proposal and urge APHIS to address these issues to the extent possible without delaying finalization of the rule. Our comments are broadly summarized as follows:

**Proposed 9 C.F.R. § 11.2 - Prohibited actions, practices, devices, and substances.**

Commenters eagerly support the proposal to prohibit action devices, performance packages, substances, and other soring and concealment techniques across the board on “any Tennessee Walking Horse, Racking Horse, or related breed that performs with an accentuated gait that raises concerns about soring.” At this time, we hope to see APHIS focus its enforcement of these prohibitions on the three specific breeds in which soring abuse is currently concentrated: Tennessee Walking Horses, Racking Horses, and Spotted Saddle Horses.

We suggest certain modifications to the agency’s proposal, specifically with regard to weighted shoes, hoof-packing materials, substances, and specific prohibitions as to all horses. Our suggestions, as discussed on pages 5-18 of our comments, are summarized as follows:

- The proposed ban on weighted shoes is insufficient because it allows the use of “a keg or similar conventional horseshoe” without limitation. It also does not address shoe width, which could impede proper inspection of the horse’s hooves. To provide adequate protection for the horses, we urge APHIS to provide in the final rule that (1) the exception for a keg or similar conventional horseshoe only applies to shoes weighing 16

ounces or less; and (2) shoes may not impede inspection, including the proper use of a hoof tester and examination of the sole.

- We urge APHIS to eliminate the exception for hoof packing materials on walking horses. The proposal to prohibit pads removes any valid purpose for using hoof packing materials.
- We recommend that the proposed ban on pads also encompass a ban on the use of any acrylic or other “false” soles. These items are often used to camouflage soring between the hoof and the acrylic sole.
- We urge APHIS to maintain current regulatory language as it prohibits specific devices, equipment, and practices on *any horse* at any horse show, horse exhibition, or horse sale or auction. These prohibitions have been and would continue to be important in preventing abuse of all horses.
- The ban on substances could effectively encompass certain therapeutic substances for which the HPA provides a limited allowance. We recommend that APHIS modify the final substance ban to provide a limited allowance for the use of truly therapeutic substances, and continue to maintain and utilize its list of defined prohibited foreign substances as guidance in enforcing the ban.

#### **Proposed 9 C.F.R. § 11.6 - Training and licensing of Horse Protection Inspectors**

We also enthusiastically support APHIS’s proposal to replace the industry’s self-regulated DQP inspection scheme in favor of a system wherein the agency licenses, trains, and oversees independent, third-party Horse Protection Inspectors, which will help ensure that inspectors are not plagued by conflicts of interest, that the agency has ready access to violations records, and that penalties and disqualifications are carried out and uniformly enforced. These changes would free up limited agency resources that are currently used to certify and regulate HIOs, including enforcing the regulations against delinquent HIOs. However, we recommend that APHIS take additional steps to fully ensure that the new program is effective, as discussed on pages 20-25 of our comments and summarized as follows:

- We urge APHIS to eliminate individuals with the following conflicts from the pool of HPis: (1) having ever received a letter of warning or been the subject of a request for a letter of warning for improper HPA inspections; (2) having a contractual or financial interest with show management, other than being appointed as an HPI; and (3) inspecting any horse who is entered, owned, trained, exhibited, or offered for sale by a person with whom the HPI has a familial or business connection.
- We urge APHIS to ensure a swift and effective transition from DQPs to HPis so there is not a period of time during which horses may not receive inspections. This may require (1) pushing back the proposed date on which DQPs’ licenses are revoked; and (2) implementing the final rule in phases, so that the prohibitions of Section 11.2 are effective immediately, to be followed in the near future by the DQP-to-HPI transition.



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U.S. Department of Agriculture, Animal and Plant Health Inspection Service

Re: Comments Regarding Proposed Rule, "Horse Protection; Licensing of Designated Qualified Persons and Other Amendments" from The Humane Society of the States, The Humane Society Legislative Fund, and the Humane Society Veterinary Medical Association

## **I. Introduction**

The Humane Society of the United States (HSUS), the Humane Society Legislative Fund (HSLF), and the Humane Society Veterinary Medical Association (HSVMA) (together, the Humane Societies) submit these comments in support of the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service's (APHIS) proposed rule, "Horse Protection; Licensing of Designated Qualified Persons and Other Amendments."<sup>1</sup> The Humane Societies agree with APHIS that these proposed amendments are necessary to ensure efficient and effective enforcement of the Horse Protection Act (HPA), 15 U.S.C. § 1821, *et seq.*, and its implementing regulations, 9 C.F.R. Part 11.

HSUS is a non-profit organization devoted to the welfare and protection of all animals. As part of that mission, HSUS actively campaigns to end the abusive practice of soring and promote the humane treatment of walking horses.<sup>2</sup> Through various actions including public education, investigations, and cooperation with APHIS and law enforcement agencies, HSUS aims to eliminate the longstanding abuse of horses in the walking horse industry. HSUS asked its supporters to submit comments supporting the proposed rule. Over 56,000 supporters submitted comments directly to HSUS, which HSUS has submitted to APHIS.

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<sup>1</sup> Horse Protection; Licensing of Designated Qualified Persons and Other Amendments, 81 Fed. Reg. 49,112 (July 26, 2016).

<sup>2</sup> The Humane Societies use the term "walking horses" to collectively refer to the three related breeds of horses that are the most frequently subjected to soring practices throughout the industry: Tennessee Walking Horses, Spotted Saddle Horses, and Racking Horses.

HSLF is a non-profit organization that works to ensure that all animals, including horses, have a voice throughout the halls of Congress and state legislatures. HSLF works to pass laws to address the suffering and abuse of animals at the state and federal levels, to educate the public about animal protection issues, and to support humane candidates for office. HSLF strongly advocates for horse welfare legislation, including through federal bans on horse slaughter and horse soring.

HSVMA is a non-profit organization comprised of veterinary professionals who want to engage in direct care programs for animals in need and educate the public and others in the profession about animal welfare issues. HSVMA protects and advocates for all animals while providing leadership and service opportunities that support a humane veterinary profession. HSVMA specifically fights to protect walking horses by advocating for federal legislation to upgrade penalties in the Horse Protection Act, ban the use of action devices and performance packages, and require more meaningful enforcement by APHIS to finally end the abusive practice of soring.

On February 18, 2015, HSUS submitted a rulemaking petition to APHIS requesting amendments to key HPA regulations to ensure that the inhumane practice of soring is no longer widespread within the walking horse industry.<sup>3</sup> APHIS's proposed regulations would satisfy the key requests HSUS made in its Petition. In particular, HSUS requested that APHIS undertake the following:

1. Abolish the inspection scheme currently overseen by Horse Industry Organizations (HIOs), and the corresponding use of Designated Qualified Persons (DQPs), and replace it with an inspection program administered and regulated by the agency, which eliminates the conflicts of interest inherent in the current system;
2. Prohibit the use of all action devices, horseshoe "stacks," "performance packages," and other soring techniques on breeds of horses known to be subject to soring with this equipment – Tennessee Walking Horses, Racking Horses, and Spotted Saddle Horses – to achieve an exaggerated or Big Lick gait;
3. Establish a policy to impose extended disqualification periods, up to and including lifetime disqualification, for offenders with multiple HPA violations; and

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<sup>3</sup> See HSUS, Supplemental Petition for Rulemaking (Feb. 18, 2015) (attached hereto as Exhibit A) (hereinafter "HSUS Petition").



4. Establish a policy to impose extended disqualification periods for horses found to be sore.<sup>4</sup>

The agency's proposed amendments to the HPA regulations essentially grant the first two requests contained in the HSUS Petition by overhauling the current industry-run inspection scheme and prohibiting the use of action devices and other methods of soring. These regulatory changes will make a meaningful difference in preventing the rampant soring abuse of walking horses. Therefore, with a few exceptions as to fine details that would strengthen the proposal, the Humane Societies enthusiastically support the implementation of the proposed regulations as soon as possible, to more effectively protect horses who have been suffering at the hands of abusive Big Lick "trainers" for too long.<sup>5</sup>

Below the Humane Societies provide its comments to specific sections of the proposed regulations, including some discussion of the agency's authority to implement the proposal. As discussed in these comments, Congress has granted APHIS sufficient rulemaking authority under the HPA to undertake each of these necessary, proposed amendments. Indeed, the HPA was passed to provide necessary protection to horses, and after decades of suffering ongoing abuse under the current, ineffective framework, that is exactly the effect that we expect these proposed changes would have.<sup>6</sup>

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<sup>4</sup> *Id.* at 4.

<sup>5</sup> As described below, the Humane Societies are concerned with some portions of the proposed amendments that could allow soring activity to persist, such as through the permitted use of weighted keg or similar conventional shoes and the elimination of specific prohibitions as to all horse breeds that are not related to walking horses. We also recommend limited amendments that would better align the proposed regulations with the HPA. In addition, we indicate throughout these comments limited portions of the proposed rule that could be strengthened by providing additional rationales for the final rule in the administrative record. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>6</sup> Those opposed to these regulatory changes have argued that the final rule would be in contravention of Congressional intent behind the HPA. However, the legislative history of the Act clearly confirms that Congress intended the HPA to protect horses and end the cruel and inhumane practice of soring. *See, e.g.*, 115 Cong. Rec. 39,896 (daily ed. Dec. 19, 1969); Proposed Bill to Protect Interstate and Foreign Commerce by Prohibiting the Movement in Such Commerce of Horses Which Are "Sored," And for Other Purposes: Hearings Before the Subcomm. On Energy, Natural Resources, and the Environment of the S. Comm. On Commerce, 91st Cong. 91-27 (1969); 116 Cong. Rec. 34,098 (daily ed. Sept. 29, 1970); A Bill to Protect Interstate and Foreign Commerce by Prohibiting the Movement in Such Commerce of Horses Which Are "Sored," and for Other Purposes: Hearing before the Subcomm. On Pub. Health & Welfare, of the H. Comm. On Interstate and Foreign Commerce, 91st Cong. 91-72 (1970); 119 Cong. Rec. 21764 (June 7, 1973); House Report on Horse Protection Act of 1974 (Oct. 17, 1974); House Report No. 94-1174 on Horse Protection Act Amendments of 1976 (May 15, 1976); 122 Cong. Rec. 20,160 (June 24, 1976).

## II. Section-by-Section Analysis<sup>7</sup>

### a. Proposed 9 C.F.R. § 11.1 – Definitions

The Humane Societies generally support the proposed changes to the definitions section of the HPA regulations, subject to a few suggested improvements. APHIS proposes principally to (1) remove definitions for DQPs, HIOs, and lubricants; (2) insert definitions for custodian, substance, and Horse Protection Inspector; and (3) amend the definition of sore.

The removal of the definition of HIOs and DQPs in their entirety is logical in light of the proposed overhaul of the current conflict-ridden industry inspection scheme, which replaces DQPs with independent, third-party Horse Protection Inspectors (HPIs) and eliminates any role under the regulations for HIOs. Further, as addressed in the HSUS Petition, because the use of action devices was the only reason an exhibitor might apply lubricants on a horse's pastern, the eradication of action devices also removes any reason to allow (and define) lubricants in the HPA regulations.<sup>8</sup>

APHIS proposes that a new definition be added for the term “substance,” to broadly encompass “any agent applied to a horse's limbs” before, during, or after “a horse is shown, exhibited, or offered for sale, or otherwise present on the grounds at any horse show, horse exhibition, or horse sale or auction.” There are many types of agents that are applied to a horse's limbs, with myriad, nefarious purposes, such as irritating, blistering, numbing, masking, and counter-irritating agents.<sup>9</sup> Accordingly, the agency should clearly indicate in the preamble to the final rule that it intends to be as inclusive as possible in its interpretation of the term “agents,” so that it encompasses any agent that is used by a custodian to sore a horse or mask that the horse is sore.

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<sup>7</sup> These comments do not substantially discuss the proposed amendments to 9 C.F.R. §§ 11.4, 11.7 - 11.9, and 11.13. Sections 11.7 and 11.8 are reserved for future use, and the Humane Societies are supportive of the proposed changes to sections 11.4, 11.9, and 11.13, which are largely a result of the proposed reorganization of the HPA regulations.

<sup>8</sup> See Exh. A, *supra* note 3, at 33 n.128 (“Without any allowances for the use of action devices, the use of lubricants on walking horses would also serve no legitimate purpose. Lubricants are typically used for the purpose of reducing friction between the device and a walking horse's pastern. Therefore, as set forth in its proposed regulations, Petitioner requests that the Agency remove both the definition of “lubricant” from 9 C.F.R. 11.1, and the allowance for the use of lubricants in 9 C.F.R. § 11.2(c).”).

<sup>9</sup> See APHIS, *Horse Protection Program: Definitions of Foreign Substances Found*, at [https://www.aphis.usda.gov/animal\\_welfare/hp/downloads/Foreign\\_Substance\\_Definitions.pdf](https://www.aphis.usda.gov/animal_welfare/hp/downloads/Foreign_Substance_Definitions.pdf) (last visited Oct. 24, 2016); see generally, Billy Go Boy, Former Big Lick Trainer Carl Bledsoe Mock Prepares Gen's Ice Glimmer For Inspection, YouTube, Aug. 13, 2015, <https://www.youtube.com/watch?v=qhF4utC-M1w> (discussing process of applying various foreign substances to walking horse's pasterns in preparation for inspection, including sulfur and motor oil).

The definition of “sore,” however, even with the proposed changes, remains insufficient to encompass all soring activity. The proposed amendment would encompass “[a]ny other substance or device” used on a horse to cause suffering, pain, distress, inflammation, or lameness, with an exception for therapeutic purposes. While this change would broaden the factors that render a horse sore, by limiting soring methods to “substance or device,” the Humane Societies are concerned that the definition could leave out certain soring practices. Therefore, we recommend that as part of the final rule, APHIS include “methods” in the definition of “sore,” or at the very least, include shoeing and hoof trimming practices.<sup>10</sup> For example, a common soring method that walking horse trainers utilize is “pressure shoeing,” which involves cutting or grinding the hooves excessively close to the quick (often until they bleed). This causes extreme sensitivity and unbearable pain every time the horse places weight on its forelegs.<sup>11</sup> Because pressure shoeing can be done without the use of devices or substances, and because it is likely that the soring faction of the industry could invent a new method of soring to circumvent these amendments, we urge APHIS to amend the definition of sore to encompass these practices.

APHIS unambiguously has authority to promulgate these proposed definitions. The HPA extends to APHIS the general authority “to issue such rules and regulations as [it] deems necessary to carry out the provisions of [the HPA].”<sup>12</sup> The ability to define terms is an essential prerequisite to carrying out regulations that effectuate the HPA. APHIS’s addition of definitions for “custodian,” “substance,” and “Horse Protection Inspector” are crucial components of APHIS’s Horse Protection Program under the HPA. Similarly, APHIS’s removal of defined terms it previously created is also proper under § 1828, as APHIS may delete terms it no longer deems appropriate or useful. Therefore, APHIS’s new, revised and deleted definitions in § 11.1 are thus proper exercises of its authority under the HPA.

b. Proposed 9 C.F.R. § 11.2 - Prohibited Actions, Practices, Devices, and Substances

APHIS proposes prohibiting all action devices, pads, substances, and certain other soring methods “with respect to any Tennessee Walking Horse, Racking Horse, or related breed that performs with an accentuated gait that raises concerns about soring at any horse show, horse exhibition, horse sale, or horse auction.”<sup>13</sup> The Humane Societies strongly support the proposed

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<sup>10</sup> Exh. A, *supra* note 3, at 33 n.130.

<sup>11</sup> *Id.* at 21-22.

<sup>12</sup> 15 U.S.C. § 1828.

<sup>13</sup> *See* 81 Fed. Reg. 49,131.

regulatory changes, with suggestions for limited amendments to the portions of the final rule that pertain to weighted shoes, hoof-packing materials, non-walking horse breeds, and substances.

The Humane Societies commend APHIS for proposing the broad ban in § 11.2(a) that encompasses action devices, pads, hoof bands, wedges, and other soring paraphernalia and methods, which is very similar to what HSUS requested in its Petition. The Big Lick faction may argue that there are certain therapeutic uses for many of the items prohibited in proposed Section 11.2(a). However, walking horse trainers and exhibitors have an established history of using these devices for the sole purpose of assisting in various brutal soring techniques. Because there is no history of any legitimate therapeutic use associated with these devices, equipment, and practices when they are used to elicit the exaggerated or Big Lick gait, a therapeutic use exception is neither required nor necessary. We also support the proposed, broad ban on substances in § 11.2(b), which would no longer allow the use of lubricants. However, as detailed in the discussion of substances below, *infra* pages 10-12, the Humane Societies urge APHIS to provide in the final rule an express exception for the use of therapeutic substances (an amendment that would better align the final rule with the requirements of the HPA).<sup>14</sup>

As provided in the HSUS Petition, and explained further below, APHIS's proposed broad prohibitions against action devices, pads, substances, and other soring implements – with our suggested clarifications – are essential to truly target soring practices. Such prohibitions are strongly supported by scientific evidence showing that the illicit use of these items can cause unnecessary pain and suffering to horses regardless of size, weight, or type.<sup>15</sup> There is no doubt that action devices and other soring techniques are still used to abuse horses because the current regulations permit their use. Indeed, according to walking horse trainer Barney Davis, who pleaded guilty in November 2011 to various violations of the Horse Protection Act, “the only way you are going to get the soring stopped is to get the pads and the chain. That’s the only way. . . . They’ve got to have the pads and the chain to do the soring.”<sup>16</sup> And as agency-commissioned researchers have observed, “[i]n reality, the ‘Big Lick’ should be called the ‘Sore

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<sup>14</sup> See 15 U.S.C. § 1821(3).

<sup>15</sup> See, e.g., Exh. A, *supra* note 3, at 18-24, 31-33.

<sup>16</sup> See Video: Tennessee Walking Horse Abuse, at 5:47-5:55 (HSUS 2012), *available at* [http://www.humanesociety.org/news/press\\_releases/2012/08/exclusive\\_barney\\_davis\\_video\\_082812.html](http://www.humanesociety.org/news/press_releases/2012/08/exclusive_barney_davis_video_082812.html) (interview by Keith Dane with Barney Davis, former Tennessee Walking Horse trainer, in Sewanee, Tenn.).

Lick’ because it is performed by a horse which, by all diagnostic criteria, is unsound and unfit to show.”<sup>17</sup>

**Action Devices.** The Humane Societies support the prohibition on action devices. The current HPA regulations are inadequate to protect horses because they allow certain action devices such as beads, bangles, rollers, and chains that weigh no more than six ounces.

However, the use of these devices can cause damage to horses. Indeed, equine lameness expert Dr. Tracy Turner, who APHIS commissioned to provide research and guidance on soring, has stated that currently sanctioned devices are commonly used in conjunction with other soring techniques, such as chemical burns, to exacerbate existing soring-related pain when rubbing or banging against inflamed areas on the horse’s leg or pastern.<sup>18</sup>

Regarding chains specifically, the “Auburn Study” from the late 1970s and early 1980s provides solid evidence that chains weighing six ounces can cause hair loss.<sup>19</sup> Another reliable study found that the use of only chains weighing six ounces makes no discernable difference in the horse’s gait on its own.<sup>20</sup> Because these devices make no difference in the horse’s gait on their own, exhibitors whose horses perform an exaggerated or Big Lick gait with currently approved action devices in the show ring are very likely using foreign substances, heavier chains, or other less conspicuous soring tools and techniques on the horse during “training,” which

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<sup>17</sup> H.A. Nelson, D.V.M., & D.L. Osheim, B.A., APHIS, *Soring in Tennessee Walking Horses: Detection by Thermography* 186 (1975) (hereinafter “Ames Study”), in Exh. A, *supra* note 3, at 185-203. The Ames Study determined, based on trials with two different sets of horses equipped with various action devices and treated with soring chemicals, that the use of stacked pads and long hooves contributes to pain that induces an exaggerated or Big Lick gait, *id.*, that horses with preexisting protrusions, such as old scars, tend to develop inflammation and pain before other horses with normal tissue, *id.* at 194, and that the use of heavy chains did not always produce visible external lesions, but that there was visible inflammation, indicative of pain, through thermographic imaging, *id.* at 195.

<sup>18</sup> Video: Use of Imaging to Aid the Enforcement of the Horse Protection Act, at 37:56-39:10, 45:33-46:09, 48:14-48:46 (Tracy Turner, DVM, MS, 2014), at [http://www.aphis.usda.gov/animal\\_welfare/hp/downloads/video/2014-01-17%20USDA%20Horse%20Protection%20Technology%20%20Public%20Webinar.wmv](http://www.aphis.usda.gov/animal_welfare/hp/downloads/video/2014-01-17%20USDA%20Horse%20Protection%20Technology%20%20Public%20Webinar.wmv) (hereinafter “Tracy Turner Presentation”) (discussing that pads create pain and inflammation without the use of chemicals; hoof bands can be tightened around sensitive areas to cause pain; and chains are widely referred to as “pain enhancers” for horses).

<sup>19</sup> See Letter from Dr. Ram C. Purohit, Associate Professor, Auburn University, to the United States Department of Agriculture (summarizing research from September 1978 to December 1982 on Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors) (hereinafter “Auburn Study”), in Exh. A, *supra* note 3, at 213.

<sup>20</sup> Dr. Molly C. Nicodemus, *Gait Analysis: Opening Doors to Understanding the Gaited Horse* 23 (2000), available at <http://www.soundhorseconference.com/pdf/Nicodemus.pdf> (“Use of heavy weights (10 oz or 283 g) pastern chain weights significantly increased stride duration at the walk, but lower weights or pastern straps did not.”)

increases sensitivity, causing pain and forcing the horse to react with a higher step.<sup>21</sup> Then, having suffered through the pain of “training” with sore limbs and heavy devices, the horses perform their conditioned response in the show ring – a high-stepping and exaggerated Big Lick gait – even with the use of currently permitted, lighter-weight action devices, or, alternatively, perform the gait in reaction to the pain present in the show ring after the numbing effect of topical anesthetics (applied to ensure a horse will pass inspection) wears off. There is therefore no legitimate purpose in allowing these action devices, as they are integral to the soring process.

The HPA explicitly grants APHIS the authority to ban all devices that raise concerns about soring. Section 1824(7) prohibits commercial activities involving “any horse which is wearing or bearing any equipment, device, paraphernalia, or substance *which the Secretary by regulation under Section 1828 of this title prohibits* to prevent the soring of horses.”<sup>22</sup> Thus, the plain language of Section 1824(7), in conjunction with Section 1828’s general rulemaking authority, grants APHIS broad authority to prohibit “any equipment, device, paraphernalia, or substances” to prevent soring.

In addition to this explicit authority, Section 1828 grants APHIS general authority to implement and enforce the HPA. Section 1828 provides that APHIS may issue “rules and regulations as [the agency] deems necessary to carry out the provisions” of the HPA.<sup>23</sup> This general grant reinforces APHIS’s authority to ban all action devices to carry out the HPA’s prohibition on all commercial activities involving a sore horse.

**Pads.** Current regulations specifically allow the use of pads, which are used in various ways to assist in brutal soring techniques, such as pressure shoeing.<sup>24</sup> Tall stacks of pads are often attached to walking horses’ front hooves, causing the horses to stand at an unnatural and chronically painful angle, like “a woman wearing high heels . . . if you nail the heel to her feet

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<sup>21</sup> Notably, chains are routinely sold in sets that contain chains increasing in weight, with the currently sanctioned, six-ounce chains as the lightest option. See HSUS, *Scientific Justification for a Ban on Action Devices*, in Exh. A, *supra* note 3, at 222-224. “[C]hains much heavier than 6 ounces and multiple sets of chains are regularly used in training, and then lighter chains are substituted in the show ring to trigger the conditioned response to the heavier chains. Chain sets are readily available in local tack stores already made up in a variety of weights, and it is routine to see chains of various weights hanging from “chain carts” at horse shows.” *Id.* at 223; see also HSUS, Investigative Report: The Humane Society of the United States Investigates Cruel Training of Tennessee Walking Horses (2012), available at [http://www.humanesociety.org/assets/pdfs/horse/mcconnell\\_twh\\_invest\\_report.pdf](http://www.humanesociety.org/assets/pdfs/horse/mcconnell_twh_invest_report.pdf) (describing behind-the-scenes soring tactics in walking horse trainer Jackie McConnell’s barn, including the use of caustic chemicals and heavy chains).

<sup>22</sup> 15 U.S.C. § 1824(7) (emphasis added).

<sup>23</sup> 15 U.S.C. § 1828.

<sup>24</sup> See Exh. A, *supra* note 3, at 21-23.



then refuse to allow her to sit or lie down for more than a few minutes of time . . . for years . . . while she is forced to go running four or five days a week. . . carrying twenty percent of her body weight on her back.”<sup>25</sup> Research shows that the elevated angle caused by stacked pads has a “significant association between . . . certain lesions or injuries” and other types of lameness;<sup>26</sup> can cause an imbalance in the hoof and rotation of the coffin bone;<sup>27</sup> poses a significant risk of ripping off part or all of a horse’s hoof;<sup>28</sup> and can result in laminitis, which causes severe pain and potentially requires euthanasia.<sup>29</sup> Pads – even a single pad – can also be used to hide evidence of soring methods, such as the insertion of hard or sharp objects between the pad and the intentionally sensitized hoof. Accordingly, the proposed prohibition on pads is extremely important.

The Humane Societies recognize that the HPA allows for 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.”<sup>30</sup> However, there is no history of walking horse trainers and exhibitors using pads for therapeutic purposes; rather they have an established record of using tall stacks of pads to assist in various brutal soring techniques. Because there is no evidence or precedent of other, non-soring uses of pads that could justify an exception for walking horses, there is no reason to allow for an exception as to the therapeutic use of pads in proposed Section

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<sup>25</sup> Letter from Pamela Reband, MD, Member, TWHBEA Board of Directors and former Vice President, former Member, National Walking Horse Association Board of Directors and recipient of NWHF Phoenix Award, and former President, Kentucky Stallion Owners Association to Representative Ed Whitfield (Dec. 22, 2013), in Exh. A, *supra* note 3, at 219.

<sup>26</sup> Christa Lesté-Lasserre, *Hoof Angles’ Impact on Lameness Examined*, The Horse, Mar. 6, 2013, available at <http://www.thehorse.com/articles/31468/hoof-angles-impact-on-lameness-examined>.

<sup>27</sup> See Niel Valk, DVM, DACVS, Remarks at the Sound Horse Conference 5-6 (Mar. 29, 2014) (transcript available at <http://www.soundhorseconference.com/2014/Neal%20Valk.doc>) (discussing connection between stacked pads and rotation of the coffin bone, producing laminitis); see also Tracy Turner Presentation, *supra* note 18, at 31:30-32:10 (the Tennessee Walking Horse has the most imbalanced hooves and feet compared to other breeds who have never been shod with pads or show shoes).

<sup>28</sup> The HorseFund, *Horse Soring Frequently Asked Questions*, <http://www.horsefund.org/horse-soring-faq.php> (last visited Oct. 24, 2016) (“It is also dangerous if a horse wearing stacks tears off a shoe, as the stack will come off and the band may rip into the hoof and tear off a good part of the hoof wall.”); see also Alexandra Kleinkopf, Taking Action For Animals, *Creature Feature: Sore Trick Pony* 3 (July 2008), available at [http://www.animalsheltering.org/resources/magazine/jul\\_aug\\_2008/creature\\_feature\\_sore\\_trick\\_pony.pdf](http://www.animalsheltering.org/resources/magazine/jul_aug_2008/creature_feature_sore_trick_pony.pdf) (the use of stacks causes a horse’s “joints to bend at unnatural angles, [ ] resulting in pain, lameness, and disfiguration. Heavy weights are added to these stacks, sometimes causing part of the hoof to tear off”).

<sup>29</sup> See Nathaniel A White II DVM MS, DACVS, *Equine Laminitis* 6, 11 (Sept. 2005), available at [https://www.vetmed.vt.edu/emc/welcome/bios/white/equine\\_laminitis.pdf](https://www.vetmed.vt.edu/emc/welcome/bios/white/equine_laminitis.pdf) (discussing the connection between laminitis and changes in the coffin bone); see also U.S. Patent No. 5,891,472 (filed Nov. 19, 1996) (describing the background of equine laminitis and the need for intervention treatment, “[i]f the animal does not recover, after the onset of lameness, the laminae deteriorate, the animal’s feet are extremely painful, and the coffin bone becomes displaced”).

<sup>30</sup> See 15 U.S.C. §1821(3).

11.2(a)(2). Pads have never served a legitimate, therapeutic use for walking horses while showing in a Big Lick exhibition; thus, a therapeutic use exception specifically for pads would have no legitimate purpose, and is therefore unnecessary.

The Humane Societies also highlight the importance of prohibiting the use of any acrylic or other “false” soles on walking horses. Acrylic soles have a hoof-like appearance and are used to obscure the true sole of a horse’s hoof. Similar to single pads, the Big Lick faction has used acrylic soles to camouflage soring evidence that exists between the hoof and the acrylic sole. In light of the proposed prohibition on all pads, it is very likely that “trainers” will increasingly turn to acrylic or other “false” soles to conceal soring methods. Therefore, it is vital that APHIS also prohibit in the final rule the use of acrylic or other “false” soles on walking horses. Alternatively, if not incorporated into the final rule, APHIS should vigilantly monitor any use of acrylic or false soles on walking horses, and require that HPIs remove the object and inspect the actual sole of any walking horse equipped with an acrylic or other “false” sole.

The same grants of authority noted above, allowing APHIS to ban action devices on walking horses, extend similar authority for the agency to ban all pads and acrylic or false soles on walking horses. When used on walking horses to elicit an exaggerated or Big Lick gait, pads have no therapeutic use or protective purpose; they are simply another type of “equipment, device, [or] paraphernalia” that the agency is authorized to “prohibit[] to prevent the soring of horses.”<sup>31</sup>

**Substances.** The Humane Societies commend APHIS for its proposal to remove from its substances provision an exception for the use of lubricants on the limbs of walking horses, as requested in the HSUS Petition.<sup>32</sup> The only reason lubricants are used on walking horses is for the purpose of reducing friction between an action device and the pastern. Without any allowances for the use of action devices, the allowance of lubricants on walking horses would serve no legitimate purpose.

We also support APHIS’s broad ban on all substances in proposed Section 11.2(b). However, we note that the proposal could conceivably encompass certain therapeutic substances for which the HPA provides a limited allowance.<sup>33</sup> Therefore, the Humane Societies recommend

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<sup>31</sup> 15 U.S.C. § 1824(7).

<sup>32</sup> See Exh. A, *supra* note 3, at 33 n. 128.

<sup>33</sup> See 15 U.S.C. § 1821(3).

that APHIS modify the final substance ban to incorporate an express exception for the use of therapeutic substances:

(b) Substances. ~~Any~~ All substances are prohibited on the limbs of any Tennessee Walking Horse, Racking Horse, or related breed horse that performs with an accentuated gait while being shown, exhibited, or offered for sale, or otherwise present on the grounds at, any horse show, horse exhibition, or horse sale or auction, except those substances that are used 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. Guidance on this prohibition will be made available on the APHIS Horse Protection Program Web site.<sup>34</sup>

Under the final rule, we suggest that the agency continue its current enforcement practices with regard to substances, including reliance on the list of defined, prohibited foreign substances as guidance for the agency and inspectors, as well as the general public, which the agency already utilizes and maintains.<sup>35</sup> We recommend that APHIS clarify this in the preamble to the final rule as follows:

Today's final regulation expands the agency's previous regulatory ban on substances by removing an exception for the use of lubricants "on the limbs of any Tennessee Walking Horse, Racking Horse, or related breed horse that performs with an accentuated gait while being shown, exhibited, or offered for sale, or otherwise present on the grounds at, any horse show, horse exhibition, or horse sale or auction." We have also clarified in the final rule that the prohibition will not apply to substances used in connection with a legitimate, therapeutic treatment of a horse, consistent with the HPA. *See* 15 U.S.C. § 1821(3) (Definitions). As provided in the regulation, APHIS will provide guidance on the prohibition. This guidance will take the form of the "Definitions of Foreign Substances," which we already maintain, update, and utilize. *See* [https://www.aphis.usda.gov/animal\\_welfare/hp/downloads/Foreign\\_Substance\\_Definitions.pdf](https://www.aphis.usda.gov/animal_welfare/hp/downloads/Foreign_Substance_Definitions.pdf). Our enforcement of Section 11.2(b) will continue to focus on the substances that are specifically provided on this list.

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<sup>34</sup> The underlined text indicates language that we suggest incorporating into the final rule, and the strikethrough text indicates language that we suggest omitting.

<sup>35</sup> *See* APHIS, *Horse Protection Program: Definitions of Foreign Substances Found*, *supra* note 9. If the final rule includes the proposal to remove the exception for lubricants, APHIS would need to update this document to also list and define lubricants as foreign substances for which it will be testing and prohibiting.

The Humane Societies suggest reliance on the foreign substances list that APHIS already maintains, updates, and utilizes because (1) it is already utilized and maintained to indicate substances that are currently known to cause or conceal soring; (2) it would require no additional agency resources to implement; and (3) it has been consistently used by APHIS for effective and efficient detection of prohibited substances on walking horses. In creating and updating the list of substances that are used improperly to sore or mask soring under current regulations, APHIS has closely scrutinized each substance, including whether it might have any therapeutic or protective purposes. Accordingly, to date APHIS has only listed those substances that have an established history of being used to sore a horse or conceal evidence of soring activity, and has been careful not to list substances with truly therapeutic or protective purposes. And in the future, APHIS would continue to similarly scrutinize each substance as it updates the list with any new, prohibited substances (such as in the case of adding lubricants pursuant to the proposed amendment to Section 11.2(b)).

The proposal to ban substances including lubricants is clearly within APHIS's authority under the HPA. The same section that allows APHIS to ban action devices and pads also provides the authority for banning substances. Section 1824(7) specifically includes the term "substance," which means that APHIS can ban any substance "to prevent the soring of horses." With our recommended reliance on the agency's guidance provided in the foreign substances list, APHIS would only be banning non-therapeutic substances as they are used to sore horses. This is unquestionably permissible under the plain language of the HPA.<sup>36</sup>

**Weighted Shoes.** In its September announcement extending the comment period an additional 30 days, APHIS also proposed to prohibit "[t]he use of any weight on horses, except a keg or similar conventional horseshoe."<sup>37</sup> This proposal aligns with the prohibitions imposed by the United States Equestrian Federation, which currently bans the use of weighted shoes on Tennessee Walking Horses, Racking Horses, and Spotted Saddle Horses regardless of age.<sup>38</sup> The

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<sup>36</sup> In addition to this explicit authority, APHIS also has the general grant of authority to implement and enforce the HPA under Section 1828, as discussed in depth above.

<sup>37</sup> Horse Protection; Licensing of Designated Qualified Persons and Other Amendments, 81 Fed. Reg. 65,307 (Sept. 22, 2016).

<sup>38</sup> See Press Release, APHIS, *USDA Proposes Changes to End the Inhumane Practice of Soring* (Aug. 26, 2016), available at [https://www.aphis.usda.gov/aphis/newsroom/news/SA\\_By\\_Date/newsroom-2016/SA-07/hpa-changes](https://www.aphis.usda.gov/aphis/newsroom/news/SA_By_Date/newsroom-2016/SA-07/hpa-changes) ("APHIS would ban the use of all action devices, pads, and foreign substances at horse shows, exhibitions, sales, and auctions. This would align the HPA regulations with existing equestrian standards set forth by the U.S. Equestrian Federation."); see also United States Equestrian Federation Rulebook, Subchapter 8F (2016), available

Humane Societies support this broad prohibition on weighted shoes, but hope the agency will go farther to ensure that the unrestricted exception for a keg or conventional shoe does not create a loophole for soring activity.

To provide complete protection for the horses, APHIS's proposal must eliminate the use of all harmful, weighted shoes on horses. As proposed in September, the ban would still allow the use of "a keg or similar conventional horseshoe."<sup>39</sup> However, even the use of a keg or conventional shoe, if heavy enough, would cause pain and suffering for a horse. We urge the agency to incorporate into the final rule that (1) the exception for a keg or similar conventional horseshoe only applies to shoes weighing 16 ounces or less;<sup>40</sup> and (2) sanctioned shoes must not impede inspection techniques, including the proper use of a hoof tester and examination of the sole.<sup>41</sup>

Heavier, weighted shoes are often used to "encourage more action," to cause "the horse to work harder (for more locomotion)," and thus, to elicit an exaggerated or Big Lick gait by causing a hyper-extension of the foot while walking.<sup>42</sup> In fact, trainers have been known to attach "eight-pound tungsten shoes [ ] to cause a gaited horse to adopt an exaggerated gait for the show ring."<sup>43</sup> A recent study determined that adding these weights causes excessive stretching of the muscles and tendons, which leads to a much higher risk of injury to the horse.<sup>44</sup> As explained in the HSUS Petition, these harms occur regardless of the horse's age.

Parts of the proposal come close to preventing harmful shoeing practices, but fail to go far enough. The proposed ban on the use of hoof bands – which are traditionally used to hold the weighted shoes onto the horse's hoof – is insufficient to eliminate the use of all weighted shoes

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at <https://www.usef.org/documents/ruleBook/2016/GeneralRules/GR08-ConductofCompetitions.pdf> ("The use of a weighted shoe . . . [on] a Tennessee Walking Horse, a Racking Horse, or Spotted Saddle Horse . . . is prohibited.").

<sup>39</sup> 81 Fed. Reg. 65,307.

<sup>40</sup> APHIS currently prohibits the use of shoes heavier than 16 ounces on yearling horses. See 9 C.F.R. § 11.2(b)(9) (prohibiting the use of "any horseshoe on yearling horses that weighs more than 16 ounces"). The Humane Societies suggest that APHIS maintain the 16-ounce standard in the final rule, and apply it to all walking horses regardless of age.

<sup>41</sup> We urge the agency to consider that it would need to require the removal of all shoes during inspection if it opts to maintain the insufficient prohibitions on weighted shoes as proposed. Removal of all shoes would allow for the application of a hoof tester during inspection and prevent the Big Lick faction from attaching extremely heavy shoes in an inhumane fashion, such that they cannot be easily removed by a farrier.

<sup>42</sup> Exh. A, *supra* note 3, at 24; see also Pat Tearney, *Shoeing the High-Stepping Tennessee Walking Horse*, AMERICAN FARRIERS JOURNAL (July 1, 2008), available at <https://www.americanfarriers.com/articles/994-shoeing-the-high-stepping-tennessee-walking-horse#sthash.2t6Kmw0S.dpuf>.

<sup>43</sup> 81 Fed. Reg. 49,120 n.14 (summarizing statements made by former walking horse trainer Barney Davis).

<sup>44</sup> See Wickler, Steven J., et al., *The Energetic and Kinematic Consequences of Weighting the Distal Limb*, 36(8) EQUINE VETERINARY J., 727-777, 776 (Dec. 2004).

because a creative industry will invent alternative methods of attaching the weighted shoes.<sup>45</sup> The proposed language – prohibiting “shoeing or trimming a horse’s hoof in a manner that will cause such horse to suffer, or can reasonably be expected to cause such horse to suffer pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving” – could in theory encompass a prohibition on weighted shoes. However, to remove all questions about whether such a prohibition is encompassed in the language, and to reduce additional burdens on the inspectors, show management, and APHIS to detect whether a weighted shoe is being used to sore a horse, the Humane Societies suggest a strict prohibition on any shoes weighing more than 16 ounces. Although APHIS proposes to authorize the use of hoof testers on horses during inspection, many of the weighted shoes currently in use are so wide that it is impossible to apply a hoof tester to (or examine) the sole of the horse’s hoof. Therefore, any allowance of weighted shoes, including keg or similar conventional shoes weighing more than 16 ounces, would preclude the effectiveness of such inspections for many walking horses.

Again, APHIS has ample authority to ban weighted shoes under Sections 1824(7) and 1828 of the HPA. As discussed above, Section 1824(7) prohibits commercial activities involving a horse that is “wearing or bearing *any* equipment, device, paraphernalia or substance” [emphasis added] that is banned by the secretary under Section 1828. Weighted shoes easily fall within this Section as a type of equipment, device, or paraphernalia. Additionally, Section 1828 provides APHIS the general authority to issue “rules and regulations as [the agency] deems necessary to carry out the provisions” of the HPA. Banning weighted shoes clearly carries out the provisions of the HPA because (as described above) these shoes are used for soring, and banning them would protect horses from such abuse.

**Hoof packing materials.** APHIS’s proposed prohibitions maintain an unnecessary exception for the use of “acceptable hoof packing, which include pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing or other substances used to maintain adequate frog pressure or sole consistency.”<sup>46</sup> Hoof packing is used on a horse when a pad is used, with

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<sup>45</sup> See Concerning the Prevent All Soring Act: Hearing on H.R. 1518 before the Subcomm. on Commerce, Manufacturing, and Trade, 113th Cong., at 10 (2013) (testimony of W. Ron DeHaven, DVM, MBA, American Veterinary Medical Association), *available at* <https://www.avma.org/Advocacy/National/Documents/AVMATestimonyPASTActHearing.pdf> (last visited Oct. 24, 2015) (“Creativity knows no bounds when it comes to causing pain and discomfort to these horses – their owners or trainers will do virtually anything to achieve the ‘big lick.’ . . . [U]nethical trainers and owners have developed creative ways to avoid detection during the inspection process.”).

<sup>46</sup> See 81 Fed. Reg. 49,131.



the purpose of filling gaps between the hoof and the pad, which aids in the redistribution of load. Without the use of a pad to hold it in place, traditional hoof packing would simply fall out of the horse's hoof. Indeed, the HPA regulations, which currently allow the use of pads, only reference hoof packing in the context of pads, by prohibiting “[a]ny object or material inserted *between the pad and the hoof* other than acceptable hoof packing . . .”<sup>47</sup>

Therefore, similar to the theory behind the agency's logical decision to prohibit the use of lubricants in light of the ban on action devices, there is no need to permit hoof packing materials of any kind given the proposed ban on pads. If any hoof packing is allowed, it could encourage the pro-soring industry to invent new methods of adhering to the hoof a substance that it passes off as “hoof packing,” with the aim of obscuring intentionally inflicted pain in (or damage to) the sole or inserting foreign objects intended to cause pain. Accordingly, APHIS should ban all hoof packing materials without exception in the final rule. We suggest amending the language in proposed Section 11.2(a)(5) as follows:

~~Any object or material inserted into the hoof other than acceptable hoof packing, which includes pine tar, oakum, live rubber, sponge rubber, silicone, commercial hoof packing or other substances used to maintain adequate frog pressure or sole consistency, is prohibited, including Acrylic acrylic and other hardening substances, are prohibited as hoof packing.~~

APHIS has unfettered authority to broadly ban all hoof packing materials under the HPA. As discussed above, the plain language of Section 1824(7) grants APHIS authority to prohibit “any equipment, device, paraphernalia, or substances . . . to prevent soring.” Once again, hoof packing is simply another type of “equipment, device, [or] paraphernalia” that is used to cause or conceal soring of walking horses to elicit an exaggerated or Big Lick gait. Therefore, the HPA provides APHIS the explicit authority to remove the exception for any packing materials.

APHIS also has the Section 1828 general grant of authority to issue “rules and regulations as [the agency] deems necessary to carry out the provisions” of the HPA. Banning all packing materials would carry out the provisions of the HPA by ensuring that the Big Lick faction could not find creative new ways to harm horses by exploiting loopholes. Thus, Section 1828 augments APHIS's clear statutory authority to ban all packing materials.

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<sup>47</sup> 9 C.F.R. § 11.2(b)(13) (emphasis added).

**Specific prohibitions as to all horses.** The Humane Societies are also concerned that the proposed rule would remove the current regulatory language that specifically bans or restricts certain “devices, equipment, or practices on any horse at any horse show, horse exhibition, or horse sale or auction.”<sup>48</sup> This subsection unequivocally provides a list of items that are not allowed on any horse, including the size, weight, and placement of those items, such as “[s]ingle or double rocker-bars on the bottom surface of horseshoes which extend more than 1 ½ inches back from the point of the toe,” and “[m]etal hoof bands, such as used to anchor or strengthen pads and shoes, placed less than ½ inch below the coronet band.”<sup>49</sup> These prohibitions and restrictions were clearly adopted to ensure the soundness and welfare of all horses.<sup>50</sup> In its place, APHIS proposes an overarching prohibition that “[n]o device, method, practice, or substance shall be used with respect to any horse at any horse show, horse exhibition, or horse sale or auction if such use causes or can reasonably be expected to cause such horse to be sore.”

If it would not impede swift promulgation of the final rule, we recommend maintaining the current regulatory language of 9 C.F.R. § 11.2(b) that applies the above prohibitions to all horses. In the alternative, APHIS should indicate in the proposed rule that it will provide clear guidance in the near future to the horse industry as to the types of devices, equipment, and practices that would fall under the proposed, overarching prohibition as to all horses in all horse shows, exhibitions, sales, or auctions.

The Humane Societies believe retention of the regulatory language of 9 C.F.R. § 11.2(b) would be beneficial and urge APHIS to restore it in the final rule. While the new general prohibition certainly should in our view prohibit the same devices as 9 C.F.R. § 11.2(b), its general nature may create ambiguity and disputes as to what devices are prohibited. Maintaining 9 C.F.R. § 11.2(b) should substantially reduce those ambiguities and disputes and provide clear guidance as to some of the devices that are still banned under APHIS’s regulations. Retaining the language of 9 C.F.R. § 11.2(b), which applies to all horse breeds, may also provide useful protection against – and a deterrent to – soring practices that may spread beyond the walking horse breeds that historically have been subject to such abuse and are the focus of the proposed ban in Section 11.2(a).

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<sup>48</sup> 9 C.F.R. 11.2(b).

<sup>49</sup> *Id.* § 11.2(b)(14), (15).

<sup>50</sup> *Id.*

**Prohibitions as to “related breeds.”** The Humane Societies appreciate the agency’s well-intentioned proposal to broadly prohibit all action devices, pads, wedges, hoof bands, and other soring implements on a range of walking horse breeds where soring is a concern. It is well-established that soring abuse is largely prevalent in three specific horse breeds: Tennessee Walking Horses and Racking Horses, which the agency has already listed in its proposal, as well as Spotted Saddle Horses. Notorious Tennessee Walking Horse “trainers” – who have been known to sore the breed – include Jackie McConnell, Larry Joe Wheelon, and ThorSport Farms.<sup>51</sup> Spotted Saddle Horse trainer and Spotted Saddle Horse World Grand Championship winner Barney Davis has spoken openly about the ongoing soring abuse that the Spotted Saddle Horse endures.<sup>52</sup> Moreover, the agency’s 2016 inspection reports confirm that events for the Tennessee Walking Horse, Racking Horse, and Spotted Saddle Horse breeds have received inspection more often than events for other breeds.<sup>53</sup> In all likelihood, this is because those breeds have higher soring rates than other breeds.

Concern has been raised in the horse industry at large, however, that the phrase “related breed that performs with an accentuated gait” could apply the prohibitions proposed in Section 11.2(a) to certain trotting breeds that exhibit accentuated gaits but have not been known to be subjected to soring abuse. These trotting breeds include but are not limited to, American Saddlebred and Morgan horses. However, APHIS has proposed that the prohibitions would apply only to the accentuated-gait breeds “*that raise[] concerns about soring.*”<sup>54</sup> Because soring is not prevalent in these breeds, we do not believe the likelihood of this happening is very substantial.<sup>55</sup>

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<sup>51</sup> See, e.g., HSUS, Investigative Report (2012), available at [http://www.humanesociety.org/assets/pdfs/horse/mcconnell\\_twh\\_invest\\_report.pdf](http://www.humanesociety.org/assets/pdfs/horse/mcconnell_twh_invest_report.pdf); Press Release, HSUS, *Indictments Made in Maryville, Tenn., Horse Soring Investigation*, Dec. 4, 2013, available at [http://www.humanesociety.org/news/press\\_releases/2013/12/tn-horse-soring-indictments-120413.html](http://www.humanesociety.org/news/press_releases/2013/12/tn-horse-soring-indictments-120413.html); Press Release, HSUS, *Detailed Undercover Investigation Reveals Tennessee Walking Horse Abuse at Top Training Barn* (August 25, 2015) available at [http://www.humanesociety.org/news/press\\_releases/2015/08/tn-walking-horse-investigation-082515.html](http://www.humanesociety.org/news/press_releases/2015/08/tn-walking-horse-investigation-082515.html).

<sup>52</sup> See, e.g., Interview by Keith Dane, HSUS, with Barney Davis, former Tennessee Walking Horse trainer, in Sewanee, Tenn., at 5:47-5:55 (June 28, 2012), available at [http://www.humanesociety.org/news/press\\_releases/2012/08/exclusive\\_barney\\_davis\\_video\\_082812.html](http://www.humanesociety.org/news/press_releases/2012/08/exclusive_barney_davis_video_082812.html).

<sup>53</sup> See, e.g., HSUS, Entries at 2016 Horse Shows Attended by VMOs, attached hereto as Exhibit B (compiled from APHIS’s Horse Protection Act 2016 Show Activity Reports, available at [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_hpa/activity-and-show-reports](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_hpa/activity-and-show-reports)).

<sup>54</sup> 81 Fed. Reg. 49,131 (emphasis added).

<sup>55</sup> Soring is practiced on the front pasterns of walking horses so that their gait is exaggerated on the front feet. This elicits the Big Lick, in which the front feet are raised high into the air, putting the bulk of the horse’s weight on its hind legs. Because trotting breeds are prized for their balanced, ground consuming gait, soring is neither practical nor prevalent.

Nonetheless, we suggest that APHIS clarify in its preamble to the final rule that soring is not currently a concern for these trotting horse breeds, and that (given the history and current concentration of soring abuse) it intends to focus its enforcement on the three walking horse breeds in which soring is rampant; that is, the Tennessee Walking Horse, Racking Horse, and Spotted Saddle Horse.<sup>56</sup> Accordingly, we suggest including language similar to the following in the preamble to the final rule:

While today's final regulations have a general prohibition against soring of any horse, the regulations include specific prohibitions for any "Tennessee Walking Horse, Racking Horse, or related breed that performs with an accentuated gait that raises concerns about soring." In light of the history and current concentration of soring, at this time we intend to focus our HPA enforcement efforts on three specific breeds: Tennessee Walking Horses, Racking Horses, and Spotted Saddle Horses. Focusing our enforcement on the breeds who are known to be victims of soring abuse, as substantiated by decades of studies and show records, effectuates our congressional mandate under the HPA to prevent the soring of horses.

c. 9 C.F.R. § 11.3 – Scar Rule

APHIS does not propose any amendments to the Scar Rule. The Humane Societies commend the agency for resisting the unsubstantiated demands from the pro-soring community to end reliance on the Scar Rule as a method of HPA inspection and enforcement.

However, we note that the proposed ban on the use of action devices and other soring methods and equipment impacts how the Scar Rule should be enforced moving forward. As written, the Scar Rule provides an exception for bilateral areas of uniformly thickened epithelial tissue on the posterior of the pastern that is typically caused by currently permissible action devices.<sup>57</sup> Because the agency has proposed prohibiting the use of all action devices on walking horses, there is no longer a need to provide such an exception in the Scar Rule.<sup>58</sup> Accordingly, as requested in the HSUS Petition, we urge the agency to amend the Scar Rule, if not in the final rule then in the near future, to require that the entire surface of the pastern be free of bilateral granulomas, as well as other bilateral evidence of inflammation or other abuse indicative of

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<sup>56</sup> The Humane Societies would not oppose changing the "related breeds" language in the final rule itself to specify that only these three breeds are subject to the prohibitions, as long as it does not impede swift promulgation of the final rule.

<sup>57</sup> See 9 C.F.R. § 11.3(b).

<sup>58</sup> See Exh. A, *supra* note 3, at 33 n.129.

soring including, but not limited to, excessive loss of hair for horses who are two years old or younger by the time these regulatory changes go into effect.<sup>59</sup>

Critics of the Scar Rule claim that it unlawfully involves an inspector's subjective analysis of the pastern through touch and sight. These arguments fail because any bilateral tissue change on a walking horse's pasterns as described in the scar rule is indicative of soring abuse. Simply put, there is no room for error. However, the proposed regulations go one step further to prevent errors in judgment by requiring inspectors to have greater expertise and more extensive training, and providing all inspectors with the same training and inspection protocols across-the-board.

d. 9 C.F.R. § 11.5 – Inspection and Detention of Horses; Responsible Parties

The Humane Societies support the proposed amendments to Section 11.5. This section currently covers access to premises and records, but as part of its reorganization of the HPA regulations, APHIS has proposed that this section cover certain inspection protocols, including which horses will be prohibited from showing based on their conduct during inspection.

We especially support the agency's proposal at Section 11.12(b)(5) to prohibit horses from showing who are not presented in a manner to allow their proper inspection, or who are unruly or fractious.<sup>60</sup> This proposal would target widely practiced stewarding abuse, in which trainers use certain devices to inflict other cruelties on the horse in an effort to prevent any outward reactions when inspectors place pressure on sensitive hoof and pastern areas. To this end, trainers try to distract the horse from the pain in its legs by affixing objects such as metal alligator clips and zip ties to a horse's tongue, gums, anus, and vagina just prior to inspection. The HPA regulations currently prohibit the use of "whips, cigarette smoke, or other actions or

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<sup>59</sup> Similar to what was suggested in the HSUS Petition, APHIS should amend the Scar Rule such that subsection (b) reads: "For horses born after January 1, 2016, the entire surface of the pastern pasterns (flexor surface), including the sulcus or "pocket" 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, and must be areas of uniformly thickened epithelial tissue if such areas are free of uniformly thickened epithelial tissue, proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation." See Exh. A, *supra* note 3, at 47. APHIS has statutory authority to expand the scope of the Scar Rule under the same HPA sections that permitted the agency to adopt the original rule. See 15 U.S.C. §§ 1821(3) (defining "sore" as delineated types of abuse "by a person to any limb of a horse:), 1823 (requiring disqualification of sore horses and the prohibition of the exhibition of a sore horse), 1824(2) (prohibiting showing any sore horse in any horse show or exhibition), 1828 (granting general authority to carry out the other provisions of the HPA). The Scar Rule clearly fulfills the intent of these sections, and does not go beyond any limitations on APHIS's authority.

<sup>60</sup> 81 Fed. Reg. 49,136.

paraphernalia [ ] used to distract a horse during examination.”<sup>61</sup> By going one step farther to prohibit horses that are not presented in a manner to allow their proper inspection from showing, the proposed rule will make clear the consequences of the use of distraction devices, and provide a greater deterrent to trainers who might otherwise attempt abusive stewarding practices.

The HPA provides APHIS with authority to effectuate the inspections envisioned in the draft regulation. Section 1823(e) unambiguously provides APHIS with the power to inspect horses, which also implies the authority to set criteria for those inspections:

[f]or purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction.

The HPA further reinforces the power to set inspection criteria by providing in in Section 1823(c) that inspectors may not “conduct inspections in a manner *other than that prescribed for inspections by the Secretary*.” [emphasis added]. The proposed regulations unquestionably fit within these grants of authority.

e. 9 C.F.R. § 11.6 – Training and Licensing of HPIs

The Humane Societies fully support the proposed changes to the training and licensing of inspectors. Section 11.6 currently covers inspection space and facility requirements, but as part of its reorganization of the HPA regulations, APHIS proposes to instead cover the training and licensing of the new HPIs in this section.<sup>62</sup> APHIS proposes to train and license HPIs, which show management will then be able to appoint for their events. This system will replace the current failed system whereby HIOs train and oversee DQPs. This section essentially grants the HSUS Petition request on this point, which requested that APHIS replace the current industry-run and conflict-laden inspection scheme with one that is comprised of independent, third-party inspectors who are licensed, trained, and overseen by the agency, and appointed by show management.

As described in the HSUS Petition, the current system of industry-managed inspection is woefully inadequate, as APHIS has left the bulk of HPA inspections to industry organizations and DQPs, most of which have little incentive to detect soring activity and are riddled with

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<sup>61</sup> 9 C.F.R. § 11.21(a)(4).

<sup>62</sup> APHIS has not proposed to remove the inspection and facility requirements currently in force; rather, it would relocate them to proposed Section 11.5.



conflicts of interest.<sup>63</sup> The impact of these conflicts of interest for DQPs includes the failure to conduct horse inspections in accordance with the law and applicable regulations, such as not observing horses in motion; not inspecting first-place horses; using improper inspection techniques, including failing to palpate horses' pasterns and not weighing action devices; giving exhibitors "freebies," or warnings, instead of issuing tickets for violations, or otherwise turning a blind eye to violations; and issuing tickets not to the exhibitors responsible for the abuse, but to almost anyone else, including friends, family, and even stable hands working for the exhibitors.<sup>64</sup> Moreover, there is a notable disparity between inspections conducted by APHIS versus those conducted by HIO-licensed DQPs, in which agency inspectors caught the vast majority of soring violations.<sup>65</sup> Thus, it is clear that HIOs and their trained and licensed DQP inspectors are integral to the ongoing prevalence of soring.

The Fifth Circuit's holding in *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258 (5th Cir. 2015), bolsters the need to eliminate the failed HIO/DQP system. By holding that APHIS could not require private HIOs to enforce HPA penalties, *Contender Farms* essentially gutted both HPA enforcement at the majority of walking horse events – which the agency does not have the resources to attend – as well as the fundamental relevance of HIOs.<sup>66</sup> Therefore, the most effective solution to ensure proper inspections and enforcement is to revamp the private inspection system and remove HIOs from the equation, as APHIS has proposed.

The Humane Societies enthusiastically support the proposed abolishment of the HIO/DQP inspection scheme and its replacement with a new system that is managed and administered by APHIS rather than the industry. Implementation of the proposed plan would free up limited agency resources spent certifying and regulating HIOs, including enforcement of the

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<sup>63</sup> See Exh. A, *supra* note 3, at 12-18. Indeed, USDA's Office of Inspector General has called attention to this troubling situation in an audit report from 2010, stating that DQPs had a "clear conflict of interest," and because of those conflicts, "they did not always inspect horses according to the requirements of the Horse Protection Act." USDA Office of Inspector Gen., Audit Rep. 33601-2-KC, Animal and Plant Health Inspection Service Administration of the Horse Protection Program and the Slaughter Horse Transport Program 2, 10-11 (2010), available at <http://www.usda.gov/oig/webdocs/33601-02-KC.pdf> (hereinafter "USDA OIG Audit").

<sup>64</sup> See USDA OIG Audit at 2, 10-14.

<sup>65</sup> See Exh. A, *supra* note 3, at 17-18 (summarizing overwhelming majority of soring violations that are detected by APHIS inspectors, not DQP inspectors). At the 2015 Celebration, APHIS inspectors identified 226 soring violations, while industry inspectors found only 35. See USDA Horse Protection Activity Report for 2015 Celebration at [https://www.aphis.usda.gov/animal\\_welfare/downloads/hp/show\\_reports/twh\\_report.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/twh_report.pdf). Results from the 2016 Celebration showed a similar, stark contrast. APHIS inspectors found 161 violations, whereas industry inspectors detected only found 29. See USDA Horse Protection Activity Report for 2016 Celebration, available at [https://www.aphis.usda.gov/animal\\_welfare/downloads/hp/show\\_reports/2016/20160825-0903-78th-Annual-TWH-National-Celebration-HP-Activity-Report.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2016/20160825-0903-78th-Annual-TWH-National-Celebration-HP-Activity-Report.pdf).

<sup>66</sup> *Contender Farms*, 779 F.3d at 274.

regulations against delinquent HIOs. APHIS has spent an inordinate amount of its limited resources providing DQP training for multiple HIOs around the country; overseeing the conduct of DQPs at shows, exhibitions, sales, and auctions; communicating with HIOs about DQP performance issues; auditing HIOs at least annually; attempting to receive records from HIOs; reviewing HIO applications and annual rule book submissions for certification; attempting to get HIOs to adopt consistent rules and penalties, and then monitoring their compliance; seeking decertification of non-compliant HIOs; and defending against multiple legal challenges by HIOs who refuse to comply with the HPA and its regulations.

None of these activities would be required under the proposed inspection system. Because the new system removes HIOs from the equation, APHIS will be free to redirect its time, energy, and limited funding toward more effective soring detection and HPA enforcement, including licensing and training a cadre of reliable and trustworthy third-party inspectors and monitoring their inspection efforts; maintaining a comprehensive and up-to-date database of HPA violations; and carrying out civil and administrative proceedings against HPA violators.

Moreover, in addition to freeing up limited agency resources, the new inspection scheme would be implemented at *no new cost to the taxpayer*. Inspectors will not be APHIS employees, but will continue to be appointed and paid by show management, as is the current practice.<sup>67</sup> And it is possible that show management will even save money under this proposed system, because they will no longer be forced to incur extra fees that are imposed by HIOs.

Removing the industry from the equation, and instead placing APHIS in charge of licensing, training, and overseeing inspectors, will also help eliminate the conflicts present in the current system that have allowed soring abuse to persist. APHIS has proposed in 9 C.F.R. § 11.6(b) that it will refuse to license an inspector applicant if: (1) “that person has been convicted or found to have violated . . . or has been assessed any fine or civil penalty, or has been the subject of a disqualification order” for violating the HPA or the Regulations; (2) “that person, any member of that person’s immediate family, or that person’s employer participates in the showing of horses or acts as a judge or farrier, or is an agent of show management involving any Tennessee Walking Horses, Racking Horses, or related breeds;” (3) “that person has been disqualified by the Secretary of Agriculture from making detection, diagnosis, or inspection;” or

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<sup>67</sup> The incentive will remain for show management to appoint inspectors to avoid personal liability in the event that soring is found on their premises. *See* 15 U.S.C. § 1824(3)-(6).

(4) “the honesty, professional integrity, reputation, practices, and reliability of the person do not support a conclusion that the applicant is fit to carry out the duties of a HPI.” We are pleased to see APHIS is proposing to capture a broad range of potential conflicts of interest that an inspector might face.<sup>68</sup>

However, as provided in the HSUS Petition, there are additional conflicts of interest that should be eliminated from the proposed inspection system, which APHIS should address in the final rule.<sup>69</sup> These additional conflicts can include, but are not limited to: (1) having ever received a letter of warning or been the subject of a request for the issuance of a letter of warning for performing inspections that do not conform with APHIS standards; (2) having any contractual or financial interest *of any kind* with show management, other than being appointed as an HPI; and (3) inspecting any horse who is entered, owned, trained, exhibited, or offered for sale by a person with whom the inspector shares a familial or business connection. The Humane Societies recommend that APHIS strengthen the licensing requirements in the final rule by adding these additional conflicts of interest, as requested in the HSUS Petition.

We also recommend that APHIS explicitly reserve its discretion to determine whether (and when) to license an applicant, regardless of whether the listed criteria are met. APHIS is the only entity with expertise in whether an individual is qualified to provide effective HPA inspection services, and there are many facets – some of which are unpredictable – that would go into making that determination. Accordingly, we suggest that the agency make clear in the final rule that it may, in its discretion, refuse to license an applicant on grounds not specifically provided in the regulations.

The Humane Societies hope the agency will ensure a swift transition away from DQPs and HIOs and toward the proposed HPI inspection system. To ensure that the transition is smooth and effectively protects horses, we note the need to ensure that there is not a time in

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<sup>68</sup> The proposed conflicts of interest provision comports with various standards set forth in USDA’s Scientific Integrity Policy Handbook, which aims “to ensure the validity and objectivity of science and technical information derived and used to guide USDA policies . . . . Scientific or technological information must be generated by [individuals] who demonstrate they do not have a conflict of interest . . . .” See U.S. Dep’t of Agric., *USDA Scientific Integrity Policy Handbook* (Guidance for Implementation of DR 1074-001), at 10 (July 10, 2013) (updated March 8, 2016). However, the handbook simply provides guidance as to thresholds for standards (such as eliminating certain financial and familial relationship), and simply cannot detect or predict every conceivable conflict in all situations. Given the breadth of potential conflicts and connections throughout the walking horse industry, the Humane Societies strongly recommend that APHIS include stricter conflict of interest prohibitions in the final rule.

<sup>69</sup> See Exh. A, *supra* note 3, at 29; see also HSUS, *Petitioner’s Proposed Amendments to 9 C.F.R. Part 11*, in Exh. A, at 85 (suggested regulatory language, pursuant to requested inspection scheme overhaul, regarding inspector conflicts of interest).

which inspectors are unavailable for show management to appoint. In other words, as soon as current DQPs' licenses are revoked, the agency must be sure to have a cadre of reliable, independent HPis licensed and ready for appointment so that horses may continue to receive inspections without interruption. Section 11.6(f) of the proposed rule would revoke DQP licenses upon the effective date of the final rule. The Humane Societies recommend instead that APHIS push back the date on which DQPs' licenses are revoked in the final rule, so that the agency has sufficient time to license and train its HPI taskforce.<sup>70</sup>

The proposed HPI system is well within APHIS's authority under the HPA, which provides that:

*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. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a 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 . . .*<sup>71</sup>

Indeed, Congress intended that the agency's resulting regulations might include:

provisions prescribing the minimum qualifications and certification of non-professional persons having the responsibility for conducting inspection as well as for the accreditation requirements of professionals having inspection responsibilities. In addition, these regulations may prescribe the conditions to assure the independence of the judgment of persons hired to conduct inspections in carrying out their responsibilities. The regulations may also include requirements that management have the responsibility to provide such inspectors with information and instruction to assist them in carrying out their responsibilities. Such regulations may require these inspectors to establish and maintain

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<sup>70</sup> It seems most efficient to allow for a phased implementation of the final rule, so that the prohibitions contained in Section 11.2 are effective immediately, to be followed in the near future by the DQP-to-HPI transition. This implementation plan would allow for swift protections against action devices and harmful substances for walking horses while the agency works toward putting HPis on the ground for inspection services.

<sup>71</sup> 15 U.S.C. § 1823(c) (emphasis added).

records of horses that they have disqualified or excused and to provide such records and other information to the Secretary.<sup>72</sup>

This authorization “plainly allows the USDA [ ] to impose those requirements that relate to the certification and inspection process for individual inspectors.”<sup>73</sup> Thus, APHIS holds broad authority to regulate the certification and training of persons qualified to detect soring at any horse show, horse exhibition or horse sale or auction. It is pursuant to this broad grant of authority that APHIS created the current inspection scheme managed by HIOs and staffed by DQPs. This same broad grant permits APHIS to replace the existing scheme with a different, more effective system involving independent, third-party inspectors who are licensed, trained, and overseen by the agency, and appointed by show management.<sup>74</sup>

The Act’s unequivocal “prohibit[ion on] the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection” necessarily implies that the agency has the power to establish criteria pursuant to which inspectors are disqualified.<sup>75</sup> The proposed rule establishes that APHIS may revoke an HPI’s license in the event that such HPI fails to follow the regulations set forth in the proposed rule, and that such denial shall be subject to appeal, with the applicant receiving notice and a full opportunity for a hearing. Given that such a program is well within the confines of the broad delegation of power under §1823(c), APHIS has ample authority to promulgate this section of the proposed rule.

Similarly, the text of the HPA explicitly states that inspections must be conducted in a manner as prescribed by the Secretary.<sup>76</sup> Such substantive references to the power to regulate inspectors and inspections necessarily implies that APHIS has the power to train, license, and oversee inspectors, as well as mandate inspection protocols and conduct to which HPIs must

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<sup>72</sup> H.R. Rep. 94-1174, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1702-03.

<sup>73</sup> *Contender Farms*, 779 F.3d at 272. *Contender Farms* also found that “§ 1823(c) permits APHIS to establish duties for inspectors, such duties must be related to their physical inspections of horses.” *Id.* at 273 n.7.

<sup>74</sup> *Contender Farms* confirms that APHIS is authorized under the HPA to create a private inspection scheme, which the agency has done by proposing that the third-party, independent HPIs will be available for appointment by show management. *See id.* at 274; *see also id.* at 273 (“The HPA authorizes the USDA to develop a private inspection system . . .”). *Cf. id.* at 272 (“[Regulations] promulgated pursuant to § 1823(c) must relate to whether ‘persons’ are ‘qualified’ to inspect horses for evidence of soring.”).

<sup>75</sup> 15 U.S.C. § 1823(c).

<sup>76</sup> *Id.* (“Appointment of a 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.”).

adhere. These regulations are necessary to ensure that HPIs are qualified to detect and diagnose sore horses and that they are conducting their inspections properly.

f. 9 C.F.R. § 11.10 - Management Responsibilities; Operation of Horse Shows, Horse Exhibitions, and Horse Sales and Auctions

The Humane Societies support APHIS's proposal to create a regulation that combines both new and pre-existing requirements as to show management's responsibilities and operations. This proposed section includes important amendments, such as advance notification of upcoming events, exclusion of disqualified individuals, inspection requirements for managers who do not appoint an inspector, and record-keeping, reporting, and access.

Specifically, we are pleased that APHIS has proposed to require show management to (1) notify the agency of an upcoming event no later than 30 days prior to the event, including information on any HPIs who the show plans to appoint; and (2) post at all events a list of individuals who are disqualified from the competition due to prior soring misconduct. While these are commendable efforts to improve the flow of information between the industry and the agency, we believe that APHIS should go farther to increase information flow to the public at large. To that end, APHIS should include in the final rule that it will publish on its website the event notifications received from show management and the lists of disqualified individuals as soon as practicable after receiving and compiling the information.<sup>77</sup>

The Humane Societies also applaud the agency's efforts to enhance HPA enforcement by expanding the inspection requirements for show managers who choose not to appoint inspectors, such that show management must inspect horses who place first, second, or third in in any Tennessee Walking Horse, Racking Horse, or related breed class or event. As noted in the discussion of Proposed Section 11.12 below – and as indicated in the agency's announcement of the proposed rule, but not included in its proposed amendments – APHIS should also apply this expanded requirement to HPI services in the final rule.<sup>78</sup>

APHIS may expand inspection requirements under the same clear-cut authority that authorizes it to establish them. Further, Section 1823(a) of the HPA clearly contemplates

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<sup>77</sup> APHIS's authority to implement these amendments is inherent from its authority to regulate the appointment and disqualification of inspectors, as well as the manner of inspections. *See* 15 U.S.C. § 1823(c). These steps would keep the agency abreast of all inspection activities and provide for more effective HPA enforcement.

<sup>78</sup> *See* 81 Fed. Reg. 49,125 (discussing agency's intent to require both HPIs and show managers who do not appoint HPIs to inspect horses who place first, second, and third in an accentuated gait class or event).



inspections at *all* horse shows, exhibitions, sales, or auctions, including those where managers choose not to appoint inspectors:

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. [emphasis added]

The HPA clearly mandates that management disqualify sore horses at *any* event, which inherently requires managers to either appoint an inspector to detect sore horses, or make those detections themselves.<sup>79</sup> Establishing a protocol for inspections for shows at which inspectors are not appointed is simply another example of APHIS’s broad purview to prescribe the “manner of inspections” under Section 1823(c).

APHIS also has the general authority under Section 1828 “to issue such rules and regulations as [the Secretary] deems necessary to carry out the provisions of [the HPA].” As discussed above, the HPA was enacted to protect horses from soring, and all of the amendments in proposed Section 11.10 serve to prevent soring by strengthening the inspection requirements for the detection of sore horses. Therefore, Section 1828 reinforces APHIS’s Section 1823 authority to amend Section 11.10 as proposed.

g. 9 C.F.R. § 11.11 - Management Responsibilities; Records and Reporting

As part of the agency’s reorganization of the HPA regulations, APHIS has proposed placing all recordkeeping and reporting requirements in a new regulation. Many of these seem to be largely the same as current requirements contained in 9 C.F.R. §§ 11.22, 11.23, and 11.24. However, APHIS has also proposed extending the timeframes by which show management must report records to APHIS, and for which show management must maintain records.

We are fully supportive of the proposal to extend show management’s responsibility to maintain records, from a mere 90 days after a show’s conclusion to at least six years. As APHIS explained in its announcement of the proposed rule, APHIS’s HPA investigations often take

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<sup>79</sup> Other HPA sections also contemplate that inspections must occur at events where management does not appoint an inspector. *See, e.g.*, 15 U.S.C. § 1824(3) (prohibiting the “failure by the management of any horse show or horse exhibition, which does not appoint and retain [an inspector] . . . to disqualify from being shown or exhibited any horse which is sore.”); *id* § 1824(4) (prohibiting the “failure by the management of any horse sale or auction, which does not appoint and retain [an inspector] . . . to prohibit the sale, offering for sale, or auction of any horse which is sore.”).

much longer than 90 days to conclude, and thus, lengthening the recordkeeping timeframe will significantly assist its enforcement efforts.<sup>80</sup> Moreover, the six-year timeframe is no longer than necessary, as it is only one year longer than the current five-year statute of limitations for HPA enforcement proceedings.<sup>81</sup> These increased record-keeping requirements easily fall within the HPA's grant of authority to APHIS:

The management of a horse show, horse exhibition, or horse sale or auction shall establish and maintain such records, make such reports, and provide such information *as the Secretary may by regulation reasonably require for the purposes of implementing this chapter or to determine compliance with this chapter*.<sup>82</sup>

h. 9 C.F.R. § 11.12 Inspection Procedures for HPIs

As part of the agency's proposed reorganization of the HPA regulations, APHIS is moving all inspection requirements for HPIs into a single section, including which horses must receive inspection, the time and place where inspection may occur, and the procedures that HPIs must follow. The Humane Societies largely support these new provisions and commends APHIS for proposing inspection requirements that are similar in strength to those currently in force under 9 C.F.R. § 11.21, if not stronger.

APHIS has also proposed that during inspection, HPIs may (1) inspect and remove any materials wrapped around the limbs of a horse to determine whether any prohibited foreign substance is present; (2) require that horseshoes be removed by a farrier; and (3) use hoof testers on all horses. As addressed in the discussion of Proposed Section 11.2 above, APHIS should ensure in the final rule that inspectors and farriers are able to properly carry out these important inspection techniques by prohibiting on walking horses the use of any shoe that would prevent the proper application of a hoof tester or examination of the horse's sole.

APHIS also proposes to require inspection for all horses performing with an accentuated gait who place first in their class. We recommend that APHIS expand this requirement so that HPIs are also required to inspect horses placing second and third, to make this consistent with the requirement for show management choosing not to appoint an inspector.<sup>83</sup> This omission

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<sup>80</sup> See 81 Fed. Reg. 49,125-26.

<sup>81</sup> See 18 U.S.C. § 3282(a) (imposing five year statute of limitation on federal crimes).

<sup>82</sup> 15 U.S.C. § 1823(d) (emphasis added).

<sup>83</sup> APHIS proposes that show management must inspect any horse placing first, second, or third in each Tennessee Walking Horse, Racking Horse, or related breed class or event. See 81 Fed. Reg. 49,134-35 (to be codified at 9 C.F.R. 11.10(b)(1)).

seems inadvertent on the agency's part, as APHIS indicated in its announcement of the proposed rule that *both* show management and HPIs should inspect horses placing first, second, or third place.<sup>84</sup> Therefore, to fulfill its stated intentions, and to bring proposed inspection requirements for HPIs in line with those of show management, APHIS should require in the final rule that HPIs also inspect horses who place second and third.

Unfortunately, APHIS has proposed to weaken the authority of HPIs when off duty, which the Humane Societies oppose. APHIS has removed key language that currently allows a DQP to inspect a horse "if present at other shows."<sup>85</sup> Not only does this remove significant authority that should belong to HPIs, but also removes an important aspect of horse protection which allows licensed inspectors to ensure compliance with the HPA wherever violations could occur. Indeed, first responders and public safety officers are often encouraged to provide assistance when off duty if it would further their roles as public servants.<sup>86</sup> Similarly, HPIs should be authorized to curtail soring violations at events, even when off duty, in furtherance of their duties to protect horses under the HPA. Accordingly, we urge APHIS to maintain the current regulatory language in the final rule that would extend this important authority to HPIs when off duty.

As discussed above, the HPA explicitly gives APHIS the authority to regulate the disqualification of sore horses; appointment and conduct of inspectors; methods of inspection; and the elimination of soring devices, equipment, paraphernalia, practices, and substances. Section 1823(c) of the HPA prohibits inspectors from "conduct[ing] inspections *in a manner other than that prescribed for inspections by the Secretary* (or the Secretary's representative) under subsection (e) of this section." Subsection (e) provides the Secretary may:

inspect any horse show, horse exhibition, or horse sale or auction  
or any horse at any such show, exhibition, sale, or auction. Such an

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<sup>84</sup> See *id.* at 49,125 ("[A]ny horse placing first, second, or third, and any other horses indicated by a HPI or APHIS representative in each Tennessee Walking Horse, Racking Horse, or related breed class or event at any horse show or exhibition, will have to be inspected after being shown or exhibited to determine if such horses are compliant with the Act or regulations. We are proposing this change to improve compliance with the Horse Protection regulations.").

<sup>85</sup> Compare 9 C.F.R. 11.20(b)(2) ("If present at other shows, [the DQP] shall examine any horse which he determines should be examined for compliance with the Act and regulations.") with 81 Fed. Reg. 49,136 (to be codified at 9 C.F.R. 11.12(a)).

<sup>86</sup> See, e.g., DECHERT & SAVE LIFE FOUNDATION, GOOD SAMARITAN LAWS, A COMPARATIVE STUDY OF LAWS THAT PROTECT FIRST RESPONDERS WHO ASSIST ACCIDENT VICTIMS (2014), *available at* <http://www.trust.org/contentAsset/raw-data/7be34cce-ea0d-4c90-8b39-53427acf4c43/file> (describing duties imposed by state laws on first responders to act in emergency situations, and any protections afforded to them in those situations).

inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

These subsections both evidence that APHIS can set inspection requirements and then ensure that the inspectors are correctly implementing such requirements. Furthermore, APHIS has the authority to ban equipment, devices, paraphernalia, or substances to prevent the soring of horses.<sup>87</sup> In order to do so, APHIS must also set inspection requirements for finding those items. Finally, as discussed in more detail above, APHIS has general authority under § 1828 to authorize such rules and regulations as are necessary to carry out the HPA.

### **III. Additional Thoughts**

APHIS specifically sought input from commenters on certain topics, including statistics on flat shod horses versus performance class horses, scientific data on the impacts of action devices, and the viability of any alternative courses of action that the agency could implement and resolve the current problems that are rampant in the walking horse industry. In addition, a number of Big Lick organizations have been disseminating stark, unsubstantiated claims that the walking horse industry is thriving, that soring abuse is no longer prevalent, and that the APHIS Horse Protection Program is unlawful. Many of these claims are directly related to the agency's requests for information. Below, we respond to these issues.<sup>88</sup>

#### **a. Flat Shod Versus Performance Class Horse Entrants**

“We welcome public comments as to how many flat-shod horses there are versus how many are entered into performance classes at HPA-covered events.”<sup>89</sup> To the Humane Societies' knowledge, the only reliable information on these figures is what the agency has published on its

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<sup>87</sup> 15 U.S.C. § 1824(7).

<sup>88</sup> The Humane Societies would like to draw the agency's attention to the 2014 Sound Horse Conference, which brought together veterinarians, researchers, walking horse owners, breeders and exhibitors, USDA, and numerous concerned individuals to discuss the ongoing soring abuse of walking horses. *See* Soundhorseconference.com, 2014 Sound Horse Conference (Entire Event), YouTube (Apr. 11, 2014), <https://www.youtube.com/watch?v=IFh43nlVrfM&feature=youtu.be>. Several presentations at the conference include information that APHIS has requested in its proposed rule announcement. *See, e.g.*, Presentation of Keith Dane, *id.* at 1:25:29 - 1:42:35; Presentation of Dr. John Haffner, *id.* at 1:45:20 - 2:07:25; Presentation of Donna Benefield, *id.* at 2:50:25 - 3:05:55; Presentation of Pastor Clay Harlin, *id.* at 3:33:20 - 4:13:30; and Presentation of Carl Bledsoe, at *id.* 6:04:50 - 6:18:30.

<sup>89</sup> 81 Fed. Reg. 49,117.

website.<sup>90</sup> We have closely analyzed the available information on flat shod versus performance classes for these comments, which we have attached as Exhibit B and summarized below.

To date for the year 2016, 57% of all entries wore pads, while 43% were flat shod. These figures seem to indicate that padded/performance classes make over half of the industry's exhibitions throughout the country. However, a closer analysis shows that the numbers are vastly skewed by portions of the industry in which the Big Lick predominates. When these premiere Big Lick events are removed from the equation, the figures confirm that there are actually *fewer* padded entries (49.8%) than flat shod entries (50.2%) for the rest of the country.<sup>91</sup>

At this year's Celebration – which is the industry's most prestigious “Big Lick” event – nearly 80% of entries were padded, while only about 20% were flat shod. For the eight events held in 2016 in Shelbyville, Tennessee – widely known as the Big Lick “mecca” – 74% of the entries were padded and only 26% were flat shod. These numbers indicate that where the Big Lick is popular, horses are being shod with stacked, performance packages to elicit the Big Lick, which can only mean one thing: most, if not all, of the horses at these events are suffering at the hands of their abusive “trainers.” Moreover, these numbers indicate that the walking horse industry for the rest of the country, moving away from Shelbyville, Tennessee, is not wholly reliant on the padded, performance class.

b. Additional Scientific Data on Soring

APHIS stated in its announcement of the proposed rule that “[a]lthough our experience enforcing the HPA indicates that soring occurs when action devices are used alone or in combination with prohibited foreign substances, we welcome public comment, supported with scientific data or other information, on whether action devices used alone or in combination with other training methods may result in soring.”<sup>92</sup> As discussed above in support of the agency's proposed prohibition on the use of all action devices, pads, substances, and certain other soring methods, as well as in the HSUS Petition requesting such action, there is ample scientific

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<sup>90</sup> See U.S. Dep't of Agric., *Horse Protection Act 2016 Show Activity Reports* (2016) available at [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_hpa/hp-activity-reports](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_hpa/hp-activity-reports).

<sup>91</sup> In reality, the nationwide percentages (excluding Shelbyville) would probably indicate a higher number of flat-shod entries. The VMOs who prepared the reports on the agency's website largely attended events which were expected to exhibit sore horses. Therefore, the remaining shows that VMOs did not attend likely had fewer or no padded horses (*i.e.* most or all entries at these shows were flat shod).

<sup>92</sup> 81 Fed. Reg. 49,120.

evidence proving that the use of these devices, with or without other “training” methods, can cause irreparable, significant pain and suffering to horses.<sup>93</sup>

In summary, this scientific evidence shows that the use of these devices to create an exaggerated gait can cause myriad damage to horses, including, but not limited to: lesions; imbalance in the hoof and rotation of the coffin bone; a significant risk of ripping off part or all of a horse’s hoof; lameness, including laminitis, which causes severe pain and potentially requires euthanasia; hair loss and inflammation marked by redness, swelling, heat, pain, and impaired function; excessive stretching of the muscles and tendons; and other extreme sensitivity and chronic, unbearable pain.<sup>94</sup>

The act of soring also takes a significant, long-lasting emotional and psychological toll on the victim horses, whose demeanor typically includes standing in only one place in their stalls, being reluctant to move or eat, and evidencing depression.<sup>95</sup> Victims of horse soring have been observed moaning and lying in their stalls unwilling or unable to rise.<sup>96</sup> Indeed, many horses who have fallen victim to soring have exhibited persistent symptoms of mental anguish – similar to Post-Traumatic Stress Disorder – in which the horses “knew not where their feet and hinds ends were . . . [evidencing a] disconnect with their bodies . . . like abused children, rape victims and soldiers . . . will.”<sup>97</sup>

Notably, the Big Lick industry has misconstrued the Auburn Study, claiming that it proves that action devices up to 6 ounces and pads cause no harm to horses.<sup>98</sup> Such a claim is

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<sup>93</sup> See generally Exh. A, *supra* note 3, at 18-24, 222-224; see also HSUS, *Forty Years of Pain and Inflammation* at 13 (attached hereto as Exhibit C).

<sup>94</sup> See *supra*, pages 5-15.

<sup>95</sup> See Ames Study, *supra* note 17, at 5, 10-12; see also Exh. C, *supra* note 96, at 9-10 (comparing Ames Study findings with demeanor of sore horses captured during HSUS’s 2012 investigation of Jackie McConnell’s barn).

<sup>96</sup> See HSUS, *Tennessee Walking Horse Investigation Exposes Cruelty*, YouTube, May 25, 2012, [https://youtu.be/gxVlxT\\_x-f0](https://youtu.be/gxVlxT_x-f0); HSUS, *USDA Inspections Find Horse Soring Cruelty*, YouTube, Sept. 2, 2016, <https://www.youtube.com/watch?v=84Sd0GNWZJs>.

<sup>97</sup> Kristen Kovatch, *Going Dutch: On Tennessee Walkers, ‘Big Lick’ and Equine PTSD*, HORSE NATION, June 20, 2016, available at <https://www.horsenation.com/2016/06/20/going-dutch-on-tennessee-walkers-big-lick-and-equine-ptsd/> (“[P]ainful physical abuse (beatings, chemicals and other so-called training methods), being unable to graze in stacked shoes, limited interaction with other horses, limited exposure to the outdoors, training equipment (tail binding, tie downs, stacked shoes) and the stress of training in stacks on a young colt/filly can create post-traumatic stress disorder, or PTSD, and other mental issues.”). See also Taylor Knopf, *NC State Fair cancels Tennessee Walking Horse show after protest*, THE CHARLOTTE OBSERVER, March 13, 2015, available at <http://www.charlotteobserver.com/entertainment/article14082011.html#storylink=cpy>, (“Jeannie McGuire, founder of the All American Walking Horse Alliance, said she has rehabilitated retired big lick show horses with not only physical scars but also mental damage similar to post-traumatic stress disorder.”).

<sup>98</sup> See Paul C. Barton, *Horse Study Once Blasted by Industry Now Trumpeted*, THE TENNESSEAN (Aug. 30, 2014), available at <http://www.tennessean.com/story/news/local/2014/08/30/horse-study-blasted-industry-now->

blatantly incorrect on multiple levels. The Auburn Study did not even research or mention the use of pads at any point.<sup>99</sup> Further, the Study concluded that action devices, even when worn “according to regulation” requiring weight of six-ounces or less, did cause ill effects in the form of hair loss for the subject horses.<sup>100</sup> Notably, the Study omitted any analysis of using 6-ounce chains in conjunction with soring chemicals, which is how walking horses are typically “trained.”<sup>101</sup> This practice undoubtedly causes even worse harm than the hair loss that was reported.

c. Alternate Courses of Action

In its announcement of the proposed amendments, APHIS stated that it “welcome[s] comments from the public on these and other alternative options. Specifically, we would seek feedback on the viability of alternative approaches that would continue to rely on the horse industry organization concept, and what the governance of such an organization should be like. Additionally, we would request comments on how any proposed alternative would minimize the conflicts of interest issues raised by the 2010 Office of the Inspector General report into the horse protection program, especially as compared to the changes proposed in this document.”<sup>102</sup>

Consistent with the OIG report and the HSUS Petition, the Humane Societies believe that the only viable means to remove the conflicts of interest and soring abuse that are so prevalent in the walking horse industry are the very solutions that APHIS has proposed.<sup>103</sup> That is, to make a meaningful difference for the horses, APHIS must overhaul the current conflict-ridden, industry-run inspection scheme and eliminate the use of action devices, pads, and other soring methods on the three breeds known to be subjected to soring.

Moreover, there is tremendous public approval for these reforms.<sup>104</sup> This support includes the strong bipartisan support and public endorsements for the Prevent All Soring Tactics (PAST)

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trumpeted/14863175/; Tennessee Walking Horse Breeders and Exhibitors Association, *Facing the Future With Pride 2* available at <http://www.twhbea.com/pdf/FacingTheFutureWithPride.pdf> (“An in-depth study conducted by Auburn University found that the pads and action devices, when used according to regulation, cause no ill effects to the horses that wear them.”); see also Exh. C, *supra* note 93, at 13.

<sup>99</sup> See Auburn Study, *supra* note 19.

<sup>100</sup> See *id.* at 213.

<sup>101</sup> *Id.*

<sup>102</sup> 81 Fed. Reg. 49,128.

<sup>103</sup> See, e.g., USDA OIG Audit, *supra* note 63, at 1 (noting that the current “program for inspecting horses for soring is not adequate to ensure that these animals are not being abused”); Exh. A, *supra* note 3, at 12-24.

<sup>104</sup> The Humane Societies attach as exhibits to these comments two packets of letters from various individuals, including horse industry professionals and members of Congress. Exhibit D includes letters indicating support for the PAST Act. Exhibit E includes bipartisan congressional letters during 2014-2016 urging the strongest possible

Act, S. 1121/H.R. 3268, 114th Cong. (2015), which incorporates these key improvements.<sup>105</sup> The PAST Act would amend the HPA to statutorily abolish the failed system of industry self-policing, ban the use of devices associated with soring in the Tennessee Walking Horse, Racking Horse, and Spotted Saddle Horse breeds, and make other reforms needed to finally end the abuse of walking horses. Hundreds of groups and key individuals, including the American Horse Council and 67 other national and state horse groups, the American Veterinary Medical Association, American Association of Equine Practitioners, state veterinary groups in all 50 states, key individuals in the Tennessee Walking Horse show world, the National Sheriffs' Association, Association of Prosecuting Attorneys, and major newspapers in Kentucky and Tennessee (the states where soring is most concentrated) strongly endorse the PAST Act.<sup>106</sup>

However, despite this overwhelming public and bipartisan Congressional support – with 50 Senate cosponsors and 266 House cosponsors – Congress still has not brought the PAST Act to a vote. It is clear that APHIS has authority under the HPA to promulgate through regulations many of the changes that the PAST Act encompasses, and certainly the agency has the responsibility to address shortcomings in its regulations that have impeded the effectiveness of carrying out the HPA. The Humane Societies applaud the agency for proposing to use that authority to finally protect horses who have been suffering at the hands of abusive “trainers” for decades. Indeed, APHIS proposed these regulatory changes because it also “believes that 38 years has been more than enough time for the gaited horse industry to reform its training practices to comply with the Act.”<sup>107</sup>

For years, the Big Lick industry has pushed for an alternative course of action via legislation that was seemingly introduced in response to the PAST Act. The Big Lick industry claims that the “Horse Protection Amendments Act,” S. 1161/H.R. 4105, 114th Cong. (2015), would “institute objective, science-based inspections and reform the Tennessee Walking Horse industry,” by the “creation of a single, independent Horse Industry Organization (HIO) and its

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enforcement of the Horse Protection Act, including support of this proposed rule. Finally, Exhibit F contains various news articles, opinion-editorials, blogs, and letters to the editor that indicate the vital need and overall support for the proposed rule.

<sup>105</sup> Exh. A, *supra* note 3, at 26-27; *see also* HSUS, *Endorsements for the Prevent All Soring Tactics (PAST) Act* (Oct. 6, 2016), *available at*

<https://drive.google.com/file/d/0B70TaAxEEA8BM2Zobk52RjJpdKE/view?usp=sharing>; HSUS, *PAST Act Cosponsors in the 114th Congress* (Sept. 27, 2016), *available at*

<https://drive.google.com/file/d/0B70TaAxEEA8Bb3pKU2YzRFJyckU/view>.

<sup>106</sup> *See* HSUS, *Endorsements for the Prevent All Soring Tactics (PAST) Act*, *supra* note 105.

<sup>107</sup> 81 Fed. Reg. 49,117.



establishment of an objective, science-based inspection protocol.”<sup>108</sup> However, S. 1161/H.R. 4105 contains none of the important reforms needed to crack down on soring; rather, it sets back current enforcement efforts by weakening the agency’s authority and surrendering even more power and influence to the perpetrators.

The industry’s alternate legislation – which they may suggest can also be accomplished through regulatory amendments – provides no solution at all. The industry’s proposed system would simply perpetuate the current corruption and conflicts of interest riddled throughout the industry’s self-regulation by allowing a universal, industry-run HIO to manage all inspections. It would eradicate the existence of sound HIOs that have zero tolerance for soring at their events, and would provide those organizations nominal, if any, influence in the new regime. Instead, the legislation would grant oversight to agriculture commissioners in Kentucky and Tennessee – two states where soring is both prevalent and largely unabated by officials – who would appoint HIO directors from within the walking horse industry. And given the conflict of interest issues inherent in the industry, there is every reason to be concerned that those selected would be Big Lick proponents, rather than individuals determined to end soring.

The Big Lick industry claims its legislation will strengthen inspections by requiring objective, science-based, peer-reviewed techniques. However, APHIS already uses methods that meet these criteria (*i.e.*, thermographic examinations; foreign substance swabbing; digital x-rays; and blood testing) as well as other procedures widely accepted by the veterinary community such as examination for Scar Rule violations and digital palpation.

Finally, this legislation does nothing to address the detection and eradication of the pads, chains, and other devices that are directly associated with soring. It is clear that the Big Lick’s proposed alternative would merely serve to codify the status quo, or make the current situation even worse, while preventing meaningful, effective reform.

#### d. Responding to the Big Lick Faction’s Opposition

The Big Lick industry has voiced an unsubstantiated fear that the proposed regulatory changes would cause their walking horses to lose all value. The industry is asserting that, because the trainers can no longer find a purpose for the horses if they cannot use stacks and action devices, these “worthless horses” would potentially starve or end up in the slaughter

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<sup>108</sup> Press Release, Tennessee Walking Horse Breeders’ and Exhibitors’ Association, *TWHBEA Endorses Blackburn Legislation* (Feb. 27, 2014), <http://www.twhbea.com/News%202012/14TWHBEAAppreciatesBlackburn.php>.

pipeline. However, sored horses are the ones ending up sent to slaughter. In 2014, HSUS rescued Dutch, a scarred Tennessee Walking Horse, from the slaughter pipeline.<sup>109</sup> Dutch was dropped off at a livestock auction with tall, stacked performance packages still attached to his hooves. This horse is just one “example of what happens to the horses in this industry. When they're no longer able to get through inspection because the scarring has gotten so bad, the owners dump them.”<sup>110</sup> By protecting walking horses from soring abuse – and its distorted, fleeting attribution of worth – more effective HPA enforcement would prevent such demise for these horses.

Numerous flat-shod classes and sound HIO exhibitions have proven time and again that action devices and pads are not a prerequisite to a walking horse's potential to compete.<sup>111</sup> Moreover, if the Big Lick faction of the industry has only been able to derive value from its horses through abuse – much of it unlawful under the HPA and current – then they have brought this eventuality upon themselves. An economy based on criminal activity should not be allowed to persist; it is wrong and unhealthy for both the walking horse and the industry.<sup>112</sup>

Finally, it is the act of soring, not attempted reform, that has caused the perceived value of walking horses to plummet and impacted the industry.<sup>113</sup> Soring has caused there to be a “negative stigma” associated with the walking horse as a breed, and “has caused the value of yearling colts to drop from \$20,000 or more to \$300-\$500 in just a few short years.”<sup>114</sup> Walking horse breeding records reflect that in 2012, less than 5% of mares were bred compared to

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<sup>109</sup> See Heidi Hall, Tennessee Walking Horse 'Dutch' Saved From Slaughter, THE TENNESSEAN (Aug. 3, 2014), available at <http://www.tennessean.com/story/news/local/2014/08/03/tennessee-walking-horse-dutch-saved-slaughter/13557647/>.

<sup>110</sup> *Id.* (quoting Keith Dane, HSUS).

<sup>111</sup> See Holly Meyer, *Walking Horse Group Successful with Flat-Shod Rules*, THE TENNESSEAN, (July 18, 2015), available at <http://www.tennessean.com/story/news/2015/07/18/walking-horse-group-successful-flat-shod-rules/30357289/> (“We saw that we couldn't be profitable with performance padded shows, but we had a great niche in the flat-shod industry. . . If the PAST Act passes and the pads and chains were gone, the industry and the Tennessee walking horse breed will certainly survive.”).

<sup>112</sup> Even if the industry could substantiate their claims of economic hardship as a result of stiffer enforcement of the HPA, “[t]he general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases.” See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Comty. Health Serv. of Crawford Cty, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

<sup>113</sup> HSUS created a pamphlet indicating the impact that soring has had on the industry over time, which is attached hereto as Exhibit G.

<sup>114</sup> See *Concerning the Prevent All Soring Act: Hearing on H.R. 1518 before the Subcomm. on Commerce, Manufacturing, and Trade*, 113th Cong., at 3 (2013) (testimony of Marty Irby, Former International Director and President of the Tennessee Walking Horse Breeders' and Exhibitors' Association), available at <http://docs.house.gov/meetings/IF/IF17/20131113/101469/HHRG-113-IF17-Wstate-IrbyM-20131113.pdf>.

2004.<sup>115</sup> Indeed, pursuant to the agency’s expert elicitation for an economic analysis of the industry in 2012, “experts agreed that the value of show horses has decreased over the past 3 to 5 years. One expert indicated that ‘a decade ago, the minimum value of a horse that could compete and win a ribbon was valued in the \$12,000 to \$15,000 price range,’ further stating that ‘the [value of the] horses in this market range have decreased significantly to the point that the most common value horse is now marketable in the value range of a minimum value horse a decade ago.’”<sup>116</sup>

Soring has caused clear damage to the walking horse industry. The membership base of the Tennessee Walking Horse Breeders’ and Exhibitors’ Association (TWHBEA) – which boasts that it is “the oldest and most prestigious organization devoted to the promotion of the breed”<sup>117</sup> – now hovers at approximately 6,500 individuals; about a decade ago, it totaled over 20,000 members.<sup>118</sup> In 2009, the World Equestrian Games refunded TWHBEA’s \$20,000 deposit and denied it exhibition space due to “some controversy surrounding that breed” due to soring.<sup>119</sup> And in 2013, Tracy Boyd, the president of TWHBEA at the time, called for reform in response to the public outcry over soring and its impact, stating “TWHBEA has lost members in droves, and the brutal emails I have received tell me why. It is our reputation. It is soring. It is our image.”<sup>120</sup>

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<sup>115</sup> See *id.*

<sup>116</sup> REPORT, PREPARED FOR USDA/APHIS BY RTI INTERNATIONAL, EXPERT ELICITATION IN SUPPORT OF THE ECONOMIC ANALYSIS OF THE TENNESSEE WALKING HORSE AND RACKING HORSE INDUSTRY 3-9 (2012), available at [https://www.aphis.usda.gov/animal\\_welfare/hp/downloads/reports/APHIS%20TN%20Walking%20and%20Racking%20Horse%20EE%20final%20report.pdf](https://www.aphis.usda.gov/animal_welfare/hp/downloads/reports/APHIS%20TN%20Walking%20and%20Racking%20Horse%20EE%20final%20report.pdf).

<sup>117</sup> See TWHBEA, *About the TWHBEA*, available at <http://www.twhbea.com/association/about.php> (last visited Oct. 24, 2016).

<sup>118</sup> See Press Release, Tennessee Walking Horse Breeders’ and Exhibitors’ Association, *Tennessee Walking Horse Breeders’ and Exhibitors’ Association Improves* (March 3, 2016), available at <http://www.twhbea.com/News%202015-2016/16Update.php>; See *Concerning the Prevent All Soring Act: Hearing on H.R. 1518 before the Subcomm. on Commerce, Manufacturing, and Trade*, 113th Cong., at 3 (2013) (testimony of Marty Irby, Former International Director and President of the Tennessee Walking Horse Breeders’ and Exhibitors’ Association), *supra* note 114.

<sup>119</sup> See Janet Patton, *WEG Picks Natural Walking Horses for Exhibits*, LEXINGTON HERALD LEADER (Oct. 30, 2009), available at <http://www.kentucky.com/sports/horses/article44012637.html> (“A controversial Tennessee Walking Horse group will not be allowed to participate in the Equine Village at the Alltech FEI World Equestrian Games after all. Instead, the Games will highlight the National Walking Horse Association, which prohibits devices and practices that exaggerate the horse’s natural gait.”).

<sup>120</sup> HORSETALK, *Walking Horse Leader Declares: It is Time for Change* (May 29, 2013), available at <http://www.horsetalk.co.nz/2013/05/29/walking-horse-leader-declares-time-for-change/#axzz4KLyqZh8B>.

Former insiders in the Big Lick industry are calling for reform. Doctor John C. Haffner, a veterinarian who previously worked for the Big Lick faction, has voiced the need to move away from the Big Lick to save the walking horse industry:

The difference is that the flat shod horse has a natural gait which is not of necessity dependent on soring. There can be flat shod shows without soring. I think this is where the future lies for the walking horse industry, and the sooner that the big lick dies, the sooner the business can get on the road to recovery.<sup>121</sup>

And Bill Harlin of Harlinsdale Farm in Tennessee, a training barn known for two-time world grand champion walking horse Midnight Sun, has similarly stated, “[p]ads and chains are killing the industry. And I don’t know how long we can wait for proper enforcement before the industry dies . . . The time has come – in fact, it’s long overdue – for these practices to end . . . We’re now in a fight for survival of the breed.”<sup>122</sup> Mr. Harlin’s son, who was raised in the walking horse industry and has served as a Director, Executive Director, and Senior Vice President of the Executive Committee of TWHBEA, now denounces soring and has urged Congress “to take the right and humane high road to securing a better future for the equine industry” by passing legislation like the PAST Act so that “this horrible nightmare will eventually come to an end and the industry will be reborn.”<sup>123</sup>

Indeed, soring “infects not only major venues like The Celebration but also the one night horse shows that are part of the culture in these breeds – and which has caused a decades-long decline in the attendance and participation at horse shows . . .”<sup>124</sup> The North Carolina Department of Agriculture and Consumer Services responded to public outcry over soring abuse by completely canceling its entire Tennessee Walking Horse exhibition, including both performance package and flat-shod classes.<sup>125</sup> And over 103,000 North Carolinians urged officials to take

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<sup>121</sup> Letter from Dr. John C. Haffner, D.V.M., to Congressman Ed Whitfield (Nov. 25, 2013), in Exh. D, *supra* note 104, at 3-5.

<sup>122</sup> Sue McClure, *Bill Harlin Worries about Future of Walking Horse Breed*, THE TENNESSEAN (Jan. 29, 2014), available at <http://www.tennessean.com/story/news/local/williamson/2014/01/30/bill-harlin-worries-about-future-of-walking-horse-breed/4981751/>.

<sup>123</sup> See Exh. D, *supra* note 104, at 6-7.

<sup>124</sup> See *Concerning the Prevent All Soring Act: Hearing on H.R. 1518 before the Subcomm. on Commerce, Manufacturing, and Trade, 113th Cong.*, at 1-2 (2013) (testimony of Teresa Bippen, President, Friends of Sound Horses), available at <http://docs.house.gov/meetings/IF/IF17/20131113/101469/HHRG-113-IF17-Wstate-BippenT-20131113.pdf>.

<sup>125</sup> See Pat Raia, *North Carolina State Fair Drops Walking Horse Classes*, THE HORSE (March 12, 2015), available at <http://www.thehorse.com/articles/35465/north-carolina-state-fair-drops-walking-horse-classes>.

similar action for the State's 2016 Championship Walking Horse Show.<sup>126</sup> There was also overwhelming opposition to hosting the Tennessee Walking Horse Trainers Show at an arena in Morgan County, Alabama given the prevalence of its past soring violations.<sup>127</sup> Therefore, it is clear that any reform that reduces the amount of soring occurring in the industry should help, rather than hurt, the industry's approval ratings and the value of the horses.

#### **IV. Conclusion**

The Humane Societies commend APHIS for taking such important steps toward reducing soring in a meaningful way by proposing to overhaul the failed, industry-run inspection system and eliminate the use of action devices and other tools and techniques that are scientifically proven to cause unnecessary pain and suffering to horses. As explained in the HSUS Petition, these reforms are the keys to significantly curtailing the decades-long abuse that is rampant in the walking horse industry, and the urgency to implement them is paramount. Indeed, as one veterinarian who previously worked in the Big Lick industry has observed, “[t]he fact is the big lick can only be accomplished by soring. When one soring technique becomes detectable, another one is developed. The big lick is a learned response to pain and if horses have not been sored, they do not learn it.”<sup>128</sup> APHIS's authority to undertake these important reforms is crystal clear. Therefore, we urge the agency to issue its final rule as quickly as possible.

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<sup>126</sup> Petition, CHANGE.ORG, *Cancel and Boycott “Big Lick” Tennessee Walking Classes - North Carolina Championship Show*, available at <https://www.change.org/p/mr-matt-buchanan-cancel-and-boycott-big-lick-tennessee-walking-classes-north-carolina-championship-show> (last visited Oct. 24, 2016).

<sup>127</sup> See Poll, *Should Celebration Arena have hosted the Tennessee Walking Horse Trainers Show given its previous horse soring violations?*, THE DECATUR DAILY (Apr. 3, 2015), available at [http://www.decaturdaily.com/should-celebration-arena-have-hosted-the-tennessee-walking-horse-trainers/poll\\_e18be182-da45-11e4-a954-abd011f62025.html](http://www.decaturdaily.com/should-celebration-arena-have-hosted-the-tennessee-walking-horse-trainers/poll_e18be182-da45-11e4-a954-abd011f62025.html); see also Leah Cayson, *Controversy follows Walking Horse Trainers Show to Morgan County*, THE DECATUR DAILY (Apr. 3, 2015), available at [http://www.decaturdaily.com/news/controversy-follows-walking-horse-trainers-show-to-morgan-county/article\\_dbaf82ff-1e9c-52ea-b83c-5b733c6ede98.html](http://www.decaturdaily.com/news/controversy-follows-walking-horse-trainers-show-to-morgan-county/article_dbaf82ff-1e9c-52ea-b83c-5b733c6ede98.html) (“When I saw the show was going to the arena, I was nauseated . . . I know that’s a show that always has a lot of soring violations, and it’s coming to my county.”).

<sup>128</sup> Letter from Dr. John C. Haffner, D.V.M., to Congressman Ed Whitfield, in Exh. D, *supra* note 104, at 2.

Respectfully Submitted,

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