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Via Electronic Mail

Richard Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
OIRA-submissions@omb.eop.gov

Re: RIN 0579-AE70, Revision to Horse Protection Act Regulations

Dear Administrator Revesz:

I am writing to inform OMB of a recently filed lawsuit raising legal challenges that bear upon the validity of the above-referenced rule, which is currently under review at OMB. I also write to inform OMB of a recent announcement from the U.S. Department of Agriculture (“USDA”) significantly changing the meaning and scope of the Scar Rule, 9 C.F.R. § 11.3, a change that substantively affects the legal rights of horse trainers and owners but that was made without notice and comment. For the reasons discussed below, that sudden change in the scope of the Scar Rule confirms that the rule is so vague and malleable that it can be used to disqualify a horse on almost any basis and necessarily produces arbitrary results. The USDA should not be permitted to retain the Scar Rule without significant revisions that address these concerns.

Wright et al. v. Vilsack et al., No. 2:24-cv-2156 (W.D. Tenn.)

On March 11, 2024, *Wright et al. v. Vilsack et al.*, No. 2:24-cv-2156, was filed in the Western District of Tennessee. See Attachment A. The lawsuit arises in the context of several specific disqualification decisions and challenges existing Horse Protection Act regulations and policies being enforced by USDA. Several of the challenges to existing regulations and policies are equally applicable to the rule under review, assuming the language of that rule remains unchanged from USDA’s Notice of Proposed Rulemaking. Horse Protection, 88 Fed. Reg. 56924, 56935 (Aug. 21, 2023) (“Proposed Rule”).

First, the lawsuit asserts that the USDA’s inspection regime under the HPA violates the Due Process Clause because it fails to provide horse trainers and owners any opportunity to secure review of a decision disqualifying a horse. As the complaint in the *Wright* case explains, USDA’s existing rules provide no hearing or other mechanism—formal or informal—by which a trainer or owner whose horse has been deemed sore by USDA can plead his case or argue why a USDA inspector’s decision was wrong. The *Wright* plaintiffs note that, nearly a decade ago, one federal court already found that the USDA’s failure to provide any opportunity for review is unconstitutional. See *McSwain v. Vilsack*, No. 1:16-CV-01234-RWS, 2016 WL 4150036, at *3 (N.D. Ga. May 25, 2016).

In the Proposed Rule, USDA also acknowledged the due process problem under the existing regulations. It explained that “in light of the due process concerns raised in comments on the 2016 proposed rule, we seek additional public comment on potential ways to resolve disputes arising from a determination of soring following inspection, including possible options for resolving such disputes before a show takes place.” Horse Protection, 88 Fed. Reg. 56924, 56935 (Aug. 21, 2023).

To the extent the new rule maintains the status quo or otherwise fails to provide any mechanism for pre-show review of a disqualification decision, it will be unlawful for the reasons identified in the *Wright* case and the *McSwain* case. Thus, to the extent the new rule fails to address this problem, we urge OMB to send it back to USDA for further consideration.

Second, the lawsuit challenges the existing Scar Rule, a regulation that sets forth certain conditions which, if found on a horse following a visual inspection and palpation of the horse’s legs, requires that the horse be deemed sore. *See* 9 C.F.R. § 11.3. As the *Wright* complaint explains, the criteria listed in the Scar Rule that require a finding that a horse is “sore” bear no relation to the statutory definition of sore in the Horse Protection Act, 15 U.S.C. § 1821(3). *See* Compl. ¶¶ 58-61. The complaint also explains that the National Academy of Sciences, Engineering, and Medicine, which was commissioned by the USDA to analyze whether its regulations were based on sound scientific principles, found that the current Scar Rule is unsupported by science and also unenforceable as written, in part because it asks inspectors to look for things that actually cannot be seen with the naked eye. *Id.* ¶¶ 62-66. It thus effectively permits inspectors based on their subjective judgment to treat almost anything as a violation and necessarily produces arbitrary results.

The revisions to the Scar Rule contained in the Proposed Rule fail to fix these problems. Whereas the existing rule provides specific criteria that are at odds with the Horse Protection Act, the language in the Proposed Rule removes any actual guidance and instead leaves it to inspectors’ subjective judgment to disqualify a horse if there are “dermatologic conditions that are indicative of soring.” Proposed Rule § 11.6(b)(22). Such “conditions” are not well defined and are left to the individual inspector to decide what is or is not a sore horse. Although the Proposed Rule provided a non-exhaustive list of examples—such as “irritation,” “moisture,” “redness,” or “loss of hair”—the Proposed Rule ultimately leaves it entirely to an inspector’s subjective judgment to decide what “dermatologic conditions” indicate soring. The Proposed Rule thus made the Scar Rule *more* subjective—and thus arbitrary—not less. USDA also fails to heed the National Academy of Science’s exhortation to ensure that the rule is supported by science. The USDA failed to conduct any studies (as the National Academy of Sciences recommended) to determine what visually observable skin conditions would provide reliable evidence of soring as defined in the Act. The Proposed Rule, which effectively expands the Scar Rule, has even less grounding in science than the existing rule.

A ruling for the Plaintiffs in the *Wright* case will highlight these flaws in the proposed revisions to the Scar Rule. Accordingly, we also urge OMB to send the rule back to USDA to ensure that any revisions to the Scar Rule are supported by science and consistent with the statutory definition of “sore” in the Horse Protection Act.

These points, as well as others, were raised in the comments submitted by TWHNCA in response to the Proposed Rule. I also point OMB to those comments, which highlight a number of additional problems set out in the Proposed Rule that, if unaddressed, create significant risk that the final rule will be struck down. Those Comments can be accessed at Regulations.gov under Comment ID APHIS-2022-0004-8788.

March 15, 2024 USDA Changes in Horse Protection Enforcement Policy

Recent actions by the USDA also bear upon OMB's consideration of the rule. On March 15, 2024, the Assistant Director for USDA's Animal and Plant Health Inspection Service e-mailed the heads of Horse Industry Organizations to alert them to a number of changes USDA inspectors would adopt at horse shows in the 2024 show year. *See* Attachment B. These changes were shared only hours before a scheduled horse show and were made effective immediately.

Of particular relevance here, USDA announced a significant change in the meaning of the Scar Rule. USDA explained that it "will no longer require hair loss associated with non-compliant tissue (i.e., non-uniformly thickened epithelial tissue or evidence of inflammation) in order to disqualify a horse." That significant change affects owners' and trainers substantive rights, and it was announced not only without notice and comment rulemaking, but without any advance notice at all. Before March 15, a horse that did not exhibit hair loss could not be found sore under the Scar Rule, because the USDA recognized that hair does not grow on a scar. As of March 15, however, the very same horse that would have passed inspection the day before could be deemed sore and disqualified. This on-the-fly change by USDA demonstrates that the vagueness of the Scar Rule permits USDA to change its requirements on a whim and without any notice to trainers and owners. Their agency's ability to make such unexplained changes is made easier by the fact that the existing Scar Rule's requirements are untethered to the statutory definition of sore.

As noted above, the language in the new Scar Rule contemplated in the Proposed Rule is even more vague than that in the existing Scar Rule. Particularly where USDA has shown a willingness to alter the rules without any notice, OMB should provide extra scrutiny to the rule under review to ensure that any rule adopted by the USDA uses objective, reproducible, and scientifically based criteria for disqualifying horses, not vague and subjective standards that permit arbitrary enforcement.

Sincerely,



Patrick F. Philbin

Enclosures