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Dr Gipson:

Pursuant to your discussion with the HIO's on the November 9th conference call set forth below please find SHOW's comments to the OIG Audit. Recently SHOW released its Response to the HSUS Petition and therefore I have not set forth all of the legal or other arguments found in that Response and which would be applicable here as well. But we would hope the USDA would take notice of those arguments, as well as the following, as part of the review of the OIG Audit recommendations and prior to any possible Rulemaking effort it might pursue.

Initially there are some interesting points raised in the OIG audit but just as important there are a lot of other key pieces of information that are not mentioned or even discussed. The OIG never mentions any industry complaints against the VMO's and the possible implications or reasoning for those. It appears that no interviews were ever conducted with the HIOs themselves as to any possible explanation for the alleged inconsistencies of tickets when the APHIS representatives were present versus when they were not.

Prior to establishing SHOW, and as part of its strategy to provide a DQP system where there would be minimal inconsistencies and conflicts, there were many conversations with Trainers, DQPs and other HIOs as to the underlying cause of the inconsistencies. It was very clear in those conversations that the threat of a LOW (to the DQP) or a Federal ticket (to the Trainer) were the key reason for some of the inconsistencies for tickets when APHIS was present versus when they were not. The USDA also attends the more public, larger shows where there is heightened competition. As we all know in any competitive sport there will always be more people pushing that competitive line and therefore it is logical for there to be more tickets written at those shows. In addition the subjective nature of the scar and sensitivity determinations of the inspections have historically been the subject of a lot of conversations within the industry and yet no mention is made of that as a possible reason for any inconsistencies. The 2009 Celebration is referenced as an example of a show that according to APHIS officials was "plagued" by inconsistent inspections, however no mention is made of the number of post show scar tickets the USDA issued for the same horses they themselves allowed to enter the show ring to begin with.

Although slightly mentioned, but only as a burdensome process, there is no analysis as to the number of tickets written by the VMO's, or information taken, and the woefully inadequate prosecutions of those same tickets. There is little mention of the unaffiliated shows in the industry, although this has been a subject of discussion for at least 15+ years. Or any discussion why this entire aspect of the show industry has been allowed to grow and thrive without any initiatives or actions by APHIS (estimated that there were over 450 in the 2010 season alone). No rationale

why utilizing veterinarians will solve the problem when it is clear that those same veterinarians will be deemed to be agents, subcontractors or employees of the USDA and therefore not allowed to issue penalties, but merely collect information for subsequent prosecution pursuant to the clear language of the HPA. And of course the same threat of losing their accreditation, similar to a LOW, would also have the possibility of the same inconsistencies.

Before discussing specifically the APHIS response to the OIG audit we thought it would help to identify some concerns about the position that the USDA has appeared to take throughout the year and which now seems to be culminating in the USDA stating that the HIOs need to accept the USDA position on the “mandatory penalties”, Points of Emphasis and OIG Audit findings or be decertified and litigate.

In the initial email, on March 9th regarding the 2010 Points of Emphasis (POE) there were numerous concerns and questions raised by the HIOs. For instance, for the first time in the history of the HPA, the USDA unilaterally, without any communication with the Industry, put aside 30+ years of precedence and declared that “HIOs must dismiss a horse found in violation of HPA from participating in any remaining portion of horse show, horse exhibition, horse sale or auction (rather than just the individual class).” While it appears that the USDA believes they have this authority it is also clear that the OIG Audit disagrees. On page 22 of the Audit it states “Regulations do not prohibit a horse that was cited for a violation in one class from returning to participate in later classes, which would entail another inspection since each horse is inspected for each class it is entered into.” Given the historical precedence it would have been appreciated if the USDA would have had some conversation with the industry especially when it appears that there is some question by the OIG as to the authority for this mandate.

The POE attempts to put the burden on the HIO for several items that are clearly the show manager’s responsibility and yet the USDA now states that the POE must be accepted or the HIO will be subject to decertification. In addition the POE attempts, for the first time, to require the HIO’s to enforce the HPA under its private association rules without any requirement to go through the due process required in the HPA. Specifically under the **Inspection Findings** it states “The USDA representative will advise the DQP of his/her findings and the DQP can recheck the horse **and/or apply the penalty through the HIO.** (emphasis added)”.

The POE also attempts to circumvent the Regulations regarding the issuance of LOWs where it states “Any licensed DQP who violates the rules, regulations, by-laws, or standards of conduct set forth by their HIO; who fails to follow the inspection procedures set forth in the Horse Protection regulations or; who otherwise fail to carry out his duties and responsibilities in a less than satisfactory manner, shall be subject to a letter of warning, or cancellation of their DQP licenses by their HIO or USDA.” While the Secretary has the authority to cancel a license of a DQP it is only “after notice and opportunity for a hearing”, something which the POE seems to have left out.

Under the **USDA Disqualification and HIO Suspensions** section it also attempts to dictate to the HIO’s limitations on HIO suspended individuals – the Regulation only goes to HPA violators not HIO rule violators. And suggests that the HIOs should honor suspension and disqualification lists from other HIOs, all of which are private associations. At least on this last point it was not mandated at that time. And of course the POE attempted to require the Penalty Protocol while retaining primary jurisdiction to pursue cases when it deems appropriate. The discussion around the “mandatory penalties” is covered in its entirety in the SHOW Response to the HSUS Petition and in another letter I sent you, but we would also like to point out that the POE also stated, regarding appeals of an HIO ticket that;

“Violators will have the right to appeal a HIO ticket.

USDA will closely monitor the HIO appeal process.

By March 1 of the 2010 show season, HIOs must submit a description of their appeal process.

HIOs must submit to USDA their decisions for ticket appeals within 30 days of the appeal decision completion.

Violators will need to have the appeal process completed or begin observing the imposed penalty within 60 days of the date of the violation.”

The above will be important in the final analysis of the OIG audit but is pointed out here as it was first stated in the POE.

Subsequent to the initial POE and after discussions with several HIO's the USDA clarified several elements of the POE, although not all of them. In an email, dated March 17th, to the HIOs, Dr. Cezar stated that "The 2010 Penalty Protocol established by USDA is a **recommended** penalty structure. HIOs can implement their own penalty protocol; however, if the HIO implements USDA's recommended protocol penalty protocol or their own penalty protocol, to the extent that it effectuates the purpose of the Act and Regulation, USDA will not initiate a federal case against the violator." She also stated "the 2009 and 2010 Points of Emphasis are mandatory for all certified HIOs. HIO's that fail to implement the 2009 and 2010 Points of Emphasis and enforce the HPA and Regulation will be subjected to action as outlined in the HPA and Regulations."

As an interesting point and coincidence, and not to suggest that there is any connection between the APHIS position espoused in the initial POE letter, the OIG Audit recommendations, and the latest USDA position on "mandatory penalties", but the HSUS Petition for Rulemaking filed on August 4th, appears to request similar if not identical items as the USDA is now requiring. Specifically they are requesting that the USDA implement rulemaking and asking for regulatory changes to;

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

Subsequent to the Petition and on August 12th, you issued a letter to the HIOs stating that the "recommended penalty protocol in 2010 will now be mandatory in 2011" and must be "added to all HIO Rulebooks, which will now require approval prior to the 2011 season." And further stating that "Suspensions and disqualifications issued by USDA or an HIO are currently to be enforced by all HIOs and show mgt." Much of SHOWs concerns regarding the "mandatory penalties" have been expressed in its Response but again it is interesting that despite Regulations clearly to the contrary, APHIS now is attempting to dictate what must be included in a private associations Rulebook, which under the Regulations must only be provided by March 1st, with no language allowing the USDA to approve or disapprove. And pursuant to Section 11.41 of the Regulations, the rulebook is requested by the USDA for "reporting requirements affecting horse industry organizations or associations" for the purpose of receiving information about disciplinary actions "to evaluate and analyze horse industry progress in effectuating self regulatory compliance with the Act and regulations." The Regulations never state or grant APHIS the right or ability to approve a private association's rulebook, hearing process, penalties or require any elements or sections be included.

On October 15th another letter is issued to the HIOs requiring the HIOs to submit their rulebook and the accompanying penalty protocol, hearing process and DQP inspection process consistent with USDA training and the Points of Emphasis. And again very important for the final discussion on the OIG audit, APHIS states that "The hearing process will be evaluated to verify that the process supports timely and judicious adjudication of violations of the Horse Protection Act and regulations."

And now to the OIG Audit. As discussed above the OIG Audit raises some interesting points. However under its own admission it only attended 4 actual shows and obtained APHIS

information on 31 others. And never talked to the HIOs themselves. The audit appears to cover the years 2005-2008 so it is recommending dramatic changes that will require rulemaking as a result of reviewing .002% of show exhibitions and only a slightly higher .0175% when adding the APHIS information. And of course it does not include the approximately 400-500 unaffiliated shows every year which would make the statistical basis for the Recommendations even more shocking.

A more significant problem with the OIG Audit is the underlying premise stated on page 13 of the Audit that "If a DQP finds evidence that a Horse Protection Act violation has occurred, he or she is responsible for issuing a ticket to the individual or individuals responsible for committing the violation." Citing the Regulations at 11.7(d)(1-3) and 11.20(b)(3). The only thing required by a DQP in the cited Regulations is to inspect, detect/diagnose if a horse is sore, inform show management, and to provide information to the Department. The only reference to a DQP issuing tickets or penalties is in HPR Section 11.21(d) where it states

"The certified DQP organization shall assess appropriate penalties for violations, as set forth in the rule book of the certified program under which the DQP is licensed, **or** as set forth by the Department, and shall report all violations, in accordance with Sec. 11.20(b)(3) of this part." (Emphasis added). Webster's Dictionary defines "or" as a "coordinating conjunction introducing... an alternative". Not a requirement and therefore leaving any penalty to the HIOs rulebook. The clear reading of this Section is to require the HIO to assess the penalty as set forth in its Rulebook. It does not require the HIO to issue an HPA penalty as prescribed by the USDA which makes logical and legal sense, since this could only be done after a hearing and conviction pursuant to the clear language of the actual law itself - the HPA. In addition it is also abundantly clear that SHOW has assessed "appropriate" penalties for all of its Rulebook violations. And if the USDA is relying on this particular sentence or word it also needs to recognize the clear language of the law in Section 6, requiring "upon conviction thereof" and where it specifically states; "**No penalty shall be assessed** unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation." (Emphasis added). Again the USDA can not do through rulemaking what it can not do under the Law.

The OIG Audit then goes on to recommend that "APHIS Should Strengthen its Direct Control Over the Inspection Process". The OIG Audit also says that by strengthening its Direct Control over the DQP's and inspection process "At present, there is no clear protocol concerning when APHIS might negotiate a penalty, so the agency is forwarding many cases for investigation that might be settled without expending further resources on investigating and prosecuting the violator. **Consistently using this authority would also result in a more immediate penalty being issued to many individuals whom APHIS employees have found to be in violation of the Horse Protection Act.** The Animal Care division has started to work with the Investigative and Enforcement Services staff to develop a protocol to better use this authority."

The clear intention of the OIG Audit and APHIS is to then use the HIOs inspection process, DQP's and "mandatory penalties" to provide a penalty to individuals "**whom APHIS employees have found to be in violation of the Horse Protection Act**". And to do so without utilizing due process and the requirements for a hearing in front of the Secretary which is clearly required in the HPA as stated above.

In response to the OIG Audit APHIS' responses are as follows;

1. The Agency will license DQPs.
2. Horse Industry Organizations (HIOs) would continue to be responsible for hiring and compensating the DQPs to inspect horse shows, but would have to use APHIS-licensed DQPs.
3. The Agency will be better able to ensure that HIOs assess appropriate penalties.
4. Since APHIS will have direct responsibility for the licensing of DQPs, APHIS will be able to hold DQPs accountable for issuing violation findings.
5. The HIOs are responsible for enforcing HPA penalties, with APHIS overseeing the process.

6. APHIS will submit a work plan to propose a regulatory change to decertify a HIO that fails to enforce the HPA and penalties set forth by APHIS.
7. Within the proposed regulations for a new DQP licensing program, we will incorporate APHIS' authority to directly discipline DQPs, including DQPs who are accredited veterinarians. (Despite HPA limitation on enforcement left to the Secretary – added comment).
8. APHIS will develop a work plan to add enforcement of the Horse Protection Act under duties for accredited veterinarians by January 1, 2011.
9. APHIS will reiterate to the HIOs in 2011 that all parties responsible for the horse (trainer, owner, rider, transporter, custodian, etc) will be penalized under the APHIS penalty protocol. (Despite clear case law to the contrary where owners and others must “knowingly allow” before being penalized– added comment.)
10. APHIS agrees with the OIG recommendation to “develop and implement protocols to more consistently negotiate penalties with individuals who are found to be in violation of the HPA.”
11. APHIS will closely monitor the appeal hearing process conducted by HIOs by attending, unannounced, randomly selected appeal hearings. It requires HIOs to submit written justification of a dismissed violation.
12. APHIS will evaluate and verify that the HIO Hearing process supports timely and judicious adjudication of violations of the Horse Protection Act and regulations.
13. APHIS sent a memo to all HIO coordinators, reminding them that HIO suspensions and USDA disqualifications are to be enforced by all HIOs and show managers.
14. APHIS will establish and implement procedures to decertify a HIO that has been found to allow horses to continue to exhibit during a show. The criteria and procedures will include a provision to immediately suspend the operation of a HIO. APHIS will propose a regulatory change to suspend the operations of a HIO that fails to enforce the HPA and requirements set forth by APHIS. (Clearly show management responsibility – added comment)

To be clear APHIS wants to license the DQP's. It wants to limit the DQP pool to only APHIS licensed DQPs. It wants to require the DQPs are trained by it. It wants to hold the DQPs accountable for issuing violations APHIS finds. It wants to have the authority to terminate them if they do not issue the violations APHIS finds. It wants to strengthen its control over the inspection process. It wants to dictate to the HIOs the penalties the DQPs must assess. It wants to decertify an HIO that “fails to enforce the HPA and **penalties set forth by APHIS.**” It wants to approve and oversee the hearing process “**to verify that the process supports timely and judicious adjudication of violations of the Horse Protection Act and regulations.**” And they want to do all the above and have stated that any HIO not complying will be decertified. Or it can litigate!

Under common employment law, and as articulated by numerous state and federal cases, to the extent that someone controls an individual's licensing, training, process for doing their work, ability to terminate, and the end result of their work, they are either employees, agents or subcontractors of that person. Simply having someone else pay that person is not sufficient to overcome the de facto elements of employer/employee relationship. As such the DQPs, if APHIS is successful in its rulemaking, (and eventually veterinarians under the proposal by the OIG Audit and APHIS), will be treated just like a VMO or even Dr. Gipson; they can not issue a penalty but must take information and pass along to the Secretary to determine, through due process and upon conviction, what if any penalty is issued.

And to the extent that the USDA then determines or attempts to use these disguised employees, agents or subcontractors to do through rulemaking what it can't do directly, issue an HPA suspension or penalty, without the due process required in the HPA, SHOW believes they are violating Federal law. Despite clear language in the HPA that states “No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation.”

The only item left for the HIOs will be to assign DQPs. Period. It is clear that APHIS, if it continues with its responses to the OIG recommendations and pursues everything through Rulemaking, wants to control the HIOs, DQPs, inspections, penalties, process, appeals, outcomes, and all

facets of the HIOs. One might speculate that there has been a clear strategy by the USDA internally and or in concert with others to develop a record to circumvent the HPA and Regulations and take over the HIOs. Whether actually or through some form of threat of decertification, Audit findings, HSUS Petition suggestions or calculated statements. Unfortunately it is pure form over substance. To the extent the USDA controls all aspects of the HIO process ultimately it fails because the HIO entities become government agents, subcontractors or employees and therefore any DQP/HIO tickets will be required to be heard by the Secretary after notice or prosecuted by the Office of General Counsel or violate the Constitutional due process required in the Horse Protection Act itself.

We hope that is not the intent of the USDA or a result of the OIG Audit findings. And we also hope that the USDA will carefully review all the record of its statements, comments and findings before pursuing any Rulemaking it may be considering. SHOW and its representatives would be happy to discuss any of the above at your convenience.

Respectfully submitted,

Dr. Stephen L. Mullins
President