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Michael C. Gregoire
Acting Administrator Animal and Plant Health Inspection Service (“APHIS”)
Docket No. APHIS-2017-0062
Regulatory Analysis and Development
PPD, APHIS, Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238

Re: Docket No. APHIS-2017-0062

Dear Mr. Gregoire:

The Animal Law Committee of the New York City Bar Association writes in response to your August 24, 2017 request for public comment on potential revisions to licensing requirements under regulations of the Animal Welfare Act (“AWA”). We urge the United States Department of Agriculture (“USDA”) to amend its rules to (i) expressly allow it to deny renewal where the applicant has a history of substantial or repeat violations of Federal, state, or local laws or regulations pertaining to animals or issue a probationary license, which would be subject to revocation upon a violation during the probationary period, where the applicant has a history of repeat violations under the AWA regulations of a relatively less serious nature (such as record keeping violations) and (ii) require applicants seeking license renewal to make a showing of compliance comparable to that required of applicants for new licenses, including providing sufficient proof that any such prior violations have been resolved. At a minimum, the USDA should not renew a license until it is able to verify that any such prior violations have been rectified. For a license renewal applicant with a history of substantial or repeat violations, the USDA should inspect the applicant prior to issuing a renewal license to ensure that it is in compliance with the law.

The New York City Bar Association is an independent non-governmental organization of more than 24,000 lawyers, law professors, and government officials, principally from New York City but also from throughout the United States and 50 other countries. Its Animal Law

Committee is the first committee of its kind in the United States and has a history of commenting on the USDA's enforcement of the Animal Welfare Act.¹

Requirements for an Initial License

Under the AWA, animal dealers and exhibitors must obtain licenses from the USDA.² An applicant for an initial license must undergo an inspection and demonstrate compliance with certain standards, including applicable requirements relating to the “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species,”³ before the USDA may grant the requested license.⁴ Separately, the USDA may determine that the applicant is “unfit to be licensed” for any of the reasons set forth in 9 C.F.R. § 2.11(a).

USDA's Automatic Renewal of Licenses Contravenes the AWA

These requirements, however, are absent from the process for *renewing* a license. Instead, the USDA automatically renews licenses where applicants pay the required fee, submit an annual report, and fill out a form certifying that they are in compliance with the relevant regulations and standards and agree to continue to comply.⁵ Licenses must be renewed each year.⁶

But self-certification is not working. Instances of the USDA renewing licenses of repeat violators abound. For example:

- On May 27, 2015, the USDA inspected an unaccredited roadside zoo in Manchester, Iowa, and found numerous violations, including repeat violations and violations having “serious or severe adverse effect on the health and well-being of the animal, or ... the high potential to” have such an effect.⁷ The same day, the USDA renewed the zoo's license to exhibit animals.⁸

¹ E.g., Letter to the USDA urging it to enforce the AWA with respect to birds (Apr. 6, 2016), <http://www2.nycbar.org/pdf/report/uploads/20073070-LetterurgingUSDA-humanetreatmentofbirdsunderAnimalWelfareActANIMALS4.6.16.pdf>; Letter to the USDA regarding Animal Welfare Act enforcement related to licensing of dealers and exhibitors (July 31, 2015), <http://www2.nycbar.org/pdf/report/uploads/20072948-USDAAWAEnforcementAnimalReportFINAL7.31.15.pdf>.

² 7 U.S.C. § 2133; 9 C.F.R. § 2.1(a)(1).

³ 7 U.S.C. § 2143.

⁴ 7 U.S.C. § 2133; 9 C.F.R. § 2.1(a), (e); 9 C.F.R. § 2.3(b).

⁵ Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1211 (11th Cir. 2015); 9 C.F.R. § 2.2(b).

⁶ 9 C.F.R. § 2.5.

⁷ Delcianna J. Winders, *Administrative License Renewal and Due Process—A Case Study*, 47 FLA. ST. U. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952062, at 3-4.

⁸ *Id.*

- From 2011 to 2015, the USDA issued violations to a kennel in Prim, Arkansas for animal care issues, including a dead puppy who had not been given appropriate veterinary care.⁹ The USDA cited the kennel again in July 2016 for violations relating to inadequate veterinary care.¹⁰ Yet the USDA has continued to renew the kennel's license.¹¹
- Between 2007 and 2011, an exhibitor based in Davenport, Florida, was cited for 33 AWA violations during USDA inspections relating to mistreatment of an elephant,¹² which the USDA acknowledged was of "great" gravity. Yet the exhibitor's license has continued to be renewed.¹³
- Between 2011 and 2015, APHIS inspected an exhibitor's facility 22 times and – even though all but three inspections resulted in citations, including many repeat violations and violations affecting the health and well being of the animals – the exhibitor's license was renewed as recently as April 14, 2015. (This entity is no longer licensed by APHIS. On November 28, 2016, pursuant to an agreement with the Florida State Attorney General's Office, the owner of this facility agreed to transfer all of her animals to another licensed entity as a result of numerous violations relating to animal care and record-keeping issued by the Florida Fish and Wildlife Commission.¹⁴)
- Between 2011 and 2015, APHIS found numerous violations by an exhibitor in Mount Ulla, North Carolina, including repeat violations relating to inadequate veterinary care and sick animals. Yet the license continued to be renewed, and that individual appears to be currently licensed as a dealer.¹⁵

⁹ THE HUMANE SOCIETY OF THE UNITED STATES, THE HORRIBLE HUNDRED 2017 A SAMPLING OF PROBLEM PUPPY MILLS AND PUPPY DEALERS IN THE UNITED STATES 3 (May 2017), <https://www.dropbox.com/s/muyct1xxmuyjwgj/Horrible%20Hundred%202017.pdf?raw=1>.

¹⁰ *Id.*

¹¹ USDA's APHIS list of persons licensed or registered under the AWA ("APHIS Licensed List"), https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf, at 17.

¹² Additional details regarding this case and the cases discussed in the bulletpoints that follow are set forth in Exhibit A to this Committee's letter, to Secretary Thomas J. Vilsack, dated July 31, 2015 (the "2015 Committee Letter"). A copy of the 2015 Committee Letter can be found at <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-the-usda-regarding-animal-welfare-act-enforcement-related-to-licensing-of-dealers-and-exhibitors>. APHIS' decision to remove inspection report information that was previously available online (see Animal Care Information System Website Review Chart, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA/acis-table) has complicated efforts to obtain up-to-date information regarding violations.

¹³ APHIS Licensed List at 84.

¹⁴ Katrina Elsken, *Animal Adventures Has New Managers*, OKEECHOBEE NEWS (Dec. 7, 2016), <http://okeechobeenews.net/community-news/animal-adventures-new-managers>.

¹⁵ APHIS Licensed List at 333.

Moreover, the USDA's Office of Inspector General ("OIG") has criticized the USDA's practice of automatic license renewal, recommending that the USDA instead implement compliance inspections prior to renewal and refuse to renew licenses for facilities not in compliance.¹⁶

And just last month, in September 2017, the Court of Appeals for the District of Columbia Circuit invited the USDA to "take appropriate action to amend its regulatory scheme" in connection with license renewals.¹⁷ The Court of Appeals vacated the lower court's order dismissing plaintiffs' claim that the USDA's reliance on self-certification of compliance by Cricket Hollow Zoo (the same zoo referenced in the first bulletpoint above at 2) was arbitrary and capricious in violation of the Administrative Procedure Act.¹⁸ The Court remanded the case, noting that plaintiffs alleged that the USDA "had a consistent record of the Zoo's chronic noncompliance, and ... the agency had no reason to suspect that anything had changed at the time of the renewal," and that an inspection finding a number of serious violations took place on the same day that the USDA issued a renewal license.¹⁹

USDA Has Authority to Discontinue the Practice of Automatic Renewals

Strengthening the requirements of the renewal process is well within the USDA's power under current regulations. Failure "to comply with any provision of the [AWA], or any of the provisions of the regulations or standards in this subchapter" is grounds for denying, suspending, or revoking a license.²⁰ And 9 C.F.R. § 2.12 provides that "[a] license may be terminated during the license renewal process or at any other time" for the same reasons that would justify denying an initial license application – such as violating regulations in the AWA subchapter or any federal, state, or local laws²¹ – "after a hearing in accordance with the applicable rules of practice."²² In addition, 9 C.F.R. § 2.3(a) requires each applicant "for an initial license *or license renewal*" to "make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection during business hours and at other times mutually agreeable to the applicant and APHIS, to ascertain the applicant's compliance with the standards and regulations." (Emphasis added.)

As for the AWA itself, several courts have held that the requirement set forth in 7 U.S.C. § 2133 that "no ... license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section

¹⁶ See USDA OIG, Enforcement of the Animal Welfare Act, Audit. No. 33600-01-Ch 12 (Jan. 5, 1995) (on file with the Animal Law Committee); Winders, *supra* note 7 at 36, 38-9.

¹⁷ *Animal Legal Def. Fund v. Perdue*, No. 1:14-cv-01462, 2017 WL 4320804, at *13 (D.C. Cir. Sept. 29, 2017).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 9 C.F.R. § 2.1(e).

²¹ 9 C.F.R. § 2.11(a).

²² 9 C.F.R. § 2.12.

2143 of this title” is ambiguous as to whether issuance applies to license renewal.²³ Thus, “a key implication of these holdings is that the agency *could exercise its discretion the other way* – i.e., the USDA does have discretion, under *Chevron*, to treat renewal applications the same way that it treats initial license applications and to condition renewal on a demonstration of compliance.”²⁴

A More Robust Renewal Process is Consistent with USDA’s Goals and Would Reduce Regulatory Burdens

By refusing to renew licenses of dealers and exhibitors with a history of substantial noncompliance (or issuing probationary licenses to renewal license applicants with a history of repeat violations), and by requiring license renewal applicants to provide proof that all violations of Federal, state, and local law and regulations pertaining to animals have been rectified, the USDA would advance its stated goals of “promot[ing] compliance with the Act,” “strengthen[ing] existing safeguards that prevent any individual whose license has been suspended or revoked, or who has a history of noncompliance, from obtaining a license or working with regulated animals” and “reduce regulatory burden and more efficiently ensur[ing] the sustained compliance of licensees with the Act.” A more robust renewal process should minimize the type of repeated and serious noncompliance detailed above at pages 2 to 4 and reduce overall regulatory burdens by encouraging compliance in the first instance and decreasing the need for enforcement actions.²⁵

Respectfully,



Lori Barrett-Peterson
Chair, Animal Law Committee

²³ See *Animal Legal Def. Fund, Inc. v. Perdue*, 2017 WL 4320804, at *14 (“The Act is silent, or at least ambiguous, as to what process (if any) is required for license renewals.”); *People for the Ethical Treatment of Animals v. U. S. Dep’t of Agric.*, 861 F.3d 502, 510 (4th Cir. 2017) (“The Act is not only silent as to renewal, but is also ambiguous as to whether the term ‘issue’ refers to license issuance and renewal.”); *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, 789 F.3d 1206, 1220 (11th Cir. 2015) (“we find Congress has not spoken directly to whether the AWA prohibits USDA from renewing a license when USDA knows an exhibitor has failed to comply with the standards governing the humane handling, care, treatment and transportation of animals on the anniversary date of his or her license”).

²⁴ *Winders*, *supra* note 7 at 55 (emphasis in original), citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁵ While automatic expiration of licenses (one of the potential revisions set forth in your request for comment dated August 24, 2017) would likewise encourage compliance—in that dealers and exhibitors would frequently have to satisfy the requirements imposed on new applicants—we believe that strengthening the renewal process and revoking licenses where appropriate would further advance these goals.

CC:

Sen. Charles E. Schumer
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