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Docket No. 97-018-2

Regulatory Analysis and Development

PPD, APHIS, Suite 3C03

4700 River Road Unit 118

Riverdale, MD 20737-1238

Re: Comments on the U.S. Department of Agriculture's (USDA) Advance Notice of Proposed Rulemaking (ANPR) under the Animal Welfare Act in response to the request for public comment published in the Federal Register on June 24, 1998.

Gentlemen:

The Animal Council is a non-profit, tax-exempt under IRC Section 501(c)(4) organization founded in 1991 to seek positive, humane solutions to the challenges of ideological animal activists through study, analysis and application of animal husbandry, statistics and law, and to preserve human benefit from all species, breeds and registries. We particularly monitor, evaluate and counsel on legislative and regulatory issues affecting cat and dog breeders. While we are not a registry and cannot provide any direct source of information about numbers of animals, we are familiar with the varied practices of a broad spectrum of the currently unregulated breeder sector.

The context of this response is the proposal to change the definition of "retail pet store" in 9 CFR Part 1 to read "a non-residential business establishment used primarily for the sale of pets to the ultimate customer." The rationale for this is the allegation that non-exempt animal activities are escaping regulation by concealment in private residences or other premises not properly classifiable as a retail store as excluded by statutory definition of dealer. By narrowing the regulatory interpretation of the statutory exclusion from dealer licensing, more dog and cat breeders would be subject to licensing. The Agency now seeks information about numbers of potential licensees in view of the proposed change.

STATUTORY CONSIDERATIONS

This discussion is notwithstanding that the existing seventh exemption (vii) derives part of its statutory authority from a separate provision in the AWA that would still provide a statutory basis for continued exemption of direct sales dog and cat breeders who meet all of the following three requirements and is separate and distinct from the §2132(f)(ii) retail pet store exclusion:

§2133 “other person” exemption requirements have three components:

REQUIREMENT 1: Derive less than a substantial portion of his income (as determined by the Secretary) from breeding and raising dogs or cats...

This is an economic qualification. Due to changing monetary valuation and variations in living standards over time, exact determination is left to agency discretion. A common sense interpretation would be that “substantial portion of income” would be sufficient after tax income to support the person and his dependents if the person had no other income. Rather than analyze persons’ tax returns, the agency developed exemption categories in the regulations to classify criteria forming reasonable parameters for this requirement based different sets of circumstances. These basically coincide with the Internal Revenue Service’s distinction between dog and cat hobbyists and those in business, as determined by the nine part test in Internal Revenue Services Regulations at Section 1.183-2. Taxpayers meeting the business criteria may file Schedule C and can use business losses as a deduction from other income. Hobbyists may deduct losses (expenses) only to the extent of hobby income. These nine factors are:

1. Manner in which the taxpayer carries out the Activity.
2. The expertise of the taxpayer or his advisors.
3. The time and effort expended by the taxpayer in carrying on the Activity.
4. Expectation that assets used in activity may appreciate in value.
5. The success of the taxpayer in carrying on other similar or dissimilar activities
6. The taxpayer’s history of income or losses with respect to the Activity.
7. The amount of occasional profits, if any, which are earned.
8. The financial status of the taxpayer.
9. Elements of personal pleasure or recreation.

IRS policy exemplifies federal recognition that activities such as dog and cat breeding, which have some characteristics of business are in fact, a hobby. Similarly, both the Act and the USDA through its Regulations have recognized that dog and cat breeding as a personal activity is almost always a hobby lacking sufficient commercial character to warrant federal regulation as interstate commerce with its burdensome costs, and inherent inefficiencies of inspection and prosecution of persons throughout the United States. Of those persons actually filing Schedule C covering breeding income, a number derive most of their animal related income from sources other than breeding such as

judging fees or stud fees from one male that might not even be alive for which stored semen has been used for the breeding.

The §2133 language does not preclude exemption of the person who actually operates a small, non-hobby business as long as the operation is not deemed a substantial portion of his income. The exemption is expressly limited to dogs and cats, thereby excluding other popular pets such as rabbits and ferrets. *Breeders of these other domestic pet animals currently exempt as direct sellers would have no further basis for exemption except to the extent provided for the small scale wholesale sector.*

REQUIREMENT 2: The breeding and raising is limited to the person's own premises. This is a broadly worded section indicating a requirement that the exempt person's breeding and raising occur on premises in which he has some personal possessory interest. The person could be an owner, a lessee or otherwise in lawful possession of the premises but is not a mere employee. The premises are not specifically limited to residential but could include a person's own business or recreational premises. *Far more likely is the interpretation that legislative intent contemplated that "own premises" would, in fact, be residential premises.*

REQUIREMENT 3: The person may only sell such dog or cat to a dealer or research facility. This means that an exempt person may only sell to another dealer, as broadly defined without reference to exclusion or exemption status which would include any person purchasing an animal and not otherwise defined, or to a research facility.

These requirements underlie the specific exemptions based on the Secretary's statutory authority under §2133 to determine what level of activities would produce "less than substantial portion of his income" including current exemption (iii). This exception is carefully crafted to allow small scale wholesaling of pet cats and dogs. The language, "for pets" is merely descriptive of the character of these dogs and cats rather than restrictive of the buyer's use so as to permit sales to a retail store or dealer. *If the Agency were to increase the number of breeding females without distinction to the type of sale but within a range not exceeding Agency enforcement resources, this could result in exemption of persons whose operations were structured to anticipate regular generation of a substantial portion of income. The statutory basis for such a change is extremely dubious.*

Current exemption (vii) is broader than the statutory language discussed above, because it includes persons who breed and raise "domestic pet animals", rather than only dogs and cats, and makes no references to "premises" either as to possessory rights or whether business, residential or other types of premises. It is further qualified by three limitations:

- the exempt person is limited to direct retail sales to another person for the buyer's own use
- the exempt person must buy no animals for resale
- the exempt person sells no animals to a research facility, an exhibitor, a dealer, or a pet store. The parenthetical example is a purebred dog or cat fancier. In this context, "dealer" should be construed as those dealers not included here specifically and not otherwise excluded or exempt.

This category is slightly broader than the statutory "other person" as to species and premises and otherwise consistent with the retail pet store exemption except that the exempt person must breed and raise his own animals rather than purchase animals for resale.

STATUTORY PURPOSE TO BE ACHIEVED BY LICENSING

The purpose of licensing is to require compliance with exacting standards for physical facilities, care of animals, staffing and other requirements of conducting a business. These assume, in fact, that the licensee is regularly conducting business such as to continuously meet the requirements and can expect to generate sufficient income to cover the cost of licensing and compliance in addition to operating expenses, notwithstanding whether there is profit potential to economically justify the ongoing operation and the inherent risk of loss from raising any animals as a business.

Current exemptions discuss retail stores based on types of activity conducted at the location of establishment as related to species and activities covered by AWA. Current exemptions are silent as to description of or limitation on land use or other legal status at the location of the establishment. Nowhere in the Act is there any reference in any respect to "residence", zoning or land uses. Ultimately there will be questions of applicability to mixed use premises zoned for commercial uses such as retail sales, boarding or training kennels, veterinary practice, agricultural sales such as fruit picking or Christmas tree cutting where a residence may be present and used by the proposed licensee. In such cases, a breeder could sell animals from the residential portion of the premises or from a portion normally used for commercial purposes including but not limited to retail sales. Or, a breeder could raise animals in his home and sell them from controlled retail location.

In fact, USDA's Guidelines for Dealers, Exhibitors, Transporters, and Researchers distinguishes between retail chain stores and independent retailers for purposes of qualifying for the exemption, i.e. if one store in a chain -- centrally managed stores -- does not qualify the entire chain must be licensed. Aside from this distinction, anyone who sells domestic pets directly to pet owners is exempt regardless of sales volume or whether sales are made in person or by mail. Under this policy, a retail store could do

business in the varied ways that other stores function ranging from exclusive mail order, sale of merchandise on hand to customers coming to the establishment combined with mail orders received from customers not coming to the establishment, custom orders placed by either type of customer, or sales of in store stock only to those coming to the establishment. As with other stores, the production location could be on the premises or in a separate facility that is or is not connected with the retail operation. It is not impossible that some of these breeders could or do operate from premises that constitute a retail store regardless of whether the premises were also used for residential purposes. The ability or desire to operate from a particular type of location will ultimately determine exclusion from licensing rather than any transactional qualities or even numerical quantities of animals maintained, bred, sold or the like.

DISTINCTIVE CHARACTERISTICS OF THE UNREGULATED SECTOR

In its ANPR and other publications, the Agency emphasizes its risk-based approach developed from analysis of its experience from investigating and enforcing existing regulations. Because existing regulations are primarily based on qualitative criteria of wholesale as opposed to direct to end user sales, the application of quantitative criteria is currently secondary and used only to limit the exemption of otherwise licensed activity not exempted by its qualitative nature.

USDA experience in developing standards, policies and risk assessments has been almost entirely based on contact with wholesale breeders. The economic differences between wholesale and direct sale breeding can be expected to involve significant differences in the way these activities are conducted so that USDA experience may not be an accurate predictor of the impact on agency resources from the proposed changes from quantitative adjustments. Thus, a mere consideration of a quantitative measure such as the number of breeding females may be misleading as to potential workload and conceal the possibility of diverting resources from higher risk dealers.

The professed rationale for the proposed change is to extend regulation to large, commercial scale retailers of dogs under the guise of such activity being conducted in residential settings where there is no typical retail use. USDA seeks a standard by which to separate the many thousands of small-scale dog and cat breeders who breed and raise litters in their homes from the few among this category who have sufficient commercial character and propensity for risk of inhumane care to justify a shift in use of agency resources. *The proposed changes would impose an effective quantity limit on exempt direct sellers based on the biological limits of reproductive capacity from 3 or fewer breeding female dogs and cats from which exempt offspring must be born and raised on the premises. Limitations based on numbers of females or litters result in disproportionate impact on breeders of cats or dogs likely to produce small litters of 1-5 as distinguished from dog breeds likely to have litters as large as 15.*

Existing wholesale licensees plan their operation on control of overhead costs so that a reasonable profit can be expected. Offspring are placed in distribution channels as soon as possible so as to curtail overhead incurred from feed and veterinary costs and the inherent cost factors of space and labor. Because of these costs, wholesale licensees tend to keep only breeding females that are economically productive and of such breed and quality that there is anticipated wholesale market. Excess or retired breeding stock is often sold off through auction channels. These practices have resulted in predictable types of compliance deficiencies at regulated sites which are likely to result in inhumane care for which USDA has developed risk assessment factors. *In fact, many such wholesale breeders enjoy the "USDA" label as assuring ultimate consumers that animals received minimally humane care, whereas direct sale breeders view this as a stigma and incompatible with a quality residential lifestyle.*

On the other hand, direct sale breeders must keep their stock until it is sold or otherwise disposed of or permanently retained. By definition, is impossible to control overhead costs so as to expect a profit regardless of anticipated market demand for particular stock. There is no process control over either quantity actually produced in a litter or over quality for unavoidably defective offspring except destruction. Most breeders are loath to cull offspring for any but the most life threatening defects. Those direct sale breeders who operate on expectation of profit must deal only in breeds for which there is anticipated demand at prices that exceed historic overhead expenses. Sales volume would be limited by actual demand and available labor to complete sales transactions. Direct sale breeders who do not produce animals for which there is both high demand and high prices would have low expectation of profit or motivation to operate at a high volume of sales transactions. For each direct sales inquiry, substantial labor time and other costs are incurred in the negotiation process which may or may not result in a sale, which may or may not result in the return of the animal or even the claim for reimbursement of the sales price and other damages provided under a sales contract or statutory warranty. The foregoing factors largely influence the practical limits on producing large numbers of animals for direct sale to pet buyers.

With negligible or uncertain expectation of profit, direct sale breeders generally maintain cats or dogs pursuant to other purposes such as participation in events or performing services, supplying others with dogs with or without special training, or for purely personal pleasure and companionship. *Such direct sale breeders maintain varying numbers of animals of all ages, breedable or not without reference to breeding in any particular time period.*

USDA has not supplied definitions of "breeding females" for these purposes. Theoretically any intact females that have reached sexual maturity regardless of age or condition could be included. However, the wholesale breeder generally would not keep females other than those being bred. Direct sale dog breeders generally keep young females for two or more years before any breeding decisions are made and may delay breeding for additional years or for long intervals and maintain females intact to

advanced ages. *Accordingly, the existing quantitative standard of three or more "breeding females" if interpreted to mean merely intact females, that has been well accepted for wholesale breeding would include a percentage of direct sale breeders disproportionate to their sales activity in comparison to currently licensed dealers.*

Additional animals not normally regulated, including older non-breeding stock would be included in the expanded scope and ultimate agency workload, because direct sale breeders normally keep animals in compatible groupings in various locations in and around their residence. The normal manner of keeping these animals in residential settings may differ widely from the typical regulated facility. Animals may not have regular enclosures aside from crates used for travel or temporary confinement or baby-gates across doorways within the home. Regular furniture such as sofas and chairs, as well as human beds may be used as bedding. Whelping boxes, used only occasionally, are often set up in a bedroom or kitchen where temperature can be controlled through the household heating system. Household bathrooms can be temporarily used to contain a litter of kittens affording easy cleanup and space for litterbox training and cat accessory items. *Because litters are not produced on a continuing or even regular basis, these arrangements afford flexibility to care for litters and household animals conveniently and safely without the need to invest capital in separate facilities.*

The widespread customs and practices within the "fancier" segment of the direct sale cat and dog breeder category have evolved from the need to incorporate breeding as a personal activity in the lives of otherwise average people involved in non-animal employment, responsibilities and interests and not from participation in a regulated industry. Direct sale breeders maintain animals of various ages and conditions that receive veterinary care as needed from appropriate vets but not under a veterinarian supervised "program" per se. *While these practices enable people to enjoy activities and breeding, they would present innumerable obstacles in regulation of this sector.*

Residential "limit laws" and other factors contribute to widespread use of co-ownerships and other arrangements that reflect personal agreements among parties rather than commercial activities result in direct sale breeders having or not having possession of animals in which they have only partial ownership interest. *Many factors besides breeding production influence the number of dogs kept by direct sale breeders.*

ABSENCE OF STATUTORY OF REGULATORY DEFINITIONS

In addition to the noted undefined term, "breeding females, the agency has requested information about the numbers of dealers of dogs intended for hunting, security, and breeding without providing a definition of these terms. "Breeding dogs" as a special category for regulation appears redundant in that these are subject to the same regulatory considerations as other dogs. When breeding stock is sold at auction, separate regulations apply and this is the usual means of disposal of older dogs by wholesale dealers. The

additional utility of hunting and security dogs increases the likelihood that they are sold in

retail transactions to the end user who wishes a dog for a specific purpose which may be either personal or commercial. Where the utility is related to special training, the dog is farther removed from breeding circumstances and the sales transaction is of an entirely different nature. Because of the labor intensive quality of training and the need to develop performance condition, the facilities in which such dogs are maintained are far different from those set up to produce puppies for sale to pet buyers. *Without specific definitions of these terms, it would be impossible to assess the number of potential licensees except as these are included in the data provided by registry organization.*

SELF REGULATORY REGISTRY ORGANIZATIONS

The majority of pedigreed cats and purebred dogs are registered with major registry organizations which conduct self regulatory activities directed at breeders who register larger numbers of litters or offspring. These activities include inspections of both records and facilities with the possibility of referral to local law enforcement for inhumane conditions and loss of registry privileges upon conviction or failure to adhere to recordkeeping requirements, permit inspection or correct deficiencies. These consequences encourage compliance and adverse action discourages ongoing breeding. *Large scale breeders of dogs and cats under major registries are already inspected subject to organizational procedures.*

STATUTORY AUTHORITY

We believe that the USDA has ample statutory authority under the Act as well as under statutory and case law applicable to its regulatory function to support and maintain the existing regulations. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). To shift regulatory resources away from the wholesale sector would be contrary to all such authority and Congressional intent to limit federal regulation of dog and cat breeders to those whose activities actually do meet significant levels of commercial activity as discussed. No compelling facts have been presented to substantiate the case that currently unregulated dog or cat breeding is of such commercial nature that it warrants federal regulation. In those cases requiring licensing, the economic character of the business supports the cost of regulatory compliance and standardized facilities and has a greater need for standards in facilities, handling and care procedures due to the large number of animals necessary to sustain the business. If these standards were applied to individuals conducting currently exempt activities in their private homes, the impact would be prohibitive and encourage expansion of truly commercial breeding to meet public demand. *This would be contrary to the public interest in supplying the retail market with pets, not as a commodity, but as part of a personal transaction with the breeder, whose knowledge of the pet's background and suitability for the buyer are a noncommercial value added best ensuring humane care of both breeders' and buyers' pets.*

Respectfully submitted,

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President