THE ANIMAL COUNCIL
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VIA FEDERAL EXPRESS

July 16, 2012

Docket No. APHIS-2011-0003
Regulatory Analysis and Development
PPD, APHIS, Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238.

Re: Comments on Docket No. APHIS-2011-0003, Proposed Rule

Gentlemen:

The Animal Council is a non-profit, tax-exempt under IRC Section 50l(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.

In 1997 and 1998, we submitted comments in support of your interpretation of the Animal Welfare Act as expressed in the current definition of retail pet store and existing exemption 9CFR 2.1(a)(3) (i) and supplemented by the fancier exemption (vii). In those comments, we argued that the distinction between breeders producing for the wholesale market and the retail breeder-sellers is easily understood and enforced by focus on the stable, predictable qualitative aspects of the wholesale business model rather than the layers of unpredictable, changing quantitative aspects of those breeding for retail sales. Following the litigation upholding your agency's discretion in adopting those regulations, your agency adopted further amendments to the regulations entirely focused on wholesale operators, particularly regarding 9 CFR 2.1(a)(3)(iii) and 2.1(a)(3)(iv). Neither we nor other organizations or individuals commented on these amendments since they would ever apply to breeders not selling at wholesale, especially those relying on the 9 CFR 2.1(a)(3)(vii) fancier exemption.

In this respect – expecting regulations wholly tailored to current licensees to simply shift over to unknown numbers of operators for whom these were never designed – will disrupt existing markets to unknown and unconsidered extents and effects including the welfare of animals involved.

PROPOSED RULE BASED ON INCORRECT REVISION OF "RETAIL" SALE

The proposed rule would "re-define" retail in order to amend regulatory exemptions that operators have relied on since the origin of AWA. "Retail" has always been understood and defined to mean sale directly to the consumer, i.e. the pet buyer. The methods of advertising, negotiation or delivery do not change the underlying structure of the retail transaction. This was the intention of Congress in enacting AWA at a time when print advertising in nationally circulated magazines resulted in sight-unseen, long distance sales of pets to consumers. Sales followed inquiries, individual acceptance of terms of sale and suitable means of taking possession – whether shipment on a common carrier, through an intermediary, at a convenient meeting point or the buyer visiting the breeder's premises.

The historical evolution of methods of communication since 1966, including answering and fax machines, email and other internet-facilitated methods including video-conferencing or real-time premises observation, or of publication facilitated by the internet, including web site pages, file downloads of documents, photographs, video and audio files, have not changed the essential nature of the retail transaction. Buyers have access to far more information and choices now than in 1966. There is no substantiation that Congress would have intended to narrow the basic meaning of retail transactions because pet buyers now can access far *more* information about and choices of breeders than was possible in 1966. To re-define a retail sale as requiring each buyer to personally visit the sellers'/breeders' premises not only exceeds the legislative intent based on historical facts at the time of enactment but likely the discretion of the enforcing agency in applying plain meaning of language both of the word "retail" and more critically, "the internet".

In formulating public policy based on "the internet" it is imperative to draw meaningful distinctions between merely supplemental methods of communication and publication and possible use of e-commerce or other tools to emulate or even mask wholesale operations or perpetrate outright consumer fraud. If existing enforcement mechanisms are insufficient to deal with these, then the way to address them is to define the ways in which technology is being used to do these, whether this is likely to be an ongoing problem or disappear with further technological adaptation by buyers, who increasingly are demanding online access to most aspects of their lives – and from mobile devices, as well. To regulate use of technology requires understanding what it is, how it works and how people do and expect to use it. To amend regulations covering a longstanding, regulated market without these considerations is to invite and cause complex disruptions without regard to reactions of consumers in a worldwide market comprised of many highly specialized sectors and ultimately, welfare of the animals within this market.

There will be advocates of this Proposed Rule who actually want to disrupt the market in any ways possible to advance their own ideas about whether pets should be bred in any purposeful way, sold or even owned as pets. This differs from many regulated markets where stakeholders do not disagree about the existence of the market and essential differences among operators' business models, or in the case of many pet breeders, absence of business models. In this situation, these differences can be exploited in destructive, un-productive and ineffective ways that will not be immediately apparent. For these reasons, it would always be preferable to limit the scope of any proposed changes, no matter how well considered. Thus, a revised definition that strains the plain language meaning of "retail" in order to maintain the original intent to license only wholesale producers, destabilizes both the regulated and un-regulated sectors with unpredictability of future directions.

CONSEQUENCES OF ELIMINATING FANCIER EXEMPTION (vii)

The Docket asserts that retaining fancier exemption (vii) would be inconsistent with the overall Proposed Rule's revision of the retail pet store definition and exemption. This would leave fanciers and all retail-sale breeders the options of selling only to on-premises buyers, impracticality in widespread and international, specialty markets, or fitting into exemption (iii) that had been developed for breeders producing for the wholesale market at *de minimus* levels, to be increased by an additional breeding female. As mentioned above, when this regulation was last amended, no one anticipated that the regulation itself, let alone the amendments would apply to retail-selling, fancier breeders where the practices and customs do not fit these restrictions for reasons arising from entirely different circumstances and motivations.

For example, fancier breeders have traditionally used co-ownerships and other contractual relationships to mentor newcomers, assure ongoing care of animals, secure and facilitate genetic diversity for planned, long term breeding programs to develop and improve a breed, participate in the pride of ownership from accomplishments and participation in animal activities, to share financial burdens of expensive breeding costs that are usually not recouped through sales, and to share costs associated with showing and performance events where as many as five or six individuals may be involved as co-owners. Some or all of these persons may also be involved relationships with others in long or short-term arrangements for different reasons not involving profitable business. To deprive retail breeders of a feasible exemption would rarely relate to aggregated for-profit breeding operations but would disrupt and change longstanding, useful practices that actually ensure welfare through educating newcomers, sharing experience, knowledge and resources in the long-term interest of better breeding.

Other disqualifications from the *de minimus* exemption (iii) would arise from selling animals not bred and raised on the premises. Again, this is a common but not business practice of fancier breeders who occasionally need to place animals bred elsewhere such as those from "stud" agreements, those they have acquired from others, even if co-owned at the time of birth elsewhere and assorted types of rescues.

For fancier purposes, raising the number from 3 to 4 or fewer breeding females is irrelevant, because numbers change in unpredictable ways within fancier practices in ways that are different from a wholesale operation.

In Docket No. 97–018–2 published in the Federal Register / Vol. 63, No. 121 / Wednesday, June 24, 1998 / Proposed Rules, APHIS stated, "Through that experience, we have determined that the risk of noncompliance with the regulations significantly increases if facilities care for more than 60 breeding female dogs and/or cats." From this experience in 1998 with the Advance Notice of Proposed Rulemaking that led to no changes in regulations, specifically the retail pet store definition, it was apparent that risks to animal welfare are insignificant until substantial numbers of females are involved – far more than 5 or anything close to it.

ECONOMIC REALTIES OF DIFFERENT MARKET SECTORS

The business model used by currently licensed breeders is designed to produce a net profit annually for an ongoing business. This works because operating costs and risks are limited, regulatory costs are known and factored into the model and inspection practices are efficient and objective for inspectors as well as operators. The issue is not whether licensing is "onerous" but whether it is feasible and makes personal and economic sense to individual breeders who would be covered either by more than 4 females or one non-qualifying sale off premises.

While 85% of existing licensees are family owned and operated in rural areas, the percentage of rural retail breeders would be much lower, partly due to the many practical barriers to buyers' willingness or ability to travel long distances or to remote areas. In addition to buyer access, retail breeders who ship individual animals need convenient access to transit. Many retail breeders live in urban, suburban or more restricted rural areas where APHIS facilities requirements are inconsistent with local laws or acceptable use of premises. Operation of a licensed facility may violate zoning laws or homeowner association rules and create underwriting barriers to adequately insuring the property and owner. There is more likely financing on residential premises that imposes insurance requirements or other restrictions on uses. In many areas of the country today, high percentages of residential mortgages are "under water" – meaning the borrower owes more on loan(s) than the property could be sold for. This is just one more consideration for any individuals considering license application as to whether to spend money on modifications that might need to be removed prior to sale of the property. Existing licensees operating in rural areas may be located on non-residential premises where these considerations are non-existent or very different. They usually need the income to live on or at least supplement other sources, unlike the fancier breeder with a "day job" who may impair his personal resume by holding this type of license, i.e. inconsistent with his professional status or existing employment or even that of a spouse or other family members.

These and many more concerns of personal finance, risk-management and lifestyle would determine whether fanciers or other types of breeders not currently licensed would decide to apply for or maintain a license. Breeding is an option and mostly a personal expense and risk: no one has to do it or have animals at all. Over the many years we have been involved with animals, we have seen and experienced ourselves the times to reduce activities or retire altogether while remaining interested in the enthusiastic newcomers. It is for those to come that we must consider and ask how these changes in regulations would create barriers to entry. Who will want a federally licensed hobby? Who will want their personal information on a public list held open to derision or worse by the advocates who oppose breeding for breeding sake or even neighbors, employers and others? Conversely, who will be a licensed breeder in this environment while the anti-breeding advocates are at the same time trying to prohibit retail brick and mortar sales of pets?

In our analysis, once licensed, breeders would have no restraints at all as to engaging in those undefined "internet sales" or selling "over the internet". Regulations pertain to standards and facilities for animals, not sales practices of operators. All types of e-commerce tools could be used as the market could absorb. If "selling over the internet" is now a competitive advantage, the Proposed Rule would actually enhance this advantage relative to the unlicensed sector where personal time must be spent meeting with each prospective buyer who is willing and able to come to the premises. Once licensed, operators whose practices inhibit or prevent individual communication and negotiation with buyers would have free reign to continue, expand and exploit these practices to the detriment of consumer protection. The labor-intensive, restricted-market-area unlicensed sector would have to adjust or disappear.

For the above reasons, we believe the Proposed Rule is based on an incorrect, flawed re-definition of "retail sales". If adopted as a Final Rule, these amendments to existing regulations will discourage the broadly diversified, historically unlicensed sectors of pet breeders from continued participation and create many barriers to similar new entrants. It is these unlicensed operators who have supplied quality pets as well as specialized types of animals to national and international buyers. In addition, a Final Rule would actually encourage licensed operators to utilize "the internet" to limit and reduce their own costs at the expense of pet buyers.

Accordingly, we urge rejection of the Proposed Rule in its entirety.

Very truly yours,

Sharon G. Coleman

SHARON A. COLEMAN
President, The Animal Council