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Jonathan Lovvorn
Vice President, Animal Protection Litigation
Humane Society of the United States
2100 L Street, N.W.
Washington, DC 20037

Re: Effect of the Pet Animal Welfare Statute of 2005 on Rescue and Shelter Operators

Dear Mr. Lovvorn:

You have asked that I set forth my views on whether Senate Bill Number 1139, (the Pet Animal Welfare Statute of 2005), which will amend the Animal Welfare Act (AWA), will require animal rescue and shelter operators to be licensed by the United States Department of Agriculture (USDA) and thus subject to USDA inspections under the AWA, 7 U.S.C. § 2132. Rescue and shelter operators currently are not required to obtain licenses under the AWA and this bill will not alter that status. As discussed in more detail below, rescue and shelter operators are not "dealers" because they do not "sell" animals from their facilities. Rather, they are non-profit groups providing a service to the public and the adoption fee accepted by such organizations is necessary to maintain their existence. Moreover, even if the adoption fees are considered "sales" under the AWA, rescue and shelter operators are (1) exempt under the amended definition of "retail pet store" provided in Senate Bill 1139 and (2) do not fall within the newly created "retail pet store exclusion" targeted at high-volume home breeding operations that have thrived due in part to the exponential growth in the use of the Internet for commerce.

The AWA was initially aimed at regulating "dealers"—high volume breeders, specifically those that sell animals wholesale. The AWA requires all "dealers" to be licensed and regulated by the USDA. 7 U.S.C. § 2132 (f). The AWA defines a "dealer" as:

any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer

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any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year.

7 U.S.C. § 2132.

The existing AWA has no statutory definition of "retail pet store." However, the USDA has promulgated a rule defining "retail pet store" as "any outlet where [pets] are sold or offered for sale, at retail, for use as pets." 9 C.F.R. § 1.1. In turn, the USDA has interpreted this exemption to include individuals selling from their residences, and thus exclude high-volume home breeding operations from the licensing and inspection requirements of the AWA. The validity of this interpretation of the AWA was challenged and upheld in federal court in Doris Day Animal League v. Veneman, 315 F.3d 297 (D.C. Cir. 2003).

Senate Bill 1139 would amend the AWA as follows:

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, ~~or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—~~ (2) any dog for hunting, security, or breeding purposes, or (3) any dog imported from outside the United States, unless the dog is imported by the person for the use and enjoyment of the person, except that this term does not include—;

(I) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer, or which sells any dogs imported from outside the United States; or

~~(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year;~~

(ii) any person who, during any calendar year—

(I)(aa) sells not more than 25 dogs or cats at wholesale or to the public; or
(bb) does not whelp more than 6 litters of dogs or cats and sells only dogs or cats bred or raised on the premises of the person directly at retail to persons who purchase such animals for their own use and enjoyment and not for resale; and

(II) derives not more than \$500 gross income from the sale of other animals;

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(n) Retail Pet Store-

(1) IN GENERAL- The term "retail pet store" means a public retail establishment that sells animals commonly kept as pets in households in the United States, including—

- (A) dogs;**
- (B) cats;**
- (C) guinea pigs;**
- (D) rabbits; and**
- (E) hamsters.**

(2) EXCLUSION- The term "retail pet store" does not include—

- (A) a person breeding animals to sell to the public as pets;**
- (B) a person selling hunting, security, or breeding dogs; or**
- (C) a person selling wild animals.**

The two critical features of the Bill are (1) to amend the AWA to include a definition of "retail pet store" within the statute as "a public retail establishment that sells animals commonly kept as pets . . . including . . . dogs [and] cats," S. 1139, 109th Cong. § 2(3), and (2) to exclude from the definition of "retail pet store" "a person *breeding* animals to sell to the public as pets . . ." Id. The net result of the measure is that breeders selling from their homes are no longer exempt from USDA regulation as "retail pet stores." However, breeders selling from their homes are still exempt if they either (1) "sell[] not more than 25 dogs or cats" a year; or (2) "do[] not whelp more than 6 litters of dogs or cats" a year. Rescue and shelter operators currently are not required to obtain licenses under the AWA and this bill will not alter that status.

Rescue and shelter operators are not dealers under the Bill.

Rescue and shelter operators do not "sell" animals as pets; they provide a service to the public. Courts have held that services performed for the benefit of the community should not be considered "sales." See Howell v. Spokane & Inland Empire Blood Bank, 785 P.2d 815, 822 (Wash. 1990); see also Washington National Corp. v. Sears, Roebuck & Co., 474 N.E.2d 116, 120 (Ind. 1985). Rescue and shelter operators provide care for animals whose owners can no longer provide such care. These groups are helping to keep stray animals off the streets and to control the overpopulation of companion animals. Since these groups cannot keep the animals they "rescue," they must adopt the animals out to loving homes. The adoption fees accepted by rescue and shelter operators are not in exchange for the animal, but rather to pay for the continued existence of the shelter, i.e. food for the animals, health care for the animals, etc.

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which in turn benefits the tax-payers who often pay to support city or state sanctioned shelters. Moreover, the fee may serve as a barrier to prevent the adoption of animals to those people who are not able or willing to provide good homes for them. In sum, as a both a practical and policy matter, these groups are not "selling" the animals they adopt out and thus are not "dealers" under the AWA.

The Bill specifically exempts from the definition of dealer "any person who in a calendar year sells not more than 25 dogs or cats." Most rescue and shelter operators find homes for more than 25 dogs or cats a year. However, this does not mean that they will now be required to be licensed by the USDA. As just explained, such operators are not dealers and thus need not fall within the exemption. Moreover, even if the rescue and shelter operators are deemed to be "dealers" under the statute, these operators fall within the "retail pet store" exemption. Thus, there is no need to meet this "dealer" exemption.

If Rescue and Shelter Operators are Considered "Dealers," they are "Retail Pet Stores" under the Bill.

Under the current law, "retail pet stores" are specifically exempt from the Act. 7 U.S.C. § 2132(f)(1). Under the Bill, if rescue and shelter operators that charge a fee for the animals adopted could be considered "dealers" that "buy[], or sell[], or negotiate[] the purchase or sale" of dogs and cats – a doubtful proposition as explained above – such operations clearly fall within the newly-defined "retail pet store" exemption– "a public retail establishment that sells animals commonly kept as pets in households in the United States."

A shelter or rescue operation is a "public retail establishment." "Public" means "of, relating to, or affecting the people as an organized community; of or relating to business or community interests as opposed to private affairs." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1836 (2002). "Retail" means "to sell in small quantities . . . to sell directly to the ultimate consumer." Id. at 1938. "Establishment" is defined as "a more or less fixed and usu. sizable place of business or residence together with all the things that are an essential part of it." Id. at 778 (emphasis added); see also Doris Day Animal League, 315 F.3d at 298-99.

Rescue and shelter operations clearly meet the "public retail establishment" definition. They are "public" because they benefit the community, they are "retail" because they "sell directly" to the consumer, and they are "establishments" because they are a fixed place "of business or residence." Moreover, the animals they adopt out—primarily dogs and cats—are "commonly kept as pets in the United States." Thus, if they are considered to "sell" such animals, they fall under the "retail pet store" exemption.

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Rescue and Shelter Operators do not fall with the newly defined exclusion of Retail Pet Store.

Senate Bill 1139 is aimed specifically at preventing high-volume home breeding operations from qualifying as "retail pet stores" by defining an exclusion from this exemption for "a person *breeding* animals to sell to the public as pets." High-volume home breeding businesses have thrived due in part to the exponential growth in the use of the Internet for commerce. These breeders' animals are sold via the Internet, newspaper ads, and through other unregulated formats and yet are exempt from AWA regulation under the current USDA interpretation.

Rescue and shelter operators do not *breed* animals. They provide shelter for unwanted, abandoned, and stray animals and find homes for them. In fact, cruelty cases associated with the currently unregulated breeders require local shelters and rescue organizations to take in their ill and unsocialized animals at the operators own expense. This problem threatens to bankrupt these local organizations. Thus, the need to exclude the high-volume home breeding operations from retail pet stores yet retain the rescue and shelter operators retail pet store exemption. In fact, a primary goal of rescue and shelter groups is to control the overpopulation of pets. Thus, rescue and shelter operators, because they do not breed animals, do not fall within the Bill's retail pet store exclusion.

In sum, based on the plain language of Senate Bill 1139, I have no difficulty concluding that the Bill will *not* require animal rescue and shelter operators to be licensed by the USDA and thus subject to USDA inspections under the AWA, 7 U.S.C. § 2132. Accordingly, I do not believe that the possible regulation of animal rescue operations and shelters by USDA is a legitimate legal issue with regard to Senate Bill 1139.

Sincerely,


Joan Schaffner