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July 26, 2005

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

Dear Mr. Lovvorn:

At your request, I have reviewed Senate Bill Number 1139 (the Pet Animal Welfare Statute of 2005) which, if enacted, will amend the Animal Welfare Act (the "AWA"), and have concluded that concerns regarding the Bill's possible reach with respect to rescue and shelter operators are unfounded. Nothing in the language or purpose of the Bill suggests that the proposed changes to the Act are directed to rescue and shelter operators, or that rescue and shelter operators will inadvertently become subject to United States Department of Agriculture ("USDA") licensure and inspection requirements.

Senate Bill 1139 is aimed specifically at eliminating the portion of the "retail pet store" exemption that currently allows high-volume home breeding operations to qualify as "retail pet stores" and thus evade USDA licensure. In order to effect this change, 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;

Senate Bill 1139 also adds a definition of the term "retail pet store" to the AWA. The term was previously undefined in the AWA, and courts and other interpreters of the AWA have focused on regulations promulgated by the USDA that interpret the term. The defined term is as follows:

(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.

Thus, the critical features of Senate Bill 1139 are to amend the AWA to include a definition of "retail pet store" within the statute and to exclude from the definition "a person *breeding* animals to sell to the public as pets ..." The net result of the measure is that high-volume breeders are no longer exempt from USDA regulation as "retail pet stores." However, breeders can still be exempt under the proposed bill 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 and, in either case, do not derive more than $500 gross income. The first of these two exemptions also applies to persons who sell a de-minimus amount of animals wholesale or to the public. There is no language in the proposed amendment directed towards rescue or shelter operators.

Any concern that Senate Bill 1139 will somehow inadvertently impact rescue and shelter operations is misplaced. At the outset, it is unlikely that rescue and shelter operators would be deemed to "sell" animals, even if they receive adoption fees or other payments. The USDA has separately defined a pound or shelter to mean a "facility that accepts and/or seizes animal for the purpose of caring for them, placing them through adoption, or carrying out law enforcement, ..." 9 C.F.R. §1.1. Rescue or shelter operators are, obviously, involved in an entirely different mission than "dealers" who sell animals solely for compensation or profit.

Still, in the event that someone attempted to argue that a rescue or shelter operator fell within the specific definition of "dealer," under the current and proposed statute (as well as court interpretations of the same and underlying regulations), rescue and shelter operators fall squarely within the definition of a "retail pet store" and, as a result, would be specifically exempt from the AWA's USDA licensure requirements. As long as rescue and shelter organizations carry out their traditional activities and do not engage in high-volume breeding, or other behavior regulated by the AWA, they will be considered "retail pet stores" under the amended AWA. This conclusion is based on a plain reading of the proposed statute, as well as court and regulatory interpretations of this provision in the context of the overall statutory scheme.

"Retail pet store" is defined in Senate Bill 1139 as a "public retail establishment that sells animals commonly kept as pets in households in the United States." At the outset, the plain meanings of the words "public," "retail," and "establishment," encompass shelter and rescue operations. "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; it should be noted that this definition of "establishment" was utilized by the United States Courts of Appeals for the District of Columbia in the context of interpreting the term "retail pet store." Doris Day Animal League v. Veneman, 315 F.3d 297 (D.C. Cir. 2003). Of particular interest is the fact that the Court, in examining the phrase "retail pet store," defined "store" to be a "business establishment," whereas the proposed language in Senate Bill 1139 defines "retail pet store" without the "business" limitation, strongly implying that not-for-profits are included in the definition. Consequently, rescue and shelter operations clearly meet the "public retail establishment" definition; they are "public" because they affect the community, they are "retail" because they "sell directly" to the consumer, and they are "establishments" because they are more or less a fixed place "of business or residence."

In fact, in the event that a rescue or shelter operator was determined to "sell" animals, there is no discernable legal difference in the context of the AWA between a public or private shelter that is providing pets to the public for an adoption fee, and a pet store that sells cats or dogs directly to consumers; if a shelter and pet store are located next to each other on the street and each distribute pets to the public for fees, they would engage in the same activity for the purpose of the AWA. Of course, if a shelter provides

pets to the public free of charge, such shelter would not be providing animals for "compensation or profit" and would not fall within the reach of the definition of "dealer" found in the AWA.

This analysis remains the same even if the pet adoptions occur with respect to a rescue or shelter operator that conducts its activities out of a residence or other locations used on a regular basis. As noted above, the USDA has interpreted the term "retail pet store" to include individuals selling from their residences. The validity of this interpretation of the AWA was explicitly challenged and upheld in federal court in Doris Day Animal League v. Veneman, 315 F.3d 297 (D.C. Cir. 2003). In Doris Day, the Court clearly stated that a "retail pet store" could operate from a domestic setting. Once again, if entities/individuals who "sell" pets to the public in domestic settings fall within the definition of "retail pet store," it would be illogical to deny such exemption to rescue or shelter operators who engage in the same activity with the public in domestic settings.

Ultimately, this interpretation is supported by the policy considerations that are behind the "retail pet stores" exemption, as articulated by the Court in Doris Day. The Court held that the USDA was correct in its approach in exempting those who sell animals to the public on a retail basis, as opposed to a wholesale basis, because such entities/individuals deal with the public, and, as a consequence, are already subject to a degree of self-regulation and oversight by persons who purchase the animals, as well as regulation by state and local laws. Doris Day, 315 F.3d at 300. Likewise, rescue and shelter operators are subject to the self-regulating oversight of persons adopting the animals as pets; they continuously interact with the public as their mission is to deliver homeless animals to new homes. In addition, they are subject to state and local animal cruelty statutes, as well as, in a significant number of cases, attorney-general and public oversight due to their not-for-profit status if such entities are not-for-profits.

In conclusion, as noted above, the key distinction created by the proposed amendment to the AWA is regarding the *breeding* of cats and dogs. As long as rescue or shelter organizations are not breeding animals, they will stand in the same legal position as a commercial retail pet store, regardless of whether they operate out of a store front, public or private shelter, or residence, and thus face no possibility of having to comply with USDA licensure requirements. Accordingly, I do not believe that there is any legitimate legal issue underlying recent concerns that the Bill will require USDA regulation of animal shelter and rescue operators.

This letter is being provided to you at your request. The legal advice, opinions and conclusions contained in this letter may not be relied upon by any other person.

Very truly yours,

David J. Wolfson