■ 2. Add at the end of Appendix C to Part 5, the following new paragraph ''68'':

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

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68. The DHS OPS–003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS OPS–003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records is a repository of information held by DHS to serve its several and varied missions and functions. This system also supports certain other DHS programs whose functions include, but are not limited to, the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities; and protection of the President of the U.S. or other individuals pursuant to Section 3056 and 3056A of Title 18. The DHS OPS–003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. This system is exempted from the following provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3): 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access and Amendment) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: June 1, 2012.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2012–13778 Filed 6–6–12; 8:45 am]

BILLING CODE 9110–9A–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 11

[Docket No. APHIS–2011–0030]

RIN 0579–AD43

Horse Protection Act; Requiring Horse Industry Organizations To Assess and Enforce Minimum Penalties for Violations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the horse protection regulations to require horse industry organizations or associations that license Designated Qualified Persons to assess and enforce minimum penalties for violations of the Horse Protection Act (the Act). The regulations currently provide that such penalties will be set either by the horse industry organization or association or by the U.S. Department of Agriculture. This action will strengthen our enforcement of the Act by ensuring that minimum penalties are assessed and enforced consistently by all horse industry organizations and associations that are certified under the regulations by the U.S. Department of Agriculture.

DATES: *Effective Date:* July 9, 2012.

FOR FURTHER INFORMATION CONTACT: Dr. Rachel Cezar, Horse Protection National Coordinator, Animal Care, APHIS, 4700 River Road, Unit 84, Riverdale, MD 20737; (301) 851–3746.

SUPPLEMENTARY INFORMATION:

Background

In 1970, Congress passed the Horse Protection Act (15 U.S.C. 1821–1831), referred to below as the Act or the HPA, to eliminate the practice of soring by prohibiting the showing or selling of sored horses. The regulations in 9 CFR part 11, referred to below as the regulations, implement the Act.

In the Act, Congress found and declared that the soring of horses is cruel and inhumane. The Act states that the term ''sore'' when used to describe a horse means that the horse suffers, or can reasonably expect to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving as a result of:

- An irritating or blistering agent applied, internally or externally, by a person to any limb of a horse,
- Any burn, cut, or laceration inflicted by a person on any limb of a horse,
- Any tack, nail, screw, or chemical agent injected by a person into or used by a person on any limb of a horse, or
- Any other substance or device used by a person on any limb of a horse or a person has engaged in a practice involving a horse.

(The Act excludes therapeutic treatment by or under the supervision of a licensed veterinarian from the definition of ''sore'' when used to described a horse.)

The practice of soring horses is aimed at producing an exaggerated show gait for competition. Typically, the forelimbs of the horse are sored, which causes the horse to place its hindlimbs further forward than normal under the horse's body, resulting in its hindlimbs carrying more of its body weight. When the sored forelimbs come into contact with the ground, causing pain, the horse quickly extends its forelimbs and snaps them forward. This gait is known as ''the big lick.''

Soring is primarily used in the training of Tennessee Walking Horses,

racking horses, and related breeds. Although a gait similar to ''the big lick'' can be obtained using selective breeding and humane training methods, soring achieves this accentuated gait with less effort and over a shorter period of time. Thus, Congress found and declared that horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore. Congress further found and declared that the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce.

Section 4 of the Act (15 U.S.C. 1823) directs the Secretary of Agriculture to prescribe, by regulation, requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction (referred to below as ''show management'') of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purpose of enforcing the Act. The intent of Congress and the purpose of this provision is to encourage horse industry self-regulatory activity and to allow show management to have the benefit of certain limits upon their liability under the Act if they employ a Designated Qualified Person (DQP) to detect and diagnose soring and to otherwise inspect horses for the purpose of enforcing the Act. The Secretary is further authorized under section 9 of the Act (15 U.S.C. 1828) to issue such rules and regulations as he deems necessary to carry out the provisions of the Act.

Under the regulations, DQPs are trained and licensed to inspect horses for evidence of soreness or other noncompliance with the Act and the regulations in programs sponsored by horse industry organizations or associations (HIOs). An HIO's DQP program must meet the requirements of § 11.7 of the regulations, which include requirements for licensing, training, recordkeeping and reporting, and standards of conduct, among other things. The U.S. Department of Agriculture (USDA) certifies and monitors these programs.

DQPs conduct inspections according to procedures set out in § 11.21 of the regulations. Paragraph (d) of § 11.21 requires the certified DQP organization (i.e., the HIO) under which the DQP is licensed to assess appropriate penalties for violations, as set forth in the rule book of the certified program under which the DQP is licensed, or as set forth by the USDA. In addition to the DQP's report to show management, the HIO must also report all violations to show management.

On May 27, 2011, we published in the **Federal Register** (76 FR 30864–30868, Docket No. APHIS–2011–0030) a proposal [1] to amend the regulations to require HIOs that license DQPs to assess and enforce minimum penalties for violations of the Act. We stated that the proposal was in response to an audit report [2] issued in September 2010 by the USDA's Office of the Inspector General (OIG) regarding the Animal and Plant Health Inspection Service's (APHIS) administration of the Horse Protection Program and the Slaughter Horse Transport Program. The audit found that APHIS' program for inspecting horses for soring is not adequate to ensure that these animals are not being abused. Due to this ineffective inspection system, the report stated, the Act is not being sufficiently enforced, and the practice of abusing show horses continues. One of the recommendations in the audit report was that APHIS develop and implement protocols to more consistently negotiate penalties with individuals who are found to be in violation of the Act.

We stated that requiring HIOs to implement a minimum penalty protocol would strengthen our enforcement of the Act by ensuring that minimum penalties are assessed and enforced consistently by all HIOs that are certified under the regulations pursuant to section 4 of the Act.

We solicited comments concerning our proposal for 60 days ending July 26, 2011. We received 28,249 comments by that date. These included 27,349 substantively identical form letters submitted by individuals who commented through an animal welfare advocacy group. The comments were from HIOs and gaited horse organizations, other horse organizations, veterinary associations, horse and animal welfare advocacy groups, participants in the horse industry, and the general public.

Many commenters supported the proposed rule and increased enforcement of the Act in general, stating that the horse industry had failed to eliminate soring. Some of these commenters noted that the proposed rule would only affect people who sore horses, not the entire Tennessee Walking Horse industry, and stated that measures such as those we proposed are necessary to ensure that horses are not sored.

Other commenters who supported the proposed rule stated that the HIOs that have not adopted the minimum penalty protocol have created an economic disadvantage for the HIOs who have done so. One commenter stated that requiring less stringent penalties has become a way for HIOs to attract business. These commenters stated that the proposed rule would ensure that soring is properly deterred and punished and that requiring uniform minimum penalties would benefit owners and trainers who reject soring and exhibit sound horses, consistent with the intention of the Act.

Most of the commenters who supported the proposed rule also recommended that we require penalties more stringent than those we had proposed; these comments are discussed below under the heading ''Requests for Increases in Proposed Penalties and Addition of Penalties for Other Violations.''

The remaining comments are discussed below by topic.

Current HIO Enforcement of the Act

Of the commenters who opposed the proposed rule, several stated that minimum mandatory penalties are not necessary because the current HIO system is working to prevent sore horses from being shown, exhibited, sold, or auctioned. The commenters stated that current DQP inspections under the HIOs are rigorous and effective. Some stated that the walking horse industry has improved its compliance dramatically in the past 2 to 3 years, with strong enforcement from certain HIOs. Commenters cited high compliance rates for horses entered at DQP-inspected shows.

Several commenters stated that the current penalties that HIOs assess and enforce are effective. Another commenter stated that there is no uncertainty about penalties under the current system, as each HIO has a published penalty structure available to all participants.

Another commenter stated that despite any progress, much work remains to accomplish the goal of eliminating soring, and that the compliance rates cited by other commenters are meaningless for several reasons: (1) The HIOs themselves are reporting the compliance rates; (2) the overall rate includes HIOs committed to the sound, unsored horse along with other HIOs, artificially inflating the compliance rate for the latter; (3) the overall rate does not include horses that are brought to shows, exhibitions, sales, and auctions but not presented for inspection when USDA is present; and (4) the overall rate includes horses that got through inspection by use of drugs.

[1] To view the proposed rule and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0030.*

[2] Available at *http://www.usda.gov/oig/webdocs/33601-02-KC.pdf.*

We have determined that it is necessary to establish minimum penalties to be assessed and enforced by HIOs in this final rule. As discussed in the proposed rule, the OIG audit found that APHIS' program for inspecting horses for soring, specifically the industry self-regulation carried out by DQPs trained by and operating under HIOs that are certified under the regulations, has not been adequate to ensure that these animals are not being abused. The OIG audit indicated that over 30 years of industry self-regulation through the DQP program has failed to eliminate the cruel and inhumane practice of soring, thus necessitating APHIS action to make the industry's self-regulatory efforts more effective.

The compliance rates cited by some commenters are not in and of themselves proof of the effectiveness of HIO enforcement of the Act, for many of the reasons cited by the last commenter. In addition, focusing on compliance rates obscures the fact that substantial numbers of horses are still found to be in violation of the Act each year, meaning that HIO enforcement has not been sufficient to eliminate the cruel and inhumane practice of soring.

One commenter stated that HIO penalties are appropriate and set based on years of experience and the severity of the violation. This commenter stated that DQPs do a better job of enforcement when a single DQP's inspection results in a smaller penalty, because the penalties that would be enforced would not potentially put a person out of business or shut down a training facility that employs several people.

As documented in the OIG audit, DQPs issue substantially more violations when APHIS VMOs are present than when they are not, suggesting that high compliance rates achieved at shows where only HIO DQPs are present may not reflect a decreased prevalence of soring. As this differential exists under the current HIO penalty structures, we do not believe that HIOs with less stringent penalties than those we proposed are ensuring the freer issuance of violations.

One commenter stated that the OIG audit predates the recent increase in HIO enforcement of the Act and that the HIOs currently enforce the Act effectively. Another stated that the OIG audit does not fairly represent the progress the industry has made in the last decade.

The OIG audit was based on data from several years, including a review of show reports from the 2008 season and site visits conducted in 2008. As noted earlier, the conclusions of the audit indicate that over 30 years of industry self-regulation through the DQP program has failed to eliminate the cruel and inhumane practice of soring. Since 2008, our experience in administering the Horse Protection Program does not indicate that there has been a significant change in the circumstances described in the OIG audit.

Many commenters stated that the penalties currently assessed by HIOs exceed those in the Act. (Conversely, two commenters stated that the proposed penalties far exceed those mandated in the Act.)

Regardless of whether the penalties imposed by HIOs exceed those in the Act, the information and data discussed in the proposed rule and directly above indicate that those penalties are not successfully achieving the goal of the DQP and HIO program, which is to end the cruel and inhumane practice of soring. Requiring all HIOs to assess and enforce minimum penalties for violations of the Act will ensure that all HIOs are operating in a consistent manner and will enhance the effectiveness of the Horse Protection Program.

Requiring HIOs To Assess and Enforce Minimum Penalties in the Context of the Act

Several commenters stated that the Department does not have the authority to change or modify the penalties in the Act by establishing a minimum penalty protocol in the regulations.

The Act sets out criminal and civil penalties for violations of the Act in section 6 (15 U.S.C. 1825). This section gives the Department authority to pursue criminal and civil penalties against those who violate the Act.

The DQP program, in contrast, was established in the regulations pursuant to section 4 of the Act in order to encourage horse industry self-regulatory activity and to allow show management to have the benefit of certain limits upon its liability under the Act. In addition, APHIS has the authority under section 9 of the Act to issue regulations that impose whatever requirements on the HIOs that APHIS determines to be necessary to enforce the Act and the regulations.

When the DQP program was established over 30 years ago, we granted a formal role in the regulations to HIOs in order to continue encouraging horse industry self-regulatory activity. The requirements for HIOs were promulgated pursuant to section 4 of the Act and thus are within APHIS' authority under the Act. Over the years, the role of HIOs has expanded to include assessing and enforcing penalties for violations of the Act, in accordance with § 11.21(d) of the regulations. However, the industry self-regulatory activity, and in particular the penalties HIOs have assessed and enforced under the regulations, have not been sufficient to end the cruel and inhumane practice of soring.

One issue that has made the HIO penalties less effective than they could have been is the discrepancies that have existed among the penalties assessed and enforced by HIOs for certain offenses, resulting in inconsistent enforcement of the Act. To ensure that the horse industry is effectively working to eliminate the cruel and inhumane practice of soring, in accordance with section 4 of the Act and with the original purpose of the regulations, this final rule requires HIOs to assess and enforce minimum penalties for violations of the Act. The penalties we are requiring HIOs to assess and enforce in this final rule do not exceed the civil penalties provided in the Act, and this final rule does not change the penalties provided in the Act.

One commenter quoted paragraph (c) of section 4 of the Act, which states that the Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing the Act. The commenter stated that this language indicates that industry inspectors may only ''detect,'' ''diagnose'' and ''inspect,'' and does not provide industry inspectors with the authority to impose any agency penalty whatsoever.

Similarly, two other commenters stated that, because the Act prohibits showing or exhibiting, entering for the purpose of showing or exhibiting, or selling, auctioning, or offering for sale any horse that is sore, all that is required under the Act is that a DQP inspect for soring, notify management when a horse is sore, and provide the appropriate reports. Therefore, these commenters stated, the proposal to require HIOs to assess and enforce minimum penalties is an effort to circumvent the Act.

Some commenters stated that the language of the Act only allows the Secretary to assess and enforce penalties and does not give the Secretary the authority to impose penalties through any other means, including a private organization such as an HIO. One commenter stated that the provisions of paragraph (b) of section 6 show that any penalty structure that an HIO implements is strictly voluntary, although the HIOs have always felt it

was in the best interest of the Act to have a penalty structure in place to deter soring. Another commenter stated that the HIOs that currently assess and enforce penalties do so through the power given to them by the exhibitors, and that the Department cannot mandate penalties to be enforced by a private corporation.

Section 9 of the Act authorizes the Secretary to issue such rules and regulations as are deemed necessary to carry out the provisions of the Act. As discussed earlier, the Act itself does not prescribe the creation of HIOs; the Department decided to create them as DQP licensing authorities to further industry self-regulation towards the goal of eliminating the cruel and inhumane practice of soring. The regulations in § 11.21(d) have long indicated that HIOs shall assess appropriate penalties for violators, as set forth in their rulebooks or as set forth by the Department. This final rule sets forth those penalties that we have determined to be appropriate and necessary to eliminate soring, which the HIOs have failed to do. Therefore, this final rule is within the authority granted to the Secretary by the Act.

HIOs that do not wish to cooperate in the effort to eliminate soring by imposing the minimum penalties required in this final rule may withdraw from certification; if an HIO refuses to implement the minimum penalties, we will initiate proceedings to decertify the HIO, as described in § 11.7(g).

Several commenters stated that requiring HIOs to assess and enforce penalties would be inconsistent with the Act's requirement, in paragraph (b) of section 6, that no civil penalty will be assessed unless such person is given notice and opportunity for a hearing before the Secretary of Agriculture with respect to such violation. (Paragraph (b) also sets out a process for review by a court of appeals.) Many of these commenters stated that it was Congress' intent to require the due process described in paragraph (b) to be followed before the imposition of a penalty, and that the proposed rule would take away individuals' rights to due process. Similarly, many commenters stated that HIOs, as private organizations that were established to cooperate with APHIS in the enforcement of the Act, are not required to provide due process for violators.

Some commenters focused on what they perceived to be the HIOs' roles as state actors (organizations acting on behalf of the Government and thus required to provide due process) in the context of the proposed rule's minimum penalty requirements. Two commenters stated that the law is clear that the initial stages of a state-action disciplinary proceeding are delegated to a private party (such as an HIO), the agency that delegated the authority must grant a *de novo* review of the decision, i.e., a new trial on the merits. One of these commenters additionally stated that the Department would likely be held liable for the actions of HIOs in the imposition of such penalties and any corresponding deprivation of rights of the individuals affected.

One commenter expressed concern that people who show in front of multiple HIOs during the course of a show season would be required to submit to each HIO's appeal process without being able to appeal the decisions to the Secretary or a court of law.

As described earlier, section 4 of the Act provides the Secretary with authority to establish requirements for the appointment of DQPs by management, as Congress envisioned that both public and private horse inspectors would monitor compliance with the Act. Thus, the horse industry in general and HIOs specifically have been playing a role in enforcing the HPA since its inception. Over the years, the role of HIOs has expanded to include assessing and enforcing penalties for violations of the Act. However, we maintained the authority to intervene if the DQPs and the HIOs that licensed the DQPs were not effectively working towards the goal of eliminating the cruel and inhumane practice of soring. This final rule responds to problems associated with discrepancies among HIO penalties by requiring consistent penalties, thus enhancing the effectiveness of the industry's self-regulating efforts.

Paragraph (e) of § 11.25 in this final rule requires each HIO to have an appeals process in its rulebook that is approved by the Department. We will only approve appeals processes that give notice and opportunity for a hearing and that ensure a fair hearing. In addition, we will monitor the appeals processes to ensure that they are working effectively. This will ensure that persons who have penalties assessed by an HIO will have recourse to challenge the penalty within the HIO structure, and thus fulfills the due process requirements of the Act. As currently occurs when HIOs assess and enforce penalties, persons who do not agree with the HIO's decision will be free to bring a suit against the HIO itself.

HIOs currently provide all these functions in accordance with the regulations in § 11.21(d). We do not expect any of these processes or functions to change with the promulgation of minimum required penalties; we are simply specifying penalties in accordance with § 11.21(d).

Inspection Procedures

DQPs find violations of the Act by inspecting horses, and thus penalties will be assessed and enforced on the basis of the results of these inspections. As mentioned earlier, § 11.21 of the regulations sets out inspection procedures for DQPs. Under this section, a DQP must walk and turn the horse being inspected and determine whether the horse moves in a free and easy manner and is free of any signs of soreness. The DQP must also digitally palpate the front limbs of the horse from knee to hoof, with particular emphasis on the pasterns and fetlocks, while observing for responses to pain in the horse. Any pain would indicate that the horse is sore.

The DQP also examines horses to determine whether they are in compliance with the scar rule in § 11.3, and particularly whether there is any evidence of inflammation, edema, or proliferating granuloma tissue. Under § 11.3, the anterior and anterior-lateral surfaces of a horse's pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and other bilateral evidence of abuse indicative of soring; the posterior surfaces of the pasterns (flexor surface), including the sulcus or ''pocket,'' may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation. If the horse is not free of these symptoms, it is considered to be sore under § 11.3.

The DQP may also carry out additional inspection procedures as he or she deems necessary to determine whether the horse is sore.

In order to ensure that the Act is being properly enforced, APHIS sometimes sends veterinary medical officers (VMOs) to conduct inspections of horses at horse shows, exhibitions, sales, and auctions, whether or not the show, exhibition, sale, or auction is affiliated with an HIO. VMOs follow the same inspection protocol as DQPs do and serve as an independent check on the effectiveness of DQP inspection. In addition, where available, VMOs use thermography to assess whether areas in a horse's forelimbs may be inflamed in a manner characteristic of soring, or x-ray examination to determine whether a horse's bones show signs of stress indicative of soring.

Several commenters opposed the imposition of penalties for what they stated are violations based on subjective inspections, which are often the subject of differences of opinion among VMOs, DQPs, and other parties. These extend to differences of opinion regarding one horse participating in different classes at a horse show. Several added that the evidence from such inspections would be insufficient to obtain convictions in a court of law, which is why, the commenters stated, the USDA has proposed the minimum penalties to be assessed and enforced by HIOs.

Numerous commenters stated that mandatory penalties should not be imposed until an objective scientific determination of when a horse is sore can be made. Several stated that such determinations are not possible with digital palpation, thermography, or x-ray analysis, all of which are subject to inconsistencies in application and interpretation. Several stated that palpation is conducted with the primary goal of inducing a response, or that it is bound to induce a response in horses that are generally skittish at inspection. Others stated that the scar rule is also applied inconsistently.

A few commenters stated that inspections of sound horses do not find any violations. One commenter stated that some HIOs and their DQPs do not follow the standards of the USDA, thus producing inconsistent results in inspections. Another commenter stated that a horse that has been trained in order to develop the natural abilities of the horse, without soring, would not be borderline with respect to compliance with the Act and would thus not be diagnosed differently by different VMOs and DQPs. This commenter stated that the more common problem with respect to subjectivity of digital palpation is DQPs not applying enough pressure during palpation and thus allowing sore horses to be shown, exhibited, sold, or auctioned. Similarly, the commenter stated, the Department has provided clear guidance on the scar rule and it is not difficult to determine whether a horse is in or out of compliance.

Digital palpation is a well-accepted and highly reliable method of determining whether a horse is sore and thus in violation of the Act. In addition, the other inspection methods we use, including examination of the horse's gait, thermography, and x-ray analysis, all have value and are reliable as well, and can provide additional information about whether a horse is sore that may not be available through digital palpation, thus contributing to our effective enforcement of the Act. We welcome suggestions from the public on other potential methods of determining whether horses are sore, and we continue to work with researchers to develop additional methods.

Some of the differences in opinion between DQPs and VMOs that the commenters discussed may be due to incorrect application of the inspection methods. This is why we help conduct DQP training to ensure that all DQPs are aware of the correct procedures for performing inspection. Information on conducting digital palpation is also available in guidance we provide to HIOs. With respect to the scar rule specifically, we train DQPs and VMOs every year to ensure that the scar rule is consistently interpreted, and we make guidance on its interpretation available to anyone who requests it.

The goal of digital palpation is to determine whether pressure applied to the forelimbs of the horse from knee to hoof causes pain. Such pain indicates that the horse is sore. APHIS VMOs conduct palpation with this goal in mind.

A recent study [3] indicates that the amount of pressure applied during digital palpation is not enough to elicit a response in a horse that has not been sored. Under this final rule, if a horse is skittish at inspection, the horse would likely be determined to be unruly under paragraph (d) of § 11.25 and thus would be excused from the class, but would not be determined to be sore.

Based on these considerations, we have determined that the inspection methods that APHIS trains DQPs to administer provide evidence that is sufficiently reliable to serve as the basis for assessing a penalty under this final rule.

Shows Not Affiliated With an HIO

Many commenters expressed concern that requiring HIOs to assess and enforce minimum penalties would encourage owners and trainers to show their horses at shows whose management does not appoint a DQP to perform inspections to ensure that sore horses are not shown. As noted earlier, at such shows, show management assumes liability under the Act for any sore horses that are shown, exhibited, sold, or auctioned. These shows are often referred to as ''unaffiliated'' shows because the show is not affiliated with an HIO that provides a DQP to conduct inspections.

Many of these commenters stated that increasing numbers of horses were being shown at unaffiliated shows, and the proposed rule would accelerate this trend. One commenter stated that there are currently a minimum of 400 unaffiliated shows each season.

Some of these commenters stated that horses shown at unaffiliated shows would not pass the inspections conducted at HIO-affiliated shows. One commenter stated that individuals who have been suspended under the current HIO penalties have shown at unaffiliated shows.

All of these commenters stated that APHIS should emphasize enforcement of the Act at unaffiliated shows, and most stated that inspections at unaffiliated shows should be emphasized in place of finalizing the proposed minimum penalty protocol. Many commenters stated that APHIS inspections at unaffiliated shows have been minimal or nonexistent. One commenter stated that the Department has never pursued a case against the management of an unaffiliated show.

One commenter stated that the penalty protocol should be implemented along with an increased emphasis on enforcement at unaffiliated shows, to best effectuate the purpose of the Act.

We agree with the last commenter. We plan to continue inspections of nonaffiliated shows; at the same time, we are promulgating the minimum penalty protocol in this final rule.

Contrary to the suggestions of many commenters, we do regularly attend unaffiliated shows. Through October 11, 2011, we attended 12 unaffiliated shows, out of a total of 74 shows attended to that point in that year. During the 2010 season, we attended 6 unaffiliated shows out of a total of 59 shows attended. Lists of all shows we have attended in the last 5 years, including unaffiliated shows, are available on the Horse Protection Web site.[4] When evidence warrants, we investigate unaffiliated shows to determine whether prosecution under the Act is warranted. We are planning more of these enforcement activities in the future, as attending unaffiliated shows is essential to the effective enforcement of the Act.

It is also essential that we attend shows that are affiliated with HIOs in order to ensure that the DQPs at those

[3] Haussler, K. K., T. H. Behre, and A. E. Hill. Mechanical nociceptive thresholds within the pastern region of Tennessee Walking Horses. Equine vet. J. (2008) 40 (5) 455–459.

[4] Lists of shows attended during the 2007 through 2010 seasons are available under the heading ''Veterinary Medical Officer (VMO) Annual Show Report'' at *http://www.aphis.usda.gov/animal_welfare/hp/hp_pubs_reports.shtml.* The list of shows attended through October 11, 2011, is available at *http://www.aphis.usda.gov/animal_welfare/downloads/hp/USDA%202011%20HP%20Activity.pdf.*

shows are effectively enforcing the Act. Over 700 shows in the 2011 season were affiliated with an HIO. It is APHIS' responsibility to oversee the DQP program to ensure that the HIOs and their DQPs are working effectively to enforce the Act, in accordance with their self-regulatory responsibilities. As mentioned earlier, the OIG audit found the current program is not sufficient to prevent soring, and the audit found in particular that DQPs issue substantially more violations when APHIS VMOs are present than when they are not. This indicates a need for continued oversight.

Suspensions

Parties Required To Be Suspended

Paragraph (b) of proposed § 11.25 described various conditions applying to suspensions under the minimum penalty protocol. For violations for which we proposed to require suspensions in § 11.25(c), we proposed in paragraph (b)(1) to require the suspension of individuals including, but not limited to, the owner, manager, trainer, rider, custodian, or seller, as applicable, who are responsible for showing the horse, exhibiting the horse, entering or allowing the entry of the horse in a show or exhibition, selling the horse, auctioning the horse, or offering the horse for sale or auction.

Many commenters objected to suspending the owner, manager, trainer, rider, and custodian for the same violation. Some trainers commented that they exhibit several horses every weekend and could be subject to a suspension penalty if any one of them is found to be in violation of the Act or the regulations. A few commenters stated that owners should not be held responsible for something done to their horses, as owners cannot be with their animals continuously and thus cannot know everything done to an animal while it is being trained.

In addition, some commenters asked us to adjust the language of proposed paragraph (b)(1). One commenter said that words like ''can'' and ''could'' need to be replaced with words like ''will'' and ''shall.'' Another stated that we should change the proposed text to require the suspension of ''all individuals, including but not limited to * * *''

A third commenter stated that the proposed language was at best vague and provides almost no guidance to HIOs about who should be subject to sanctions for any particular violation of the Act. This commenter recommended that we adopt language from the 2007–2009 HPA Operating Plan,[5] which contained language specifying which individuals should be subject to penalties for various offenses.

Section 5 of the Act (15 U.S.C. 1824) prohibits transporting, showing or exhibiting, entering for the purpose of showing or exhibiting, or selling, auctioning, or offering for sale any horse which is sore. It also prohibits an owner from allowing the showing or exhibiting, entering for the purpose of showing or exhibiting, or selling, auctioning, or offering for sale any horse which is sore. Thus, requiring owners to be suspended is consistent with the Act. In addition, as trainers commonly are responsible for showing or exhibiting horses under their care, it is appropriate to require that they be suspended if they fill those roles.

The regulatory text we proposed in paragraph (b)(1) indicated that anyone who is responsible for showing a sore horse, exhibiting such a horse, entering or allowing the entry of such a horse in a show or exhibition, selling such a horse, auctioning such a horse, or offering such a horse for sale or auction must be suspended. We believe that listing the types of people who may be responsible for violations of the Act may have confused readers. In this final rule, we have rewritten paragraph (b)(1) to read as follows: ''For the violations listed in paragraph (c) of this section that require a suspension, any individuals who are responsible for showing the horse, exhibiting the horse, entering or allowing the entry of the horse in a show or exhibition, selling the horse, auctioning the horse, or offering the horse for sale or auction must be suspended. This may include, but may not be limited to, the manager, trainer, rider, custodian, or seller, as applicable. In addition, if the owner allowed any activity listed in this paragraph, the owner must be suspended as well.'' This is substantively equivalent to the proposed text but indicates more clearly that people must be suspended when they have violated the Act, not simply because they have a certain role with respect to a sore horse.

We understand that trainers often have multiple horses showing at any given time. However, if a trainer shows or exhibits multiple horses, or enters multiple horses for the purpose of showing or exhibiting, and a violation of the Act or the regulations is detected on any of those horses, the trainer should be suspended for at least the minimum period prescribed in § 11.25 for each violation. In addition, paragraph (b)(4) of § 11.25 requires multiple suspensions to be served consecutively, not concurrently. A trainer who sores a horse or otherwise violates the Act should be penalized for the violation to ensure that the Act is effectively enforced.

One commenter stated that APHIS has expressed concerns that the trainer who has committed a violation may not always be charged with that violation, and stated that the proposed suspensions would exacerbate that problem.

As discussed earlier, the trainer of a horse that is inspected and found to be sore or otherwise in violation of the Act will be suspended when he or she shows or exhibits that horse or has entered that horse for the purposes of showing or exhibiting it. The HIOs are responsible for correctly identifying the person who has shown, exhibited, or entered a horse when the HIOs enforce penalties. Concerns have been expressed to APHIS that trainers will name someone else as responsible for a horse that is in violation of the Act or the regulations in order to avoid being penalized themselves. We expect the HIOs to handle this problem as part of their commitment to enforcing the Act.

Transporters

In paragraph (b)(2), we proposed to provide that, if a horse is found to be bilaterally sore or unilaterally sore, in violation of the scar rule, or in violation of the prohibition against the use of foreign substances, the transporter of the horse may also be suspended if the transporter had reason to believe that the horse was to be shown, exhibited, entered for those purposes, sold, auctioned, or offered for sale.

Two commenters expressed concern that persons transporting horses would not know whether a horse they were transporting was sore or had a scar, and that those persons should not be subject to penalties.

Section 5 of the Act prohibits the shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction. The Act only makes an exception for shipping, transporting, moving, delivering, or receiving of any horse by a common or

[5] The Operating Plan, which is no longer in effect, was a document in which the Department agreed to allow HIOs to exercise initial enforcement authority, including assessing suspension penalties for certain violations, for horse shows, horse exhibitions, and horse sales and auctions that were affiliated with the HIOs.

contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore. Therefore, our proposed language was consistent with prohibitions in the Act itself. It is appropriate to require suspensions for violations of the Act.

As proposed, paragraph (b)(2) did not directly parallel the language in the Act. We have rewritten paragraph (b)(2) in this final rule so that it more closely parallels the Act. We believe this will make it more clear that such suspensions are required due to violations of the Act.

Normally, a person will receive a penalty for transporting a sore horse if that person is also responsible for showing the horse, exhibiting the horse, entering or allowing the entry of the horse in a show or exhibition, selling the horse, auctioning the horse, or offering the horse for sale or auction. If a horse is found to be sore during preshow inspection and the horse is obviously lame or has open lesions, we would consider the transporter to have had reason to believe that the horse is sore and require the HIO to assess and enforce a penalty, even if the transporter was not responsible for one of the activities listed previously.

Activities Not Permitted During Suspensions

Proposed paragraph (b)(3) stated that a person who is suspended must not be permitted to show or exhibit any horse or judge or manage any horse show, horse exhibition, or horse sale or auction for the duration of the suspension.

Three commenters requested that we make changes to this language to expand the scope of activities that are prohibited for suspended persons. Two stated that we should adopt the language on this topic from the 2007–2009 Operating Plan. The Operating Plan stated:

> A person who has been suspended or disqualified as a result of an HPA violation shall not: (1) Enter a horse for the purposes of showing, exhibiting or selling at auction (''Enter a horse,'' as used in this section, shall mean to perform any of the activities that are required to be completed before a horse can actually be shown or exhibited); (2) show or exhibit a horse at a horse show, public auction, or exhibition such as a college football game or parade; (3) judge a horse show; (4) enter the show ring during the course of a horse show; (5) enter the inspection area or warm-up area where previously inspected horses are allowed to await ring or sale entry, during the course of a horse show or sale; (6) coach any trainer, owner, or exhibitor anytime during the show or exhibit; (7) transport horses to shows, exhibitions or public auctions; (8) prepare a horse on the sale, show, auction or exhibition grounds; or (9) serve as a horse show official. An HIO may employ its own procedures to ensure that such suspensions are enforced.

Another commenter stated that proposed paragraph (b)(3) should be changed to clearly prohibit anyone who has been suspended from participating at a horse show in any way other than as a spectator. The commenter stated that this language already exists in the 2010 Points of Emphasis (a guidance document we prepared for HIOs), but should be included in the regulations. Further, the commenter stated, the prohibition from participating should extend to include coaching via electronic or radio communication from the suspended party to anyone working with a horse on the grounds or riding it.

The language in proposed paragraph (b)(3) is taken from the Act (specifically, paragraph (c) of section 6). We believe it is appropriate to include similar language in the regulations. The activities described in the 2007–2009 Operating Plan are all included within the prohibition from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, or horse sale or auction. The 2010 Points of Emphasis states that ''a violator on disqualification or suspension may only participate as a spectator at the horse show, horse exhibition, horse sale, or horse auction.'' Like the 2007–2009 Operating Plan, it goes on to describe specific parameters of this prohibition, all of which are included within the prohibitions in proposed paragraph (b)(3). We will make guidance regarding the activities in which people who are suspended may not participate available to HIOs after this final rule becomes effective, recognizing that any list of prohibited activities is not necessarily exhaustive.

Minimum Penalties

Paragraph (c) of proposed § 11.25 set out our proposed minimum penalties for each type of violation. We received several comments on the proposed penalties.

Dismissal of Horses

A few commenters stated that the only penalty that should be assessed when a horse is found to be in violation of the Act is that the horse should not be allowed to participate in the horse show, exhibition, sale, or auction at which it was inspected. These commenters stated that owners of horses would not continue to engage trainers whose horses were not allowed to participate after inspection, as bringing a horse to a show at which it was not then shown was costly. This process would remove the incentive to employ training methods and devices that violate the Act.

Section 4 of the Act states that the management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited which is sore or if the management has been notified by a DQP that the horse is sore. Thus, such a penalty is the absolute minimum necessary for shows and exhibitions to comply with the Act. All of the proposed minimum penalties include dismissal of the horse from the horse show, exhibition, sale, or auction at which it was presented for inspection, not just the class for which the inspection was conducted, to provide a further deterrent effect. (The only exception is for a fractious or unruly horse that cannot be inspected; such a horse has not been found to be in violation of the Act and may be reinspected for another class in the same horse show, exhibition, sale, or auction.) However, we have found that the minimal self-regulatory effort of simply dismissing the horse from the horse show, exhibition, sale, or auction has not provided sufficient incentive for individuals to eliminate the cruel and inhumane practice of soring horses. Therefore, we are requiring that HIOs assess and enforce minimum penalties for violations of the Act, to ensure consistent enforcement of the Act.

Requests for Increases in Proposed Penalties and Addition of Penalties for Other Violations

Several commenters asked generally for changes or additions to the penalty protocol. Some commenters asked that we add fines to the suspension penalties. Some commenters asked that we increase the suspension penalties as well, to provide a more substantial deterrent, and apply a minimum suspension penalty for all violations, rather than varying the penalties based on the type of violation. Some commenters addressed each violation listed in proposed paragraph (c) specifically and asked that the penalties be increased. One commenter stated that the horse on which a violation is found should be suspended for the duration of the suspension of the greatest duration of any other party related to that violation.

For horses that are found to be sore, we proposed to require the shortest suspension penalties for scar rule violations, with increased suspensions for unilateral sore violations and the longest suspensions for bilateral sore violations. A few commenters stated

that both unilaterally sored and bilaterally sored horses are considered ''sore'' for the purposes of the Act and thus equal penalties should be assessed and enforced in both situations. One commenter stated that unilateral sore violations are common to balance out the motion of the horse, and recommended that we add penalties for unilateral scarring as well. Another commenter noted that violations of the scar rule involve evidence of bilateral soring, and recommended that penalties for scar rule violations be set equal to those of a unilaterally sored horse.

We proposed to provide penalties that increase with each violation for bilateral sore, unilateral sore, and scar rule violations, but not for the violations of the equipment-related prohibitions in § 11.2. One commenter requested that we establish penalties that increase with each violation for such violations. In addition, we did not propose to require HIOs to assess and enforce suspension penalties when violations of § 11.2 are discovered before or during the show, exhibition, sale, or auction; several commenters requested that we require penalties for such violations.

Some commenters requested that we add required minimum penalties for violations other than those we included in the proposed rule. Some commenters stated that separate minimum penalties should be established for pressure shoeing, in which the sole of the horse's foot is made sensitive so that standing and walking cause the horse to be in constant pain. Some commenters stated that minimum penalties should be established for providing false information, for stewarding horses (i.e., inflicting pain to distract the horse during DQP or VMO inspection), and swapping horses (i.e., substituting a horse that has not passed inspection for one that has). Some commenters stated that the use of plastic wrap (a common means to apply prohibited substances to the horse's forelimbs) or overweight chains on show grounds should be subject to minimum penalties.

We recognize these commenters' desire to ensure that the minimum penalties established in § 11.25 are adequate to prevent soring and address possible violations of the Act comprehensively. In developing the minimum penalty protocol, APHIS took into account the civil and criminal penalties set forth in the Act; those penalty structures used in previous years, including those penalties included in previous Operating Plans; and input we received from industry stakeholders. The penalties we proposed are consistent with penalties that have historically been required by the industry in its self-regulating capacity, dating back to 2001. Our proposal was intended to reflect this historical understanding of penalties that are appropriate for violations of the Act and require the HIOs to assess and enforce consistent penalties while minimizing disruption to the industry.

For those reasons, we have decided to implement the minimum penalties as proposed. In coming show seasons, we will monitor the effectiveness of each specific penalty at deterring the violation for which the penalty is assessed and enforced. We will also monitor the occurrence of violations for which we did not propose to require a mandatory minimum penalty. If any of the penalties does not have the appropriate deterrent effect, or if we determine that there should be minimum penalties for other types of violations, we may propose changes in the future along the lines that these commenters suggest.

Some commenters asked that we require permanent suspension of all persons associated with violations of the Act, either after some number of violations or upon the first violation. Some commenters also asked us to require permanent prohibition of horses found to be in violation of the Act from participating in horse shows, exhibitions, sales, or auctions. Some commenters supported permanent prohibition particularly for horses found to be in violation of the scar rule, since the evidence of the violation will by definition continue to manifest itself permanently. Other commenters objected to the idea of permanent suspensions on people or permanent prohibitions on horses as unfair.

The Act does not provide APHIS with the authority to permanently disqualify horses that have been scarred from soring from competitions, nor does APHIS have the authority to permanently disqualify repeat violators of the Act. The disqualification provisions and penalty provisions are clearly enumerated in the Act. We would not consider it appropriate to require HIOs to enforce penalties exceeding those in the Act.

Disclosure

One commenter recommended that the parties involved in any and all soring violations be fully and immediately publicly disclosed.

We make lists of people who have been disqualified through USDA action and people who have been suspended through HIO action available on the Horse Protection Web site, at *http://www.aphis.usda.gov/animal_welfare/hpa_info.shtml.* We will continue to do so after this final rule becomes effective.

DQPs

One commenter supported penalties for DQPs who ignore violations.

Paragraph (f) of § 11.7 provides a process for the cancellation of a DQP's license in such circumstances.

Minimum Penalties

A few commenters expressed concern about APHIS' characterization of the penalties included in proposed paragraph (c) as minimum penalties. These commenters stated that the phrase ''minimum penalties'' implies an open door for more penalties to come later. One commenter asked what prevents us from requiring maximum penalties or from taking a horse away from an individual who has a penalty assessed for a minor infraction.

The word ''minimum'' in the description of the penalties in § 11.25 refers to the fact that HIOs are free to require penalties in excess of the penalties provided in this final rule.

As discussed earlier, the penalties we proposed are consistent with penalties that have historically been assessed and enforced by the HIOs for the violations listed in paragraph (c) of proposed § 11.25. However, we will monitor the effectiveness of the penalty protocol, and we may propose changes to the penalty protocol in the future. The Act does not give us the authority to take a horse away from an individual.

Increasing Penalties for Each Violation

The penalties for bilateral soring, unilateral soring, and violations of the scar rule in proposed paragraph (c) each included more severe penalties for repeat offenders, with the third and subsequent violations of these prohibitions earning the longest suspensions.

Some commenters objected to this approach. Two requested that there be no increase in penalties when a person commits a repeat violation (although one made an exception for a habitual offender). Others stated that violators should revert to first-offender status after remaining violation-free for a certain period of time, thus wiping the slate clean. Two of these commenters compared violations of the Act to traffic violations, stating that the latter are wiped clean after a period of time.

Another commenter asked whether violations would be erased after the suspension is served and any fine required by the HIO is paid. This commenter also asked how violations would accumulate.

Two commenters supported taking into account all violations in a violator's history when assessing penalties. One stated that providing a certain period of time after which previous violations no longer are considered in penalty assessment only matters to violators, especially to those who are or expect to be repeat offenders.

The penalties in this final rule increase in severity for repeat offenders to provide an additional deterrent effect for people who have already shown a willingness to violate the Act. Increasing penalties when a person repeatedly violates established requirements is a common practice to ensure compliance. Violations will accumulate for individuals as they are incurred; there will not be an opportunity to ''wipe the slate clean.'' We do not consider violations of the Act, which require deliberate effort on the part of the violator to inflict physical pain or distress, inflammation, or lameness on a horse, to be comparable to traffic violations.

One commenter objected to the notion that scar rule penalties should escalate with additional violations only if those violations are found on the same horse. This commenter stated that showing horses that are scarred is as significant a violation as showing horses that are bilaterally sore, and that it undermines the effectiveness of the scar rule if a violator is allowed to serially scar multiple horses without suffering increasing penalties.

The proposal did not state that penalties would escalate with additional violations only if those violations are found on the same horse. Penalties will escalate when an individual is found to have violated the scar rule multiple times, regardless of the horse on which the violation has occurred. For example, if a trainer's horse is found to be in violation of the scar rule and it is the trainer's first offense, the trainer will be suspended for 2 weeks. If a different horse trained by that trainer is found to be in violation of the scar rule, that would count as a second violation for that trainer and result in the trainer's suspension for 1 month. The same escalation process would apply for unilateral or bilateral sore violations. We appreciate the opportunity to clarify this point.

Suspensions for Unilateral Sore Violations

We proposed to require HIOs to assess and enforce penalties for unilateral sore violations in paragraph (c)(2) of the proposal. One commenter stated that the penalty for unilateral soring makes no sense because a person would not sore a horse on only one foot. Such a horse would be unlevel and would not perform properly, and thus would be excused anyway. Two commenters stated that a horse trainer who is soring a horse is not doing so only on one foot, and therefore a unilateral soring violation is more likely caused by the inspection process.

As another commenter noted, unilateral sore violations are often written when a second-leg examination is equivocal. Therefore, a unilateral sore violation may well be evidence of bilateral soring. In addition, masking agents are sometimes applied to a horse's forelimbs in an attempt to numb the horse to pain and thus pass inspection. A horse to which a masking agent has been applied may exhibit a different pain response in one forelimb than in the other. As horses that are unilaterally sore are considered to be sore under the Act, it is appropriate to provide minimum penalties that must be assessed and enforced by HIOs when such violations are found.

Suspensions for Scar Rule Violations

We proposed to require HIOs to assess and enforce penalties for scar rule violations in paragraph (c)(3) of the proposal. The proposed penalties were suspensions of 2 weeks for the first offense, 60 days for the second offense, and 1 year for the third offense. One commenter stated that requiring HIOs to assess and enforce a 1-year suspension penalty for a third violation of the scar rule was unfair, due to what the commenter characterized as the subjectivity and inconsistency in the interpretation of the scar rule. The commenter also opposed requiring penalties for unilateral sore violations, stating that such violations are subject to human factors as well as the reaction of the horse to any surrounding stimuli. The commenter recommended that we concentrate on bilateral sore violations.

As discussed earlier, we proposed to require suspensions for scar rule and unilateral sore violations that are shorter than those for bilateral sore violations, based on historical precedent. However, as both horses determined to be in violation of the scar rule and horses that are unilaterally sore are considered sore for the purposes of the Act, it is appropriate to require that HIOs assess and enforce penalties when these violations are discovered.

Open Lesions

One commenter stated that, in the Strategic Plan,[6] APHIS treated any open lesion, other than those from self-inflicted injures, as a violation of the scar rule. The commenter stated that there can be no more clear violation of the Act than a horse with an open lesion on the pastern or in the pocket. The commenter stated that it is at best unclear what penalties APHIS expects HIOs to assess and enforce when open lesions are found on a horse.

Open lesions fall within the scope of the Act only when they are indicative of soring. If a horse has open lesions and is also bilaterally or unilaterally sore, the appropriate penalties will apply; if a horse has bilateral open lesions that cause it to be considered sore under the scar rule, it will be penalized as a scar rule violation. As many HIOs have separate penalties for horses with open lesions, though, we should note that this final rule does not prevent HIOs from continuing to assess and enforce such penalties.

Suspensions for Equipment Violations

We proposed to require HIOs to assess and enforce penalties for violations of the equipment-related prohibitions in § 11.2(b)(1) through (b)(10) and (b)(12) through (b)(17) in paragraph (c)(5) of the proposal.

One commenter stated that exhibitors should not be suspended for all equipment violations. The commenter cited an example of a pleasure horse that had a bit that was one-half inch too long, not intentional and not hurting the horse.

The situation cited by the commenter would not have been a violation of the regulations, as the equipment-related prohibitions in § 11.2(b)(1) through (b)(10) and (b)(12) through (b)(17) contain no reference to the allowable length of bits. The prohibitions in those paragraphs prevent the use of equipment that has been shown to be used to sore horses. Therefore, we consider it appropriate and necessary to require that penalties be assessed and enforced for such violations.

Unruly or Fractious Horses

For an unruly or fractious horse that cannot be inspected in accordance with § 11.21, we proposed in paragraph (c)(8) to require the horse to be dismissed from the individual class for which it was to be inspected.

One commenter expressed concern that a fractious horse could result in a violation for which people could be banned for the rest of the show season.

As a fractious horse cannot be inspected in accordance with § 11.21,

[6] The Strategic Plan was designed to increase public-private cooperation in eliminating soring. The Operating Plans were created to fulfill the goals of the Strategic Plan.

we have no means of determining whether it is sore. Therefore, we did not propose to require any penalty for such horses beyond dismissal of the horse from the class for which it was being inspected. Such a horse could be entered into and inspected for other classes in the same horse show, exhibition, sale, or auction.

One commenter stated that unruly or fractious horses that cannot be inspected in accordance with § 11.21 should not be considered to be violating the Act, but should simply be deemed ''not qualified to compete.''

We agree with this commenter. Because an unruly or fractious horse cannot be inspected to determine whether it is in violation of the Act, it is inaccurate to describe such a situation as a violation of the Act. To separate the requirement that unruly or fractious horses be dismissed from the class for which they are being inspected from the violations of the Act listed in paragraph (c), we have moved the unruly or fractious horse requirement into a new paragraph (d), and we have designated proposed paragraphs (d) and (e) as paragraphs (e) and (f), respectively, in this final rule. We have also added a requirement in paragraph (a) that HIOs that license DQPs enforce the requirement in the new paragraph (d). With these changes, the regulations will require unruly or fractious horses to be dismissed from the class for which they are being inspected without characterizing such horses as being in violation of the Act.

Appeals

Proposed paragraph (d) of § 11.25 set out a requirement for an appeals process for penalties assessed by an HIO. We proposed to require that, for all appeals, the appeal must be granted and the case heard and decided by the HIO or the violator must begin serving the penalty within 60 days of the date of the violation.

One commenter stated that procedural delays often result in suspensions taking effect during the ''off'' season when horse shows are not held, which has no negative impact at all on the violators. This commenter suggested that we require HIOs to administer suspensions quickly after a violation has been found in order to further increase the deterrent effect of suspensions, and to require that the suspensions be served during the show season. Another commenter concurred with the recommendation that suspensions be served during the show season, and proposed defining the show season to exclude the months of December, January, and February.

We agree that it is important to administer suspensions quickly after a violation has been found. The requirements in paragraph (d) ensure that, absent an appeal, all penalties will be enforced within 60 days after the violation, which we believe is a reasonable amount of time to allow an appeal to take place if necessary.

After considering requiring suspensions to be served during the show season, we have determined that it would be difficult to track penalties across the different HIOs to ensure both that HIOs are adhering to the 60-day requirement in enforcing their suspensions and that some or all of the suspensions do not occur during the show season. In addition, the show season may vary among HIOs. We are making no changes to the proposed rule in response to these comments. However, we will monitor the HIOs' implementation of the minimum penalty protocol, and if we find that HIOs are attempting to game the system to ensure that a disproportionate number of suspensions are served outside the regular show season, we will change the regulations in order to ensure that the suspension penalties have a stronger deterrent effect.

We also proposed to require the HIO to submit to the Department all decisions on penalty appeals within 30 days of the completion of the appeal.

One commenter stated an assumption that data supporting the decision of the HIO regarding violators must be provided along with the decision; if this is not the case, the commenter recommended that we amend the proposed rule accordingly.

We did intend to require that the HIO provide evidence supporting its decision along with the record of the decision itself when a penalty is overturned on appeal. This will allow APHIS to review the effectiveness of the appeal process. We have added this requirement to the final rule.

HIO Penalties and Government Civil and Criminal Penalties

Some commenters stated that Federal enforcement proceedings for violations for which HIOs have assessed and enforced a penalty would put violators in double jeopardy.

Paragraph (e) of proposed § 11.25 stated that the Department would retain the authority to initiate enforcement proceedings with respect to any violation of the Act, including violations for which penalties are assessed in accordance with proposed § 11.25, and to impose the penalties authorized by the Act if the Department determines that such actions are necessary to fulfill the purpose of the Act and the regulations. In addition, proposed paragraph (e) indicated that the Department would reserve the right to inform the Attorney General of any violation of the Act or of the regulations.

We will pursue a Federal enforcement proceeding for a violation for which an HIO has assessed and enforced a penalty only when the HIO has not properly assessed and enforced the penalty or the violation is so egregious that it warrants additional enforcement. We must retain the ability to pursue enforcement proceedings in such circumstances to ensure that the Act is effectively enforced in cases where the industry self-regulatory mechanism is not sufficient.

The U.S. Constitution's prohibition against double jeopardy, which in this case refers to being retried for an offense for which one has been found not guilty, applies only to criminal trials. Penalties imposed by HIOs are not criminal penalties, and thus double jeopardy is not relevant to such penalties.

Economic Issues

The proposed rule was accompanied by an analysis of the rule's potential economic impacts, including its potential impact on small entities. The analysis concluded that, since the HIOs already administer their own individual penalty protocol for violations of the Act, the proposed rule is not expected to impose additional costs upon HIOs or show participants (other than those individuals who incur more severe penalties because of the rule). The analysis accompanying the proposed rule stated that the proposal would not have a significant economic impact on a substantial number of small entities.

Several commenters expressed concern that the proposed rule would have a significant effect on the horse industry. One commenter stated that the Tennessee Walking Horse industry has a $300 million impact on the economy in Tennessee alone and that many in the industry have already been irreparably harmed. Commenters generally identified a decline in the industry, with some commenters discussing declining sale values for young horses and other commenters who supply goods to the Tennessee Walking Horse industry stating that their business has been down in recent years. One commenter believed that requiring minimum penalties would force him to close his horse business, and that many others would do the same.

Two commenters stated that, as trainers, they had seen a drop in the number of horses that are in training barns. One HIO commented that their

inspections have dropped by over 30,000 horses, presumably in recent years.

Several commenters noted that many walking horse shows benefit some kind of charity. These commenters predicted that the proposed rule would lead to charities receiving fewer revenues from such shows due to a lack of participation.

One commenter cited a recent Government Accountability Office (GAO) report, ''Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter,'' [7] that included an econometric model used to determine what portion of declining horse sale prices may have been due to bans on horse slaughter within the United States. This commenter asked us to conduct a similar analysis analyzing the Department's influence on the decline of the Tennessee Walking Horse industry, as expressed in horse sale prices in Tennessee and Kentucky.

Another commenter stated that the Tennessee Walking Horse industry has declined more than the horse industry in general, due to factors related to the desires of many in the industry to continue soring horses and the desires of others not to be associated with such activities.

We do not believe that minimum penalties for violations of the Act will necessarily have the effect described by these commenters. People who do not violate the Act, for example, will be unaffected; the minimum penalty protocol will only affect violators.

While it is possible that increased penalties for violations of the Act could lead to reduced attendance at shows and exhibitions, this is not the only possible outcome. The minimum penalties could also lead owners and trainers of walking horses, racking horses, and other gaited horses to use training methods that do not involve soring. This would allow for continued attendance at all shows, including those benefitting charities.

The GAO report cited by one commenter used a hedonic model, a type of model that predicts horse prices based on the estimated components of the quality (or value) of the horse. Although some commenters supplied anecdotal data regarding the walking horse industry, we do not have sufficient, broad-based data about the prices of Tennessee Walking Horses, racking horses, and other gaited horses to conduct such an analysis with respect to our enforcement activities.

[7] Available at *http://www.gao.gov/products/GAO-11-228.*

One commenter stated that his HIO had previously implemented the proposed penalties voluntarily. As a result, the commenter stated, exhibitors who had shown with the HIO the previous year advised the HIO that, due to the subjectivity of the inspection process and the possibility of receiving an undeserved violation, they could not show with the HIO now. The commenter stated that implementation of these penalties has already harmed his organization on a small level and expressed concern about the effects on the whole industry of mandating the penalties in the proposed rule.

This final rule will put all HIOs in an equivalent competitive position with respect to penalties, thus removing the incentive for exhibitors to leave organizations such as the commenter's for another HIO on the basis of the penalties assessed by that HIO (unless an HIO decides to impose penalties greater than those required in § 11.25).

Several commenters stated that the Act says that nothing should be done to harm the horse industry, and that the proposed rule would do exactly that.

We were unable to determine what section of the Act the commenters are referring to. In the Act, however, Congress does find that horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore. Requiring mandatory minimum penalties for violations of the Act will ensure consistency among HIOs and further the purpose of the Act, which is to eliminate the cruel and inhumane practice of soring.

Some commenters expressed concern about the potential impact on HIOs of the requirement to provide an appeals process. These commenters stated that providing investigative services, gathering witnesses, and then absorbing the cost of lawsuits should a party be dissatisfied with the outcome of an appeal would present prohibitive costs for HIOs.

HIOs have existing structures to support these activities. Many HIOs currently charge fees for appeals in order to cover the costs of such activities. Should there be a significant increase in appeals, we expect that HIOs will be able to handle them.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Efforts to eliminate soring have been hindered by the non-uniform assessment of penalties for violations of the Act. The rule will require HIOs to adhere to a uniform minimum penalty protocol. Also, the rule will give USDA the authority to decertify HIOs that refuse to implement the minimum penalty protocol.

Since the HIOs already administer a penalty protocol for violations of the Act, the proposed rule is not expected to impose additional costs upon HIOs or show participants (other than those individuals who incur penalties for violating the Act or the regulations).

The uniform penalty protocol may benefit the walking horse industry by:

- Helping to ensure more humane treatment of the horses;
- Reducing uncertainty about penalties for infractions of the Act;
- Enhancing the reputation and integrity of the walking horse industry;
- Providing for more fair competition at shows, which may positively impact attendance and regional economies; and
- Improving the value of the walking horse breeds.

The Small Business Administration's (SBA) small-entity standard for business associations that promote horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse is not more than $7 million in annual receipts (North American Industry Classification System (NAICS) 813910). The SBA small-entity standard for entities involved in Horses and Other Equine Production is $750,000 or less in annual receipts (NAICS 112920), while the small-entity standard is $7 million or less in annual receipts for businesses classified within Support Activities for Animal Production (NAICS 115210). Businesses that may be affected by this rule are likely to be small.

Under these circumstances, the Administrator of the Animal and Plant

Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Paperwork Reduction Act

This final rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 11

Animal welfare, Horses, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR part 11 as follows:

PART 11—HORSE PROTECTION REGULATIONS

■ 1. The authority citation for 9 CFR part 11 continues to read as follows:

Authority: 15 U.S.C. 1823–1825 and 1828; 7 CFR 2.22, 2.80, and 371.7.

§ 11.7 [Amended]

■ 2. In § 11.7, paragraph (g), the first sentence is amended by removing the word ''section'' the second time it appears and adding the word ''part'' in its place.

■ 3. In § 11.21, the section heading and paragraph (d) are revised to read as follows:

§ 11.21 Inspection procedures for designated qualified persons (DQPs).

* * * * *

(d) The HIO that licensed the DQP shall assess and enforce penalties for violations in accordance with § 11.25 and shall report all violations in accordance with § 11.20(b)(4).

■ 4. A new § 11.25 is added to read as follows:

§ 11.25 Minimum penalties to be assessed and enforced by HIOs that license DQPs.

(a) *Rulebook.* Each HIO that licenses DQPs in accordance with § 11.7 must include in its rulebook, and enforce, penalties for the violations listed in this section that equal or exceed the penalties listed in paragraph (c) of this section and must also enforce the requirement in paragraph (d) of this section.

(b) *Suspensions.* (1) For the violations listed in paragraph (c) of this section that require a suspension, any individuals who are responsible for showing the horse, exhibiting the horse, entering or allowing the entry of the horse in a show or exhibition, selling the horse, auctioning the horse, or offering the horse for sale or auction must be suspended. This may include, but may not be limited to, the manager, trainer, rider, custodian, or seller, as applicable. In addition, if the owner allowed any activity listed in this paragraph, the owner must be suspended as well.

(2) Any person who is responsible for the shipping, moving, delivering, or receiving of any horse that is found to be bilaterally sore or unilaterally sore as defined in paragraph (c) of this section, in violation of the scar rule in § 11.3, or in violation of the prohibition against the use of foreign substances in § 11.2(c), with reason to believe that such horse was to be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale in any horse show, horse exhibition, or horse sale or auction, must be suspended; *Provided,* that this requirement does not apply if the horse was transported by a common or contract carrier or an employee thereof in the usual course of the carrier's business or the employee's employment, unless the carrier or employee had reason to believe that the horse was sore.

(3) A person who is suspended must not be permitted to show or exhibit any horse or judge or manage any horse show, horse exhibition, or horse sale or auction for the duration of the suspension.

(4) Any person with multiple suspensions must serve them consecutively, not concurrently.

(c) *Minimum penalties*—(1) *Bilateral sore.* A horse is found to be sore in both its forelimbs or hindlimbs. The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction. First offense: Suspension for 1 year. Second offense: Suspension for 2 years. Third offense and any subsequent offenses: Suspension for 4 years.

(2) *Unilateral sore.* A horse is found to be sore in one of its forelimbs or hindlimbs. The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction. First offense: Suspension for 60 days. Second offense: Suspension for 120 days. Third offense and any subsequent offenses: Suspension for 1 year.

(3) *Scar rule violation.* A horse is found to be in violation of the scar rule in § 11.3. The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction. First offense: Suspension for 2 weeks (14 days). Second offense: Suspension for 60 days. Third offense and any subsequent offenses: Suspension for 1 year.

(4) *Foreign substance violations.* Violations of the prohibition against the use of foreign substances in § 11.2(c).

(i) *Before or during the show, exhibition, sale, or auction.* The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction.

(ii) *After the show, exhibition, sale, or auction.* Suspension for 2 weeks (14 days). The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction.

(5) *Equipment violation.* Violations of the equipment-related prohibitions in § 11.2(b)(1) through (b)(10) and (b)(12) through (b)(17).

(i) *Before or during the show, exhibition, sale, or auction.* The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction.

(ii) *After the show, exhibition, sale, or auction.* Suspension for 2 weeks (14 days). The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction.

(6) *Shoeing violation.* Violation of the shoeing-related prohibitions in § 11.2(b)(18). The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction.

(7) *Heel-toe ratio.* Violation of the heel-toe ratio requirement in § 11.2(b)(11). The horse must be dismissed from the remainder of the horse show, exhibition, sale, or auction.

(8) *Suspension violation.* A violation of any suspension penalty previously issued. Suspension for an additional 6 months (180 days) for each occurrence.

(d) *Unruly or fractious horse.* A horse that cannot be inspected in accordance with § 11.21. The horse must be dismissed from the individual class for which it was to be inspected.

(e) *Appeals.* The HIO must provide a process in its rulebook for alleged violators to appeal penalties. The process must be approved by the

Department. For all appeals, the appeal must be granted and the case heard and decided by the HIO or the violator must begin serving the penalty within 60 days of the date of the violation. The HIO must submit to the Department all decisions on penalty appeals within 30 days of the completion of the appeal. When a penalty is overturned on appeal, the HIO must also submit evidence composing the record of the HIO's decision on the appeal.

(f) *Departmental prosecution.* The Department retains the authority to initiate enforcement proceedings with respect to any violation of the Act, including violations for which penalties are assessed in accordance with this section, and to impose the penalties authorized by the Act if the Department determines that such actions are necessary to fulfill the purpose of the Act and this part. In addition, the Department reserves the right to inform the Attorney General of any violation of the Act or of this part, including violations for which penalties are assessed in accordance with this section.

Done in Washington, DC, this 31st day of May 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–13759 Filed 6–6–12; 8:45 am]

BILLING CODE 3410–34–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

[Docket No. PRM–26–7; NRC–2011–0220]

Certification of Substance Abuse Experts

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; consideration in the rulemaking process.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) will consider in the rulemaking process the issues raised in the petition for rulemaking (PRM), PRM–26–7, submitted by the American Academy of Health Care Providers in the Addictive Disorders (the Academy or the petitioner). The petitioner requested that the NRC amend its regulations to include the Academy as one of the organizations authorized to certify a substance abuse expert. The NRC determined that the issues raised in the PRM are appropriate for consideration and will consider them in the ongoing Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26 Technical Issues rulemaking.

DATES: The docket for the petition for rulemaking, PRM–26–7, is closed on June 7, 2012.

ADDRESSES: Further NRC action on the issues raised by this petition will be accessible on the Federal rulemaking Web site, *http://www.regulations.gov,* by searching on Docket ID NRC–2012–0079, which is the rulemaking docket for the 10 CFR part 26 Technical Issues rulemaking.

You can access publicly available documents related to the petition, which the NRC possesses and are publicly available, using the following methods:

- *Federal Rulemaking Web Site:* Supporting materials related to this petition can be found at *http://www.regulations.gov* by searching on the Docket IDs for PRM–26–7 or the 10 CFR part 26 Technical Issues rulemaking, NRC–2011–0220 and NRC–2012–0079, respectively. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668, email: *Carol.Gallagher@nrc.gov.*
- *NRC's Public Document Room (PDR):* You may examine and purchase copies of public documents at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.

FOR FURTHER INFORMATION CONTACT: Paul Harris, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1169; email: *Paul.Harris@nrc.gov;* or Scott C. Sloan, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1619; email: *Scott.Sloan@nrc.gov.*

SUPPLEMENTARY INFORMATION: On October 5, 2011 (76 FR 61625), the NRC published a notice of receipt (76 FR 61625) for PRM–26–7. The petitioner requested the NRC to amend its regulations under 10 CFR 26.187(b)(5) to include the Academy as one of the organizations authorized to certify a substance abuse expert.

The NRC received one comment during the public comment period (ADAMS Accession No. ML11341A064), which closed on December 19, 2011. The commenter, a student pursuing a master's degree in social work, provided a statement in support of the Academy's request to amend the NRC's regulations. The commenter stated that by ''amending the NRC's regulations to include the Academy as an authorized organization to certify substance abuse experts, more individuals can become qualified to provide addiction counseling. This would hopefully reduce the number of under qualified care providers and ensure that the clients are receiving the highest level of care.''

The NRC determined that the issues raised in PRM–26–7 are appropriate for consideration and will address them in the ongoing 10 CFR part 26 Technical Issues rulemaking. Docket No. PRM–26–7 is closed.

Dated at Rockville, Maryland, this 17th day of May 2012.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. 2012–13807 Filed 6–6–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0719; Directorate Identifier 2010–NM–087–AD; Amendment 39–17074; AD 2012–11–11]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for certain The Boeing Company Model 767–200, –300, and –400ER series airplanes. That AD currently requires replacing the separation link assembly on the applicable entry and service doors with an improved separation link assembly, and doing related investigative and corrective actions if necessary. This new AD adds an