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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OKLAHOMA; OKLAHOMA HORSE RACING COMMISSION; TULSA COUNTY PUBLIC FACILITIES AUTHORITY, dba fair Meadows Racing and Sports Bar; STATE OF WEST VIRGINIA; WEST VIRGINIA RACING COMMISSION; HANOVER SHOE FARMS, INC.; OKLAHOMA QUARTER HORSE RACING ASSOCIATION; GLOBAL GAMING RP, LLC, dba Remington Park; WILL ROGERS DOWNS, LLC; UNITED STATES TROTTING ASSOCIATION; STATE OF LOUISIANA,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; LEONARD S. COLEMAN, JR.; NANCY M. COX; FEDERAL TRADE COMMISSION; REBECCA KELLY SLAUGHTER, in her official capacity as Acting Chair of the Federal Trade Commission; NOAH JOSHUA PHILLIPS, in his official capacity as Commissioner of the Federal Trade Commission; ALVARO BEDOYA, in his official capacity as

No. 22-5487

Commissioner of the Federal Trade Commission; CHRISTINE S. WILSON, in her official capacity as Commissioner of the Federal Trade Commission; STEVE BESHEAR; ADOLPHO A. BIRCH, JR.; ELLEN MCCLAIN; CHARLES P. SCHEELER; JOSEPH DEFRANCIS; SUSAN STOVER; BILL THOMASON; D.G. VAN CLIEF; LINA KHAN,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.
No. 5:21-cv-00104—Joseph M. Hood, District Judge.

Argued: December 7, 2022

Decided and Filed: March 3, 2023

Before: SUTTON, Chief Judge; COLE and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Matthew D. McGill, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., for Appellants. Courtney L. Dixon, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Horseracing Authority Appellees. **ON BRIEF:** Matthew D. McGill, Lochlan F. Shelfer, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., Zach West, Bryan Cleveland, OFFICE OF THE OKLAHOMA ATTORNEY GENERAL, Oklahoma City, Oklahoma, Lindsay S. See, OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL, Charleston, West Virginia, Joseph Bocock, BOCOCK LAW PLLC, Oklahoma City, Oklahoma, Todd Hembree, CHEROKEE NATION BUSINESS, Catoosa, Oklahoma, Elizabeth B. Murrill, LOUISIANA DEPARTMENT OF JUSTICE, Baton Rouge, Louisiana, Michael Burrage, WHITTEN BURRAGE, Oklahoma City, Oklahoma, Jared C. Easterling, GREEN LAW FIRM PC, Ada, Oklahoma, for Appellants. Courtney L. Dixon, Joseph F. Busa, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Pratik A. Shah, Lide E. Paterno, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., John C. Roach, RANSDELL ROACH & ROYSE, Lexington, Kentucky, for Horseracing Authority Appellees. Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, Paul E. Salamanca, Lexington, Kentucky, April A. Wimberg, DENTONS BINGHAM GREENEBAUM LLP, Louisville, Kentucky, Gregory G. Garre, Blake E. Stafford, LATHAM & WATKINS LLP, Washington, D.C., for Amici Curiae.

SUTTON, C.J., delivered the opinion of the court in which GRIFFIN and COLE, JJ., joined. COLE, J. (pp. 20–31), delivered a separate concurring opinion.

OPINION

SUTTON, Chief Judge. Sometimes government works. In 2020, when Congress enacted the Horseracing Safety and Integrity Act to create a national framework to regulate thoroughbred horseracing, it generated several non-delegation and anti-commandeering challenges to the validity of the Act. The lead challenge—the non-delegation challenge—turned on the reality that the Act replaced several state regulatory authorities with a private corporation, the Horseracing Authority, which became the Act's primary rule-maker and which was not subordinate to the relevant public agency, the Federal Trade Commission, in critical ways. The Fifth Circuit declared the Act unconstitutional because it gave "a private entity the last word" on federal law. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872, 888–89 (5th Cir. 2022).

In response, Congress amended the Act to give the Federal Trade Commission discretion to "abrogate, add to, and modify" any rules that bind the industry. Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022). The Constitution anticipates, though it does not require, constructive exchanges between Congress and the federal courts. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (explaining that "interdependence" and "reciprocity" should characterize the relationship between the branches as much as "separateness" and "autonomy"). A

productive dialogue occurred in this instance, and it ameliorated the concerns underlying the non-delegation challenge. As amended, the Horseracing Act gives the FTC the final say over implementation of the Act relative to the Horseracing Authority, allowing us to uphold the Act as constitutional in the face of this non-delegation challenge as well as the anti-commandeering challenge.

I.

Unlike other sports, no one authority traditionally has regulated horseracing. Instead, 38 state regulatory schemes have supplied an array of protocols and safety requirements. Kjirsten Lee, *Transgressing Trainers and Enhanced Equines*, 11 J. Animal & Nat. Res. L. 23, 26 (2015). Most Americans know horseracing through occasional high-visibility races, say the Kentucky Derby on the first Saturday of May, or high-visibility books, say *Seabiscuit*. But as the partly and fully initiated alike can appreciate, the sport comes with risk. Racing a dozen or more jockeys atop large horses around a mile or more track, all with prize money and gambling positions at stake, creates plenty of danger. Over the last seventy years or so, fatal accidents for jockeys during horseraces have exceeded that of drivers in NASCAR races. Peta L. Hitchens *et al.*, *Jockey Falls, Injuries, and Fatalities Associated with Thoroughbred and Quarter Horse Racing in California 2007–2011*, at 3, Orthopedic J. Sports Med. (2013) (129 jockeys killed between 1940 and 2012); *How Many NASCAR Drivers Have Died Racing?*, Motor Racing Sports, https://tinyurl.com/2d3xnazy (last visited Feb. 6, 2023) (82 NASCAR drivers killed between 1950 and 2021). Faring no better, almost 500 thoroughbreds died in 2018 alone due to racing

injuries. *Why Horse Racing Is So Dangerous*, Nat'l Geographic (Jan. 21, 2020), https://tinyurl.com/ycyf5rhv.

Whether it's the risk of pushing horses past their limits or the risks associated with unsafe tracks and doping, or other health and safety issues facing horses and jockeys, no one doubts the imperative for oversight. The question, as is so often the case, is whether the regulation should be national or local.

In 2020, Congress answered national but did so in conventional and unconventional ways. Conventionally, it enacted the Horseracing Integrity and Safety Act to nationalize regulatory authority over thoroughbred racing. 15 U.S.C. §§ 3051–60. Less conventionally, it chose to use a private nonprofit corporation—the Horseracing Integrity and Safety Authority—to do some of the regulating.

The Act charges the Horseracing Authority with "developing and implementing a horseracing antidoping and medication control program and a racetrack safety program." *Id.* § 3052(a). The Authority's jurisdiction also includes the "safety, welfare, and integrity" of covered thoroughbreds, jockeys, and horseraces. *Id.* § 3054(a)(2)(A). The Authority may expand the Act's coverage to other breeds upon request by a state racing commission or a breed governing organization. *Id.* § 3054(*l*).

The Horseracing Authority funds its operations through fees on the horseracing industry. Each year, it calculates its budget and apportions amounts owed by each State. *Id.* § 3052(f)(1)(C). The States have two options. They may collect the fees themselves from covered entities and remit the fees to the Authority.

Id. § 3052(f)(2)(D). Or they may allow the Authority to collect the fees directly. *Id.* § 3052(f)(3)(A)–(C).

The Act empowers the Horseracing Authority to promulgate rules on a variety of subjects: prohibited medications, laboratory protocols and accreditation, racetrack standards and protocols, injury analysis, enforcement, and fee assessments. *Id.* § 3053(a). The Authority also develops procedures for its investigatory and subpoena powers. *Id.* § 3054(c). Once issued, the rules preempt state law. *Id.* § 3054(b).

The Horseracing Authority implements the rules, monitors compliance, and investigates potential rule infractions. *Id.* § 3054(c), (h), (i). The Act directs "the Authority and Federal or State law enforcement authorities" to "cooperate and share information" whenever a covered person may have violated federal or state law in addition to one of the Authority's rules. *Id.* § 3060(b). After investigating, the Authority may enforce the rules through internal adjudications or civil lawsuits. *Id.* §§ 3054(j), 3057(c).

Under the Horseracing Act as originally passed, the Federal Trade Commission played a limited role. The FTC published the Authority's proposed rules for public comment. *Id.* § 3053(b)(1). After the comment period, the FTC had to approve the rules if they were "consistent" with the Act and with other "applicable rules approved by the Commission." *Id.* § 3053(b)–(c). The FTC also could issue an "interim" rule if it had "good cause" to do so and if the rule was "necessary to protect" the welfare of horses or the integrity of the sport. *Id.* § 3053(e) (2020); *see* 5 U.S.C. § 553(b)(B).

This framework prompted legal challenges. In a case filed in federal court in Texas, several claimants argued that the Act violated the Constitution by

delegating unmonitored lawmaking power to a private entity. The Fifth Circuit agreed, reasoning that the FTC's oversight was insufficient because the FTC could not modify the rules or otherwise question the Horseracing Authority's policy choices. *Black*, 53 F.4th at 872–73, 886–87. Our court faced a similar challenge. Oklahoma, West Virginia, Louisiana, their racing commissions, and other entities (collectively, Oklahoma) claimed that the Act unlawfully delegated federal power to a private entity and unlawfully commandeered the States. The district court dismissed Oklahoma's claims.

After the Fifth Circuit issued its decision and after we heard oral argument in our case, Congress enacted, and the President signed into law, an amendment to the Act that increased the FTC's oversight role. The amendment eliminated the FTC's interim-rule authority and instead gave sweeping power to the FTC to create rules that "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. § 3503(e) (as amended). Oklahoma maintains that the Act remains unconstitutional.

II.

Mootness. First things first: Does the amendment to the Act transform this live controversy into a moot one? When Congress amends a statute, it is true, pending claims challenging the law sometimes become moot. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). Not invariably, however. If the revised statute continues to place a non-trivial burden on the plaintiff that arises from the same theory of unconstitutionality set forth in the complaint, the case remains live. *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 692–93 (6th Cir. 2022). A similar

conclusion applies if the amendment does not affect other features of the challenge. Both exceptions apply here.

The amendment to § 3053(e) of the Horseracing Act does not moot Oklahoma's non-delegation claim. While significant to the outcome of the case, this singular amendment changes little about the Act's basic structure. The revised Act "operates in the same fundamental ways," with the Authority proposing and enforcing rules and with the FTC overseeing all of them, the key difference being that the FTC has far more oversight authority than it had before. *Id.* at 693. The revised Act likewise presents fundamentally the "same controversy," with Oklahoma continuing to argue that the Act gives too much unsubordinated power to a private entity. *Id.*; *see Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006). Nor does the Act moot Oklahoma's anti-commandeering claim. In reality, the amendment does not change that dispute in any material way.

Remand. One other preliminary point remains. If the legislature changes a law while a live challenge to it remains on appeal, appellate courts may remand the case for the district court to take the first look at the revised law. *Hadix v. Johnson*, 144 F.3d 925, 934 (6th Cir. 1998), *abrogated on other grounds*, 530 U.S. 327 (2000). The option is discretionary, not mandatory. In this instance, we see "little to be gained" from a remand because Oklahoma brings facial challenges that raise only legal issues and because the parties and panel have already devoted considerable time and resources to the dispute. *Id.* at 935; *see Phelps-Roper v. Troutman*, 712 F.3d 412, 417 (8th Cir. 2013) (per curiam). Fortifying this conclusion is the reality that

the challengers have asked us to proceed to the merits.

III.

A.

Non-delegation. Through the United States Constitution, the People separated the powers of the National Government into three branches. They vested the legislative power in Congress, the executive in the President, and the judicial in the federal courts. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. The People also constrained each branch's use of its power through counterweights in the other branches. To preserve this balance, the Constitution bars further delegations of power between the branches. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

What about delegations to private entities? Surely, if the Vesting Clauses bar the three branches from exchanging powers among themselves, those Clauses bar unchecked reassignments of power to a non-federal entity. Just as it is a central tenet of liberty that the government may not permit a private person to take property from another private person, *Calder v. Bull*, 3 U.S. (Dall.) 386, 388–89 (1798) (Chase, J.), or allow private individuals to regulate other private individuals, *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122 (1928), it follows that the government may not empower a private entity to exercise unchecked legislative or executive power. Those who govern the People must be accountable to the People. Completely transferring unchecked federal power to a private entity that is not elected, nominated, removable, or impeachable undercuts representative government at every turn.

Precedent confirms that unchecked delegations to private entities at a minimum violate core separation-of-power guarantees. Consider *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A federal statute gave the President discretion to create codes of fair competition based on proposals from private entities. *Id.* at 542. Rejecting the government's view that private participation cured any surplus delegation to the President, the Court explained that transforming private groups into legislatures was "utterly inconsistent" with the constitutional design. *Id.* at 537.

The Court applied the same standard to the Bituminous Coal Act. In *Carter v. Carter Coal Co.*, the Court concluded that, by empowering coal producers to set wages and to control the businesses of others, the Act amounted to a "delegation in its most obnoxious form" because such regulation "is necessarily a governmental function." 298 U.S. 238, 310–11 (1936). Appreciating the problem, Congress amended the Act the next year to give the Coal Commission, a government entity, the power to set prices. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). After Congress subordinated the private coal producers to a public body (the Coal Commission) that could modify or reject their proposals, the Court determined that the statute did not impermissibly delegate "legislative authority to the industry." *Id.* at 399.

Taken together, these cases draw a line between impermissible delegation of unchecked lawmaking power to private entities and permissible participation by private entities in developing government standards and rules. *Adkins* shows that a private entity may aid a public federal entity that retains authority over the implementation of federal law. *Id.* at

388. But if a private entity creates the law or retains full discretion over any regulations, *Carter Coal* and *Schechter* tell us the answer: that it is an unconstitutional exercise of federal power. *See Carter Coal*, 298 U.S. at 311; *Schechter*, 295 U.S. at 537.

Decisions from the courts of appeals hold this line. Private entities may serve as advisors that propose regulations. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); *Cospito v. Heckler*, 742 F.2d 72, 87–89 (3d Cir. 1984); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977). And they may undertake ministerial functions, such as fee collection. *See Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989), *abrogated on other grounds*, 521 U.S. 457 (1997). But a private entity may not be the principal decisionmaker in the use of federal power, *Pittston Co.*, 368 F.3d at 395–97, may not create federal law, *Texas v. Rettig*, 987 F.3d 518, 533 (5th Cir. 2021), may not wield equal power with a federal agency, *Ass'n of Am. R.R. v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 671–73 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015), or regulate unilaterally, *Black*, 54 F.4th at 872.

An illuminating example comes from securities law. The Securities and Exchange Commission regulates the securities industry with the assistance of private, self-regulatory organizations called SROs. The SROs propose rules for the industry, and they initially enforce the rules through internal adjudication. The SEC oversees both the rulemaking and the enforcement. As to the rules, the SEC approves proposed rules if they are consistent with the Maloney Act, and may "abrogate, add to, and delete from" an SRO's rules "as the Commission deems necessary or

appropriate." 15 U.S.C. § 78s(b)(2)(C), (c). As to enforcement, the SEC applies fresh review to the SRO's decisions and actions. *Id.* § 78s(e); *see Sartain v. SEC*, 601 F.2d 1366, 1369–71 (9th Cir. 1979). In case after case, the courts have upheld this arrangement, reasoning that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors. *See R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co.*, 557 F.2d at 1012–13; *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982); *see also Amtrak I*, 721 F.3d at 671 n.5 (describing the SROs' role as "purely advisory or ministerial").

These sources all suggest that, at a minimum, a private entity must be subordinate to a federal actor in order to withstand a non-delegation challenge. Whether subordination always suffices to withstand a challenge raises complex separation of powers questions. Simplifying matters for today, if not for a future day, the parties accept this framing of the appeal. As the case comes to us, then, the determinative question is whether the Horseracing Authority is inferior to the FTC.

B.

The Horseracing Authority is subordinate to the agency. The Authority wields materially different power from the FTC, yields to FTC supervision, and lacks the final say over the content and enforcement of the law—all tried and true hallmarks of an inferior body.

Rulemaking. As amended, the Horseracing Act gives the FTC supervision over the rules that govern the horseracing industry. At the outset, the

Horseracing Authority drafts rules on racetrack safety and anti-doping matters, and the FTC must approve those proposals if they are consistent with the Act. 15 U.S.C. § 3053(c)(2). But, critically, as the FTC "deems necessary or appropriate," it "may abrogate, add to, and modify the rules." *Id.* § 3053(e) (as amended). The FTC's power to abrogate and change the Authority's rules creates "a clear hierarchy." *Black*, 53 F.4th at 888–89.

Section 3053(e)'s amended text grants the FTC a comprehensive oversight role. The Act provides that the FTC may act as it "finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act." 15 U.S.C. § 3053(e) (as amended). The final catchall indicates that § 3053(e) spans the Horseracing Authority's jurisdiction. The parties are one in agreeing that this section allows the FTC to modify rules "if it wishes." Appellants' Suppl. Br. 1.

A comparison with § 3053(e)'s pre-amendment language reenforces the point. Before the amendment, § 3053(e) allowed the FTC to adopt interim rules only if "necessary," and only if good cause existed to bypass the Administrative Procedure Act's notice and comment procedures. 15 U.S.C. § 3053(e) (2020). The Fifth Circuit concluded that the ability to "make temporary rules on a break-glass-in-case-of-an-emergency basis" did not give the FTC sufficient control. *Black*, 53 F.4th at 883. The FTC could overrule the Authority only in rare, extreme cases, making it the inferior, not the superior, rule-maker. The amended section, by contrast, requires no emergency, no good cause, no necessity. The FTC now may create new

rules or modify existing rules as it deems "appropriate to" advance "the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended). That amounts to true oversight authority.

With § 3053(e)'s broad power to write and rewrite the rules comes policymaking discretion. *See Cospito*, 742 F.2d at 88–89. When the FTC decides to act—whether by abrogating one of the Horseracing Authority's rules or introducing its own—the FTC makes a policy choice and necessarily scrutinizes the Authority's policies. That is no less true when the FTC decides *not* to act. In either setting, the FTC may "unilaterally change regulations," *Amtrak I*, 721 F.3d at 671, and "is free to prescribe" the rules, showing that it "retains ultimate authority," *Cospito*, 742 F.2d at 88. In a recent rule, the FTC recognized as much, explaining that its new "rulemaking power" allows it to "exercise its own policy choices." *Order Ratifying Previous Commission Orders* 3, Fed. Trade Comm'n (Jan. 3, 2023), https://tinyurl.com/dkenwspt.

In full, § 3053(e)'s amended text gives the FTC ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority's implementation of those rules. By the same token, ultimate "law-making is not entrusted to the [Authority]." *Adkins*, 310 U.S. at 399; *see Frame*, 885 F.2d at 1129. That makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one. *See Adkins*, 310 U.S. at 388.

Accountability considerations lead to the same destination. Before the amendment, the Fifth Circuit determined that the FTC could not question the Horseracing Authority's policy choices or modify its rules. *Black*, 53 F.4th at 886–87. It followed that the

Authority, a private entity beyond public control, alone was responsible for the exercise of government power in this area. Not so anymore. With its new ability to have "the final word on the substance of the rules," the FTC bears ultimate responsibility. *Id.* at 887; *cf. Lynn*, 502 F.2d at 59. The People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it "ensure[s] the fair administration of the Authority" and advances "the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended).

Enforcement. A similar conclusion applies to enforcement of the Act. The Horseracing Authority's enforcement duties are extensive, granted. The Authority implements the Act, investigates potential rule violations, and enforces the rules through internal adjudications and external civil lawsuits. Even so, the FTC's rulemaking and rule revision power gives it "pervasive" oversight and control of the Authority's enforcement activities, just as it does in the rulemaking context. *Adkins*, 310 U.S. at 388.

Take an example to illustrate the point. Imagine that the Horseracing Authority began enforcing its rule without giving thought to the procedural rights of jockeys, trainers, and other industry participants. Section 3053(e) gives the FTC the tools to step in. To ensure a fair enforcement process, the FTC could issue rules protecting covered persons from overbroad subpoenas or onerous searches. The FTC could require that the Authority provide a suspect with a full adversary proceeding and with free counsel. And the FTC could require that the Authority meet a burden of production before bringing a lawsuit or preclear the decision with the FTC. In these ways as well as others, the FTC may control the Authority's enforcement

activities and ensure that the FTC, not the Authority, ultimately decides how the Act is enforced.

Topping this oversight off, the FTC has full authority to review the Horseracing Authority's enforcement actions. 15 U.S.C. § 3058(c)(1)–(2). After an independent review, the FTC may reverse the Authority's decision. *Id.* § 3058(c)(3). As with rulemaking, so with adjudication: The Authority's adjudication decisions are not final until the FTC has the opportunity to review them. *See Cospito*, 742 F.2d at 88; *Todd & Co.*, 557 F.2d at 1012–14. All told, the Horseracing Authority is "subject to [the FTC's] pervasive surveillance and authority," revealing that the Authority "operate[s] as an aid to the [FTC]," nothing more. *Adkins*, 310 U.S. at 388.

Whether the FTC becomes a demanding taskmaster or a lenient one, the FTC *could* subordinate every aspect of the Authority's enforcement "to ensure the fair administration of the Authority . . . or otherwise in furtherance of the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended). That potential suffices to defeat a facial challenge, where Oklahoma must show that the Act is unconstitutional in all its applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

C.

In seeking to head off this conclusion, Oklahoma points out that the amendment does not change one feature of the Act—that the FTC has power only to review proposed rules by the Authority for "consistency" with the Act, a standard of review that, it says, does not pick up policy disagreements. 15 U.S.C. § 3053(c). Maybe so. But even if that is the case, the FTC's later authority to modify *any* rules for any reason at all, including policy disagreements, ensures

that the FTC retains ultimately authority over the implementation of the Horseracing Act. The FTC's review authority in this respect parallels similar authority exercised by the SEC under the Maloney Act. *Compare* 15 U.S.C. § 78s(c) (providing that the SEC "may abrogate, add to, and delete from . . . the rules of [the private entity] as the Commission deems necessary or appropriate"), *with* 15 U.S.C. § 3053(e) (as amended) (providing that the FTC "may abrogate, add to, and modify the rules of the Authority . . . as the Commission finds necessary or appropriate"). The same is true in the Coal Act. *See* Bituminous Coal Act of 1937, Pub. L. No. 75-48, § 4, 50 Stat. 72, 78 (providing that the Coal Commission could "approve, disapprove, or modify" proposals).

Before the amendment, Oklahoma observed that the SEC's modification power gives the SEC "largely unbounded authority to craft [the private entity's] regulations as it sees fit." Reply Br. 7. The same is now true under the Horseracing Act. The lack of a modification power, moreover, was the "key distinction" the Fifth Circuit identified between the Maloney and Horseracing Acts. *Black*, 53 F.4th at 887. The amendment to § 3053(e) eliminates that distinction. Even if other less-material distinctions between the two laws remain, the FTC's new discretion to adopt and modify rules correctly places the private Horseracing Authority in a subordinate position to the public FTC. All of this explains why every court of appeals to address the validity of such delegations under the Maloney Act and the Coal Act, as noted, has upheld them.

Oklahoma worries that the Horseracing Authority's rules could govern a dispute until the FTC undoes rules it dislikes. It's true that the FTC's modification authority under § 3053(e), as it currently

exists, customarily would run through ordinary rulemaking. But that current reality need not be a future reality. For one, the threat of modification is not likely to miss the attention of the Authority. For another, the FTC has power to initiate new rules, not just to modify rules it does not like. To the extent this timing gap creates a problem, the FTC is free to resolve it ahead of time. It might, for example, adopt a rule that all newly enacted rules do not take effect for 180 days, thereby giving the FTC time to review rules and prepare preemptive modifications.

This argument overlooks another reality. When the FTC reviews the Horseracing Authority's proposed rules, it asks not just whether they are "consistent" with the Act; it also asks whether they are "consistent" with other "applicable rules approved by the Commission." *Id.* § 3053(c)(2). Any risk of a policymaking gap between initial consistency review and initial full review will diminish over time as the FTC chooses to exercise—or not to exercise—its complete authority to initiate new rules or modify old ones. Over time, the FTC's threshold consistency review will account for its own full-throated rulemaking power.

Oklahoma notes that the FTC's duty under the Administrative Procedure Act to explain any changes to the rules limits its hand. But that just means it may not arbitrarily alter the rules. The APA does not limit the FTC's authority to disagree with the Horseracing Authority over a policy choice delegated to the agency by Congress. The FTC "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It is enough that "there are good reasons" for

the new policy "and that the agency believes it to be better." *Id.*

No matter, Oklahoma adds: The Horseracing Authority's ability to expand its jurisdiction to breeds other than thoroughbreds escapes the FTC's review. Not so. The FTC's § 3053(e) power allows it to revoke the Authority's decision or place procedural and substantive conditions on any such decision.

Oklahoma points to the Horseracing Authority's ability to enforce the Act through civil lawsuits, asserting that the ability cannot reside outside the executive branch. "Difficult and fundamental questions," we agree, arise when private entities enforce federal law. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). But this is not an as-applied challenge to an individual enforcement action; it is a facial challenge to the Act. The FTC's ultimate authority over all rules promulgated under the Act, which would include any rules related to enforcement, offers a potent answer to this concern in the context of a facial challenge. The Authority's enforcement through internal adjudication and external lawsuits is subordinate to the FTC. The other reality is that the parties simply have not engaged with this feature of the Act, including briefing with respect to founding-era or contemporary analogs showing the role private entities may, and may not, play in law enforcement. That omission is understandable. From the start, Oklahoma litigated this claim as one turning on "governmental oversight" of and "accountability" for the Horseracing Authority's activities, not as a categorical Article II inquiry or as a question of historical meaning. R.53 ¶ 150; R.98 at 23–24. We thus will decide the case as it comes to us, and save resolution of such questions,

if such questions there be, for a day when the Authority's actions and the FTC's oversight appear in concrete detail, presumably in the context of an actual enforcement action.

IV.

Oklahoma separately claims that two provisions of the Horseracing Act, § 3060(b) and § 3052(f), violate the anti-commandeering guarantee of the Tenth Amendment. Oklahoma lacks standing to challenge the first provision, and the second one does not count as a cognizable form of commandeering.

A.

Oklahoma initially sets its sights on § 3060(b), which requires state authorities to "cooperate and share information" with the Horseracing Authority or federal agencies. Right or wrong about whether this requirement amounts to commandeering, Oklahoma and the other State plaintiffs lack standing to challenge it.

Standing arises from the Constitution's mandate that federal courts decide only "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. A plaintiff must establish standing for each claim he presses and each statutory provision he challenges. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–08 (2021). To do that, he must point to an injury that is traceable to the defendant's conduct and that a judicial decision can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In a pre-enforcement challenge like this one, a plaintiff must also allege a "credible threat" of future enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Oklahoma has not carried this burden. Even if Oklahoma is correct that § 3060(b) unlawfully orders

the States to cooperate, the provision does not contain a penalty or enforcement mechanism. And Oklahoma does not point to any actual or threatened enforcement actions. An unenforceable statutory duty does not give rise to Article III standing, *California v. Texas*, 141 S. Ct. 2104, 2113–14 (2021), and "mere conjecture" about possible enforcement is not any better, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

Oklahoma asserts in response that wrongdoing will "frequently" implicate both federal and state law, and thus trigger the duty to cooperate. R.86 at 10. But the question is not how often the opportunity for cooperation may arise; it is whether the defendants can or will mandate cooperation when that time comes. Even so, Oklahoma notes, the Horseracing Authority may penalize States that refuse to cooperate. But the Authority's sanction power extends only to covered persons, a term that does not include States. 15 U.S.C. §§ 3051(5), 3054(d), 3057(a)(1); *see Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The same is true of the Authority's ability to initiate civil lawsuits. 15 U.S.C. § 3054(j).

Absent a credible allegation that the Horseracing Authority or the FTC can or will enforce § 3060(b), Oklahoma lacks standing to challenge it. *California*, 141 S. Ct. at 2115.

B.

Oklahoma separately claims that § 3052(f) puts the States to an unconstitutionally coercive choice. While § 3052(f)'s threat of preemption gives Oklahoma standing, *Kentucky v. Biden*, 23 F.4th 585, 597–601 (6th Cir. 2022), the provision does not commandeer the States.

Congress may not require the States, separate sovereigns all, to implement federal programs. *Printz v. United States*, 521 U.S. 898, 925 (1997). Nor may the federal government issue "orders directly to the States" to carry out this or that federal program. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). At the same time, Congress may "encourage a State to regulate" or "hold out incentives" in hopes of "influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992).

One option in this last respect is that Congress may encourage the States through conditional preemption. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981). Instead of preempting state law altogether, Congress may offer States a regulatory role contingent on following federal standards. *New York*, 505 U.S. at 167–68. The choice brings consequences. If a State participates, it often has discretion in how it implements the program. *See Hodel*, 452 U.S. at 289. If a State decides not to participate, the State's activities are preempted. By offering States such a non-coercive choice—regulate or be preempted—Congress has not violated any constitutional imperatives. *Murphy*, 138 S. Ct. at 1479; *New York*, 505 U.S. at 167; *Hodel*, 452 U.S. at 288–91; *FERC v. Mississippi*, 456 U.S. 742, 769 (1982).

That's how § 3052(f) operates. It presents States with a choice, not a command. States may elect to collect fees from the industry and remit the money to the Horseracing Authority or States may refuse. That's their call. If a State participates, it gains discretion over how the fees are collected. 15 U.S.C. § 3052(f)(2)(D). If a State refuses, the Authority collects the fees itself, and the State "shall not impose or

collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters." *Id.* § 3052(f)(3)(D).

This scheme fits comfortably within the conditional preemption framework. Section 3052(f) "simply establish[es] requirements for continued state activity in an otherwise pre-emptible field." *FERC*, 456 U.S. at 769; *see Printz*, 521 U.S. at 925–26. And because Congress may regulate horseracing under its commerce power, there is nothing unconstitutional about Congress "offer[ing] States the choice of regulating that activity according to federal standards or having state law pre-empted." *New York*, 505 U.S. at 173–74.

Section 3052(f) also lacks the hallmark of commandeering: a "direct" order to the States. *Murphy*, 138 S. Ct. at 1476. Section 3052(f)'s statement that a State "shall not impose or collect" certain fees may sound like a command, true enough. *Id.* § 3052(f)(3)(D). But preemption often carries that tone, as similar language in other statutes confirms. *See, e.g.*, 42 U.S.C. § 7543(a) (1988) ("No State . . . shall adopt or attempt to enforce any standard relating to control of emissions . . . ."); 49 U.S.C. § 40116(b) ("[A] State . . . may not levy or collect a tax [or] fee . . . on an individual traveling in air commerce . . . ."). Because Congress often speaks in this manner, "it is a mistake to be confused" by preemption provisions that "appear to operate directly on the States." *Murphy*, 138 S. Ct. at 1480. Congress in this instance offers the States a choice, as Oklahoma all but concedes. Reply Br. 2, 25, 26, 27 (referring to § 3052(f) as a "threat of preemption"). A choice is not a command. *See Printz*, 521 U.S. at 925–26.

All of this is not to say "that the choice put to the States—that of either abandoning regulation" or

assisting the Authority—is an easy one or a good one as a matter of policy. *FERC*, 456 U.S. at 766. Fraught though it may be, Congress has not commandeered the States by putting them to this choice.

Oklahoma's principal counterargument is that a choice between collecting fees and losing fee collecting authority is illegitimate, coercive, or punitive. We don't think so.

Oklahoma begins by arguing that § 3052(f)'s choice—collect fees for the Horseracing Authority or stop collecting entirely—commandeers the States because Congress may not force the States to adopt either alternative. *See New York*, 505 U.S. at 175–76. Congress may not force a State to collect fees, true. *Printz*, 521 U.S. at 933. But Congress may use its commerce power to preempt the field of horseracing, preventing States from imposing fees. *See FERC*, 456 U.S. at 764; *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Threatening to do so, it follows, is a "conditional exercise of [a] congressional power." *New York*, 505 U.S. at 176.

Oklahoma's response that a "threat of preemption," Reply Br. 25, is coercive runs aground on contrary precedent. The Court has rejected the argument "that the threat of federal usurpation of their regulatory roles coerces the States." *Hodel*, 452 U.S. at 289; *New York*, 505 U.S. at 176.

Even so, Oklahoma continues, threatening a State's taxing authority is especially coercive. We fail to see how. The validity of conditional preemption does not fluctuate with the power that is threatened. *See Hodel*, 452 U.S. at 290–91. This would not be the first time a State's taxing power was preempted. *See Aloha Airlines, Inc. v. Dir. of Tax'n*, 464 U.S. 7, 14 n.10

(1983); *Exxon Corp. v. Hunt*, 475 U.S. 355, 360–63 (1986).

Oklahoma presses the point that Congress's financial incentives may become so overwhelming that a State effectively cannot refuse. *See South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987). Grafting this principle on conditional preemption raises legal and factual problems. Legally, it is bereft of support; no case evaluates conditional preemption by looking to a State's monetary incentives. Factually, Oklahoma falters because it does not quantify its expected loss. *See NFIB v. Sebelius*, 567 U.S. 519, 580–82 (2012) (opinion of Roberts, C.J.) (comparing an incentive to a State's budget). Without knowing how much money is at stake, how are we to say the sum is too high?

Oklahoma adds that the threat is punitive because it serves no purpose other than to obtain compliance. Conditional preemption, however, amounts to a "permissible method of encouraging a State to conform to federal policy." *New York*, 505 U.S. at 168; *see FERC*, 456 U.S. at 766. And a State that sees itself as a sovereign sometimes must act like one. Another reason is not difficult to find anyway. The fee provisions ensure that a single entity—whether a State or the Authority—imposes fees on the horseracing industry for all anti-doping and racetrack safety matters. Eliminating "double taxation" and fostering uniformity are adequate grounds to preempt parallel collection regimes. *Aloha Airlines*, 464 U.S. at 9–10; *see Coventry Health Care of Mo., Inc. v. Nevis*, 581 U.S. 87, 97–99 (2017); *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (plurality).

Oklahoma next argues that Congress failed to "appropriate the funds needed to administer the program" by forcing States to pay for collecting fees even

if they refuse to act as the Authority's fee collector. *Murphy*, 138 S. Ct. at 1477. Not so. Private parties pay for the Authority's operations. 15 U.S.C. § 3052(f)(2)(D), (3)(B). And if a State does not collect fees under the Act, the Authority incurs the cost of doing so. Even if States suffer a pocket-book loss from preemption, that does not force them to pay for the program. *See Hodel*, 452 U.S. at 288.

Oklahoma also worries that the scheme blurs accountability. Conditional preemption, however, leaves a State and its citizens with "the ultimate decision as to whether or not the State will comply." *New York*, 505 U.S. at 168. The ability to choose ensures that state and federal entities are accountable for their roles. *See id.*

We affirm.

CONCURRENCE

COLE, Circuit Judge, concurring. While I agree with the majority's conclusions that the Act is facially constitutional, and its analysis in full in Part IV, I write separately because I depart slightly from its framing of the issue and its analysis of the private nondelegation doctrine.

I. ISSUE ON APPEAL

As a threshold matter, I note what is before us on appeal. In 2020, with wide bipartisan support, Congress passed, and then-President Trump signed into law, the Horseracing Integrity and Safety Act ("HISA" or "the Act"). Pub. L. No. 116-260, §§ 1201–12, 134 Stat. 1182, 3252–75 (2020) (codified at 15 U.S.C. §§ 3051–60). Petitioners challenged the Act's constitutionality and appealed the district court's dismissal of the case for failure to state a claim. A few weeks after this panel heard oral argument in the appeal, Congress amended the Act. *See* Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 126 Stat. 4459, 5231–32 (2022) (codified as amended at 15 U.S.C. § 3053(e)). Congress amended section 3053(e), which now provides that:

> The Commission, by rule, in accordance with section 553 of title 5, United States Code, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or

> otherwise in furtherance of the purposes of this Act.

15 U.S.C. § 3053(e). Under the current form of the statute, the Federal Trade Commission ("FTC") can, in certain circumstances delineated in the Act, and through proper rule-making procedures as required by the Administrative Procedure Act, "abrogate, add to, and modify" existing rules promulgated by the Horseracing Integrity and Safety Authority ("Authority"). *Id.*

Today, our review is cabined to the statute as amended, withholding judgment on the previous version or other circuits' handling of the original statute. To the extent that the cogent majority opinion goes further—opining in dicta that the original statute was unconstitutional—I note that not only does such analysis not carry the force of law, but also that I disagree, as I believe the original statute was constitutional because the private Authority has always been subordinate to the FTC.

II. PRIVATE NONDELEGATION DOCTRINE

The nondelegation doctrines broadly refer to judicially imposed limits on Congress's ability to constitutionally delegate authority to others. Specifically, Congress cannot delegate its legislative authority to an executive agency unless the statute contains an "intelligible principle" guiding the agency. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *see also Mistretta v. United States*, 488 U.S. 361, 372 (1989). This is the public nondelegation doctrine. The private nondelegation doctrine refers to constitutional concerns that arise where a private entity—rather than a government entity—wields significant power to execute a statutory scheme. *See Carter*

v. Carter Coal Co., 298 U.S. 238 (1936). Only the latter of these, private nondelegation, is at issue here.

I agree with the majority that the Act is constitutional under the private nondelegation doctrine, and also that the main test for this issue is whether the private entity is subordinate to the federal agency. But I write separately because I diverge from the majority's analysis in two ways: (1) the source of the private nondelegation doctrine, and (2) the precise framing of the private nondelegation question.

A. Source of Private Nondelegation Doctrine

The private nondelegation doctrine is rooted in both due process and separation of powers concerns. Indeed, the earliest invocations of the private nondelegation doctrine arose in the context of local regulations. *See Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121–22 (1928); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530 (1917); *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912). In these cases, localities granted private homeowners the power to create zoning laws for their neighborhood, and the Supreme Court found these ordinances violated property owners' federal due process rights. *Eubank*, 226 U.S. at 143–44. "The Court was concerned that private property owners, with their own interests at stake, had been given total, standardless control over an important aspect of their neighbors' property." *Rice v. Vill. of Johnstown*, 30 F.4th 584, 589 (6th Cir. 2022) (citing *Eubank*, 226 U.S. at 143).

The separation of powers concerns, meanwhile, stem from the Vesting Clauses, inasmuch as the Constitution vests each of the three branches of government with specific powers and responsibilities.

Article I of the Constitution grants Congress legislative power, Article II grants the President executive power, and Article III grants the federal courts judicial power. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy*, 139 S. Ct. at 2123; *see Mistretta*, 488 U.S. at 371 ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."). Therefore, when a statute confers "the power to regulate the affairs of an unwilling minority" onto a private entity, that "is legislative delegation in its most obnoxious form[.]" *Carter Coal*, 298 U.S. at 311. But when the private entity "operate[s] as an aid to the [agency]" and is "subject to [the agency's] pervasive surveillance and authority, . . . law-making is not entrusted to the [private entity]" and so such a "statutory scheme is unquestionably valid." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940).

Notably, in its federal private nondelegation cases, the Supreme Court has blurred the lines between the two rationales, opting not to definitively root the private nondelegation doctrine in one or the other, and often referring to both. For instance, in *Carter v. Carter Coal*, the first case applying the private nondelegation doctrine to a federal statute, the Court ruled that a portion of the Bituminous Coal Conservation Act of 1935 was unconstitutional under the private nondelegation doctrine. 298 U.S. at 311. In invalidating the statute, the Court found the delegation at issue "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." *Id.* at 311–12 (first citing *Schechter Poultry Corp. v. United States*, 295 U.S.

495, 537 (1935); then citing *Eubank*, 226 U.S. at 143; and then citing *Roberge*, 278 U.S. at 121–22).

In so holding, the Court cited two of the zoning cases premised on the due process concerns of the private nondelegation doctrine, and also *Schecter Poultry*, addressing the separation of powers argument. By doing so, the Court maintained the public versus private division as opposed to a rationale-based division and endorsed both of the rationales underpinning the private nondelegation doctrine. *See Carter Coal*, 298 U.S. at 311.

The Fifth Circuit, when it ruled recently on the original version of the Act, recognized this ambiguity. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 881 n.23 (5th Cir. 2022). "Courts and commentators," it wrote, "differ over the locus of the constitutional violation." *Id.* (citing several articles and cases). *Compare U.S. Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 46 (2014) ("This argument [regarding private nondelegation] rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers."), *with id.* at 87–88 ("[O]ur so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses.") (Thomas, J., concurring). But the Fifth Circuit concluded it "need not weigh in" to resolve the question at hand. *Black*, 53 F.4th at 881 n.23. "Whatever the constitutional derivation, all parties and the district court agree that the outcome turns on whether the private entity is subordinate to the agency." *Id.*; *see also Ass'n of Am. R.R.s v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 671 n.3 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015) ("While the distinction [between the due process clause and Vesting Clauses] evokes scholarly interest, . . . our own

precedent describes the problem as one of unconstitutional delegation."). When presented with the same ambiguity, the D.C. Circuit also did not decide the issue because the doctrine turns on unconstitutional delegation, regardless of its textual roots, and "neither court nor scholar has suggested a change in the label would effect a change in the inquiry." *Amtrak I*, 721 F.3d at 671 n.3.

Moreover, if we root the private nondelegation doctrine solely in separation of powers concerns, we circumvent our own court's private nondelegation doctrine cases—many of which focus on local regulations, not federal ones, and are grounded in due process rights, as opposed to separation of powers principles. *See Rice*, 30 F.4th at 589–91; *Kiser v. Kamdar*, 831 F.3d 784, 791–92 (6th Cir. 2016); *Stevens v. City of Columbus*, No. 21-3755, 2022 WL 2966396, at *9 (6th Cir. July 27, 2022).

Whatever the exact underpinning of the private nondelegation doctrine, what is clear is that the statute is constitutional if the Authority remains subordinate to the FTC. *See Adkins*, 310 U.S. at 388, 399 (holding a statute constitutional where the private entity is "an aid" to the agency and is "subject" to the agency's "pervasive surveillance and authority"); *Carter Coal*, 298 U.S. at 310–11 (invalidating a statute where private entities were granted the power to establish the maximum hours of labor without any governmental oversight or approval).

That is the beginning and end of the inquiry as to whether a statute is constitutional under the private nondelegation doctrine. The Supreme Court has never suggested that this is the minimum finding, or that subordination on its own may not suffice to withstand a challenge to a statute on private

nondelegation grounds. And so the parties could not have framed the appeal in a different way, because the only private nondelegation test is that of subordination.

Now that the framing and source of the nondelegation doctrine is clear, I apply the existing precedent to HISA, finding that HISA as a whole is facially constitutional because the Authority is subordinate to the FTC in several ways.

B. HISA's Constitutionality

1. Rulemaking Authority

Oklahoma raises several concerns with the Act and its different components. I agree in full with the majority's discussion of section 3053(e)'s amended text, and its conclusion that the amended text indicates that the Authority remains subordinate to the FTC. I diverge in that I find the rest of the Act to be nearly identical to the previously upheld Maloney Act and Coal Act. I also find that the amended text supports the Authority's subordination but does not alone ensure the Act's constitutionality.

To begin, the Authority does not have independent rulemaking power—only the FTC can promulgate regulations with the force of law:

> A proposed rule or proposed modification to a rule cannot take effect unless approved by the Commission. The Commission is authorized to grant such approval if the proposed rule or modification of a rule is consistent with the requirements in this legislation and any applicable rules approved by the Commission. The Commission is granted the authority to prescribe rules and interim final rules to carry out their responsibilities under this section

> using the rulemaking process under the Administrative Procedure Act.

H.R. Rep. No. 116-554, at 25 (2020).

Like the private entities in the Maloney Act, known as self-regulatory organizations ("SROs"), and the private entity in *Adkins*, the Authority may only "propose[ ]" rules to the Commission. 15 U.S.C. § 3053(a). The Authority's rule *cannot* go into effect "unless the proposed rule . . . has been approved by the Commission." *Id.* § 3053(b)(2); *accord Adkins*, 310 U.S. at 388 (upholding statute where boards "propose[d]" prices that only took effect once the agency "fix[ed]" them); 15 U.S.C. § 78s(b)(1) (writing that private entities in the securities arena may "propose[ ]" rules but, generally, "[n]o proposed rule change shall take effect unless approved by the [SEC]"). Here, a rule only goes into effect once the FTC has approved it, and to approve it, the FTC must first ensure that the rule "is consistent with" HISA and other "applicable rules approved by the [FTC]." 15 U.S.C. § 3053(c)(2).

This consistency review is no mere rubber stamp. The FTC, under the express terms of the Act, must review the Authority's proposed rules to ensure they are consistent with "the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces[.]" *Id.* § 3054(a)(2)(A). There are certain categories of rules for which Congress explicitly laid out clear boundaries for both the Authority and the FTC, and such rules provide "clearly defined policy" for the Authority and FTC to effectuate. (*See* D. Ct. Opinion, R. 105, PageID 1496.) But even for the ones with fewer constraints, all promulgated rules must abide by Congress's explicit imperative to create rules for "the safety, welfare, and integrity" of covered

entities. *Id.* § 3054(a)(2)(A). "[T]o the extent HISA affords rulemaking discretion to advance Congress's broader objectives, such as the requirement that safety standards be 'consistent with the humane treatment of covered horses,' the FTC (not the Authority) ultimately exercises that statutorily conferred discretion—all of which is bound up with 'the policy implications of rules proposed.'" (Authority Br. 41 (citations omitted).)

HISA is remarkably similar to the constitutional Maloney Act, and was so even when assessed irrespective of the amendment. The Maloney Act provides the following parameters regarding the SEC's approval of an SRO's rules. The SEC "shall approve"—meaning it *must* approve—a rule "if it finds that such proposed rule change *is consistent with* the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." 15 U.S.C. § 78s(b)(2)(C)(i) (emphasis added). Likewise, HISA provides that the FTC "shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification *is consistent with*—(A) this chapter; and (B) applicable rules approved by the Commission." *Id.* § 3053(c)(2) (emphasis added).

Both the Maloney Act and HISA therefore provide for analogous consistency review: the reviewing agency must approve rules that are consistent with both the statute and previously issued rules. The Supreme Court held that the SEC "has broad authority to oversee and to regulate the rules adopted by the SROs" because rules are not enacted "unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)[.]" *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220,

233–34 (1987). If that is true for 15 U.S.C. § 78s(b), then that must also be true of 15 U.S.C. § 3053(c)(2).

And neither agency's review of the respective private entity ends there. Each act also provides additional requirements for the consistency review of proposed rules in specific instances. In the Maloney Act, specifically relating to rules proposed by one specific subset of SROs, the SEC's consistency review includes that the rules be "designed[,] . . . in general, to protect investors and the public interest[,]" as well as not be "designed to permit unfair discrimination . . . among participants[.]" *Id.* § 78q-1(b)(3)(F); *see also Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017). In the context of another subset of SROs, the SEC must ensure that the proposed rules meet various textual standards, including that they "are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons," and additional standards. 15 U.S.C. § 78f(b)(5).

In HISA, the Authority proposes rules or modifications to rules "relating to" eleven buckets of issues that it then "submits" to the FTC. *Id.* § 3053(a). Some of these include "a list of permitted and prohibited medications"; "standards for racing surface quality maintenance"; and "a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons[.]" *Id.* But in addition to these categories, the Authority may also propose "rule[s], standard[s], or procedure[s] . . . to carry out the horseracing anti-doping and medication control program or the racetrack safety program." *Id.* § 3053(d)(1). For these programs, HISA contains additional requirements and

considerations that the FTC includes as part of its consistency review. *See, e.g.*, *id.* § 3055(b) (listing seven categories of horse-welfare considerations); *id.* § 3055(g)(3)(b).

Both HISA and the Maloney Act therefore provide for similarly broad consistency review, with additional requirements for specific subsets of rules, such that consistency review on its own can ensure that a private authority remains subordinate to a federal agency.

HISA also matches the aforementioned Coal Act's constitutional agency review of private entities' proposed rules. The statute, which the Supreme Court upheld as "unquestionably valid," *Adkins*, 310 U.S. at 399, granted the Coal Commission the power to "approve, disapprove, or modify" the private coal boards' "proposed minimum prices *to conform to the requirements* of this subsection," Bituminous Coal Act of 1937, § 4, pt. II(a), 50 Stat. 72, 78 (emphasis added). Whether providing that the rule must be consistent with a statute, which both the Maloney Act and HISA require, or that the rule must conform to the requirements of a statute, as the Bituminous Coal Act requires, all three statutes properly and constitutionally subordinate the private entity to the federal agency.

And all three statutes provide the agency with independent rulemaking power. The Maloney Act provides that the SEC "may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as 'amend') the rules of a[n SRO] . . . as the [SEC] deems necessary or appropriate to insure the fair administration of the [SRO], to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this

chapter[.]" 15 U.S.C. § 78s(c). Such review is textually cabined to "Amendment by Commission of rules of self-regulatory organizations," so it applies only to previously enacted rules, not the SRO's proposed rules or its proposed changes to previously promulgated rules. *Id.*

Further still, the Maloney Act provides a separate set of requirements for the SEC to approve an SRO's new rule or rule change. *See id.* § 78s(b). Under this subsection, the SEC may either "approve or disapprove the propos[al,]" or it may "institute proceedings under subparagraph (B) to determine whether the propos[al] should be disapproved." *Id.* § 78s(b)(2)(A)(i). Subparagraph B requires that the SEC "shall provide" the SRO with "notice of the grounds for disapproval under consideration" and the chance for a hearing on the rule. *Id.* § 78s(b)(2)(B)(i). The other portion of subparagraph B makes clear that within the mandated time frame, the SEC must "issue an order approving or disapproving the" proposed rule. *Id.* § 78s(b)(2)(B)(ii)(I). Notably missing from these procedures? The SEC's ability to itself modify an SRO's proposed rule.

The Coal Act also provided the Coal Commission limited modification power. Much like the review described in the Maloney Act, the Coal Commission's power to modify rules was not all-encompassing: it could only be done to conform the proposal to the requirements of the statute. § 4, 50 Stat. at 78. The importance of this power is that the Coal Commission could ensure that proposed rules that did not align with, or were inconsistent with, the statute's purpose did not become promulgated rules with the power of law.

Both before and after the amendment, the FTC has had, and continues to have, independent rulemaking power. Prior to the amendment, section 3053(e) provided that the FTC could issue an interim final rule, which carries the power of law, under the standards articulated in the Administrative Procedures Act, 5 U.S.C. § 553(b)(B)—if "necessary to protect" "(1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces." 15 U.S.C. § 3053(e) (2020). 5 U.S.C. § 553(b)(B), known as the APA's good-cause provision, allows agencies to issue rules where regular notice-and-comment procedures are "impracticable, unnecessary, or contrary to the public interest." This section provided the FTC with broad rulemaking power without the need for notice-and-comment rulemaking that could be used beyond the emergency context, such as when notice and comment was "unnecessary"—for example, if there had already been sufficient notice-and-comment procedures regarding various alternative options presented in a proposed rule. *See* 16 C.F.R. § 1.142(a)(3) (requiring the Authority to include a discussion of "any reasonable alternatives" to the proposed rule and explain why the specific proposal was chosen); *Mobil Oil Corp. v. United States EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) ("If the original record is still fresh, a new round of notice and comment might be unnecessary."); *Priests for Life v. United States Dep't of Health & Human Servs.*, 772 F.3d 229, 276 (D.C. Cir. 2014) (similar), *vacated on other grounds by Zubik v. Burwell*, 578 U.S. 403 (2016).

Now, with the amendment, the FTC can utilize proper procedures under the APA, including either regular notice-and-comment procedures or the good-cause provision, to "abrogate, add to, and modify the rules of the Authority" whenever the FTC "finds

necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to the requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act." 15 U.S.C. § 3053(3). Just as the Maloney Act and the Coal Act allow the agency to amend the private entity's proposed rules in certain circumstances, so does HISA. Ultimately, none of Oklahoma's arguments regarding the unlawfulness of HISA's rulemaking structure carry substantial weight.

One final note about the private nondelegation doctrine and the cases that have formulated the subordination test. I have noted the numerous ways in which HISA—both with and without the amendment—is nearly identical to the unquestionably constitutional Maloney Act. But even if there are slight differences between the two statutes, no case has ever said that the Maloney Act in its current form is a floor for private nondelegation purposes. In other words, it is not true that a statute must be identical to the Maloney Act, or provide more oversight than the SEC, to be a constitutional delegation. The private entity simply must be subordinate to the agency. The Authority is subordinate to the FTC, and so HISA remains facially constitutional.

2. Enforcement Authority

Oklahoma also challenges HISA's enforcement structure. The Supreme Court has not ruled on this precise issue, but other circuit courts have relied upon Supreme Court precedent to do so in a way that supports the enforcement structure's constitutionality. Courts' review of the Maloney Act is once again instructive. All circuits that have ruled on the issue have held that the Maloney Act's enforcement scheme

is constitutional where, as here, a private entity (the National Association of Securities Dealers ("NASD")) brought enforcement actions against covered entities. *See, e.g.*, *Sorrell v. SEC*, 679 F.2d 1323 (9th Cir. 1982); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir. 1952), *cert. denied*, 344 U.S. 855 (1952).

The Second Circuit held that because of "the [SEC's] review of any disciplinary action" taken by the NASD, there is "no merit in the contention that the Act unconstitutionally delegates power to the association." *R.H. Johnson & Co.*, 198 F.2d at 695. The Ninth Circuit, citing to Second and Third Circuit decisions upholding the constitutionality of NASD's enforcement powers, noted that "[petitioner's] claim of unconstitutional delegation appears to rest on his mistaken idea that the SEC does not engage in an independent review of NASD decisions. As we stated in *Sartain v. SEC*, 601 F.2d 1366, 1371 n.2 (9th Cir. 1979), SEC review is de novo." *Sorrell*, 679 F.2d at 1326 n.2. The unanimous principle from the circuit decisions—which the Supreme Court has not disturbed despite repeated opportunities to do so—is that so long as the agency retains de novo review of a private entity's enforcement proceedings, there is no unconstitutional delegation of legislative or executive power, even if the agency does not review the private entity's initial decision to bring an enforcement action. The consistency of this principle reinforces the constitutionality of HISA's enforcement scheme.

In fact, the enforcement scheme in HISA is even more constitutionally sound than that found in the Maloney Act. The Maloney Act was amended in 1975, and, in relation to the enforcement scheme, the

amendment may have constrained the SEC's power to review the disciplinary proceedings the NASD pursued. *See Bergen*, 605 F.2d at 697. Nonetheless, this did not change the court's analysis:

> We need not now decide whether this statutory change effects a significant alteration in the SEC's power to review NASD disciplinary proceedings. It suffices to say that to the extent the amendment restricts the SEC's ability to receive additional evidence not presented below, this does not alter our conclusion in Todd [*Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977)] that there is no unconstitutional delegation of legislative authority.

Bergen, 605 F.2d at 697. HISA, unlike the Maloney Act, unambiguously empowers the FTC to obtain additional evidence not in the record below and to review the proceeding de novo. *See* 15 U.S.C. § 3058(c)(3)(C). The enforcement scheme in HISA, including two levels of de novo review and allowing the FTC to review evidence not in the record, ensures that HISA is soundly in the company of previously upheld enforcement mechanisms, and is thus not an unconstitutional delegation of power to a private authority.

* * *

Although the majority and I take different paths in our analysis, I fully agree that HISA is constitutional under Supreme Court precedent as well as the majority of federal court caselaw.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

STATE OF OKLAHOMA, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Case No. 5:21-cv-104-JMH **MEMORANDUM OPINION AND ORDER** June 3, 2022

* * *

This matter comes before the Court on Defendants Steve Beshear, Adolpho Birch, Leonard S. Coleman, Jr., Ellen McClain, Charles Scheeler, Joseph DeFrancis, Susan Stover, Bill Thomason, D.G. Van Chef, and the Horseracing Integrity and Safety Authority, Inc.'s (collectively, the "Authority Defendants") Motion to Dismiss [DE 68] Plaintiffs' First Amended Complaint [DE 53], pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for alleged lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In addition to Authority Defendants' Motion [DE 68], Defendants the United States of America, the Federal Trade Commission (FTC), Lina Khan, in her official capacity as Chair of the FTC, Rebecca Kelly Slaughter, in her official capacity as Commissioner of the FTC, Rohit Chopra, in his official capacity as Commissioner of the FTC,

Noah Joshua Phillips, in his official capacity as Commissioner of the FTC, and Christine S. Wilson, in her official capacity as Commissioner of the FTC (collectively, the "Federal Defendants") move the Court to dismiss Plaintiffs' First Amended Complaint [DE 53], pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [DE 70]. In opposing Authority and Federal Defendants' Motions to Dismiss [DE 68; DE 70], Plaintiffs State of Oklahoma, Oklahoma Horse Racing Commission ("OHRC"), State of West Virginia, West Virginia Racing Commission ("WVRC"), State of Louisiana, Hanover Shoe Farms, Inc. ("Hanover"), United States Trotting Association ("USTA"), Oklahoma Quarter Horse Racing Association ("OQHRA"), Tulsa County Public Facilities Authority d/b/a Fair Meadows Racing and Sports Bar ("Fair Meadows"), Global Gaming RP, LLC d/b/a Remington Park ("Remington Park"), and Will Rogers Downs LLC (collectively, "Plaintiffs") move for summary judgment, pursuant to Federal Rule of Civil Procedure 56. [DE 87]. For the following reasons, the Authority Defendants' Motion to Dismiss [DE 68] and the Federal Defendants' Motion to Dismiss [DE 70] will be denied in part, insofar as they seek dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction, and granted in part, insofar as they seek dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and Plaintiffs' Motion for Summary Judgment [DE 87] will be denied.

I. DISCUSSION

This case arises from Congress' passage of the Horseracing Integrity and Safety Act ("HISA") and what Plaintiffs allege is an unconstitutional delegation of legislative power to a private organization, the Horseracing Integrity and Safety Authority, Inc. (the

"Authority"). HISA grants the Federal Trade Commission ("FTC") authority to promulgate rules to address concerns with medication, alleged doping, and track safety in horseracing to bring more consistency to horseracing regulations than what state-based horseracing laws provide. Plaintiffs' primary issue with the legislation is that the FTC's rules will be based on proposed standards offered by the Authority, which Plaintiffs' claim the FTC is required to adopt, making the FTC subordinate to the Authority.

A. JURISDICTION

Before considering the Parties' arguments concerning requests for dismissal for failure to state a claim and summary judgment, the Court must first determine whether Plaintiffs' claims must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction, as it is a threshold matter. "The jurisdiction of federal courts is limited to 'cases' and 'controversies.'" *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black,* No. 5:21-CV-071-H, 2022 WL 982464, at *4 (N.D. Tex. Mar. 31, 2022) (citing *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 559 (1992) (citing U.S. Const. art. III, § 2))). "Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir v. Greater Cleveland Reg'l Transit Auth.,* 895 F.2d 266, 269 (6th Cir. 1990). Moreover, Plaintiffs must "meet their burden of showing their claim is ripe for review" to overcome concerns "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Connection Distrib. Co. v. Holder,* 557 F.3d 321, 342 (6th Cir. 2009) (internal quotation marks omitted). The Court must "presume that [it] lack[s] jurisdiction unless the contrary appears affirmatively from

the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991) (citations omitted).

1. STANDING

To establish standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338 (2016). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan,* 504 U.S. at 560 (quotations omitted). "To be 'fairly traceable to the challenged action of the defendant,' the injury must 'not [be] the result of the independent action of some third party not before the court.'" *Nat'l Horsemen's,* 2022 WL 982464, at *4 (quoting *Lujan,* 504 U.S. at 560). Redressability will not be shown if it is "merely 'speculative[ ]' that the injury will be 'redressed by a favorable decision.'" *Lujan,* 504 U.S. at 561. Since the "determination of standing is both plaintiff- and provision-specific," plaintiffs must demonstrate they have standing for each claim they seek to press. *Fednav, Ltd. v. Chester,* 547 F.3d 607, 614 (6th Cir. 2008); *see Town of Chester v. Laroe Estates, Inc.,* 137 S. Ct. 1645, 1650 (2017) ("[S]tanding is not dispensed in gross[.]").

"[A]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 414 n.5 (2013)). "But a plaintiff who challenges a 'statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Nat'l Horsemen's,* 2022 WL

982464, at *5 (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)).

Here, Plaintiffs challenge the rulemaking mechanism in HISA, which they allege is an unconstitutional delegation of power that permits the Authority, a private entity, to regulate without sufficient government oversight. HISA requires that the regulations take effect on July 1, 2022, and Plaintiffs will be objects of the regulations adopted under HISA. *Nat'l Horsemen's,* 2022 WL 982464, at *5 (citing §§ 3051(14), 3055(a)). "HISA states that the FTC 'shall' approve rules proposed by the Authority if it finds that they are 'consistent' with the statute itself and with applicable rules." *Id.* at 6 (quoting § 3053(c)). Moreover, "the Authority 'shall' propose rules to develop the programs on the topics outlined in the statute while taking into consideration the guidance outlined in the statute." *Id.* (citing §§ 3055(a)-(d), 3056(a)-(c)). "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corps.,* 419 U.S. 102, 143 (1974) (citing *Carter v. Carter Coal Co.,* 298 U.S. 238, 287 (1936)). So, presuming the FTC "act[s] properly and according to law,'" as the Court must, *Nat'l Horsemen's,* 2022 WL 982464, at *6 (quoting *FCC v. Schreiber,* 381 U.S. 279, 296 (1965)), there is a substantial risk that Plaintiffs will be subjected to the regulations. *Susan B. Anthony List,* 573 U.S. at 158 (quoting *Clapper,* 568 U.S. at 414 n.5).

In addition to there being a substantial risk that Plaintiffs will be subjected to the regulations, Plaintiffs must show that a threatened, concrete injury is

"imminent" to challenge the regulatory scheme found in HISA. *Lujan,* 504 U.S. at 560. While Plaintiffs cannot show that they have been aggrieved by the regulatory scheme found in HISA, the Court agrees with the finding in *Nat'l Horsemen's* that "HISA requires that certain regulations be passed, showing that a concrete injury is 'certainly impending,' which will 'aggrieve'" Plaintiffs because they will be subjected to the allegedly unconstitutional rulemaking scheme and the Authority's alleged regulatory control. 2022 WL 982464, at *7 (quoting *Susan B. Anthony List,* 573 U.S. at 158 (quoting *Clapper,* 568 U.S. at 414 n.5)); *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 140 S. Ct. 2183, 2196 (2020)).

Plaintiffs' alleged certainly impending regulatory injury is also "fairly traceable" to the challenged rulemaking scheme. *Lujan,* 504 U.S. at 560. Plaintiffs challenge HISA's rulemaking scheme, which they allege subjects them to be unconstitutionally subjected to the Authority's regulatory control, "[a]nd, outside of interim final rules, all rules flow through the Authority-proposal-FTC-approval scheme." *Nat'l Horsemen's,* 2022 WL 982464, at *7 (citing § 3053). Therefore, the alleged regulatory injury is directly traceable to the allegedly unconstitutional regulatory scheme found in HISA.

Lastly, the Court finds that a decision in Plaintiffs' favor would likely redress their alleged certainly impending injury. Specifically, were the Court to find that HISA unconstitutionally delegates legislative power to the Authority, a private entity, Plaintiffs would not be subjected to regulatory control under HISA. Accordingly, the Court finds Plaintiffs have standing to pursue their claims.

2. RIPENESS

"Ripeness requires that the 'injury in fact be certainly impending'" and "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 280 (6th Cir. 1997) (citations omitted). Questions of ripeness require the Court to consider the following factors: (1) the likelihood that the alleged injury will come to pass; (2) the fitness of the issues for judicial decision at the pre-enforcement stage, meaning whether the record is adequately developed to produce a fair adjudication of the merits of the parties' claims; and (3) the hardship to the parties of withholding court consideration during the pre-enforcement stage. *Id.* at 284 (citing *United Steelworkers, Local 2116 v. Cyclops Corp.,* 860 F.2d 189, 194-95 (6th Cir. 1988)).

In the present case, the first factor weighs in Plaintiffs' favor because without judicial intervention, the alleged injury is certain to occur, as discussed previously herein. Specifically, Plaintiffs will be subjected to an allegedly unconstitutional rulemaking scheme that allows a private party to oversee them without sufficient governmental oversight.

A ripeness analysis requires the Court to analyze whether the claims were "amenable to judicial consideration *at the time the complaint was filed," Kardules v. City of Columbus,* 95 F.3d 1335, 1346 (6th Cir. 1996) (emphasis added). However, Plaintiffs argue that the "challenge to HISA's constitutionality does not depend on the content of the regulations that are ultimately promulgated, but on the constitutionality of the organic statute itself." [DE 99, at 4 (citing [DE 87, at 32])]. Specifically, Plaintiffs claim, "[T]he regulatory

structure established by HISA is unconstitutional and that the Authority and the FTC can accordingly take no action whatsoever pursuant to it. Those arguments are suitable for judicial resolution now." [DE 87, at 32]. For the following reasons, the Court agrees.

In two similar cases involving allegedly unconstitutional delegations of power, the Supreme Court of the United States "assessed the plaintiffs' claims by looking to the language of the statute to see if Congress unconstitutionally delegated power." *Nat'l Horsemen's,* 2022 WL 982464, at *9 (citing *Carter Coal Co.,* 298 U.S. at 311 (finding the statute at issue "conferred" regulatory power to "private persons"); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 399 (1940) ("Since law-making is not entrusted to the industry, the statutory scheme is unquestionably valid."")). "The inquiry is one of structural subordination and the agency's statutory surveillance and authority." *Id.* (citing *Adkins,* 310 U.S. at 399). Likewise, in *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.,* the D.C. Circuit found a pre-enforcement challenge to a statute was ripe because its constitutionality was a "purely legal question . . . appropriate for immediate judicial resolution." 721 F.3d 666, 672 n.6 (D.C. Cir. 2013), vacated on other grounds. Moreover, due process arguments involving allegedly self-interested actors regulating their competitors have been found to present purely legal questions. *See Nat'l Horsemen's,* 2022 WL 982464, at *9 (citing *Ass'n of Am. Railroads v. U.S. Dep't of Transp.,* 821 F.3d 19, 32 (D.C. Cir. 2016) (finding self-interest based on the statutory language governing its incentives); *see also N. Carolina State Bd. of Dental Examiners v. FTC,* 574 U.S. 494, 510 (2015)). Therefore, the Court need not wait until HISA is in effect and applied to make an informed decision about the issues present in this matter because

the constitutional challenges are to the statute itself and present purely legal questions regarding delegation and potential conflicts of interests concerning self-interested private entities regulating their competitors.

The remaining factor in the Court's ripeness analysis requires the Court to consider whether withholding a decision would cause Plaintiffs undue hardship. As discussed above, once HISA goes into effect on July 1, 2022, Plaintiffs will be subjected to regulations that stem from an allegedly unconstitutional rulemaking scheme wherein the Authority, a private entity comprised of potentially self-interested individuals, funnels proposed rules to the FTC that the FTC allegedly has no choice but to accept. The Court's failure to address this matter before July 1, 2022, could result in harm to Plaintiffs. Therefore, this matter is ripe for review, and both the Authority Defendants' Motion to Dismiss [DE 68] and the Federal Defendants' Motion to Dismiss [DE 70] will be denied in part, insofar as they seek dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction.

B. DISMISSAL UNDER 12(b)(6) AND SUMMARY JUDGMENT

1. STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint may be attacked for failure "to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A motion to dismiss is properly granted if it is beyond

doubt that no set of facts would entitle the petitioner to relief on his claims." *Computer Leasco, Inc. v. NTP, Inc.,* 194 F. App'x 328, 333 (6th Cir. 2006). When considering a Rule 12(b)(6) motion to dismiss, the court will presume that all the factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 434 (6th Cir. 2008) (citing *Great Lakes Steel v. Deggendorf,* 716 F.2d 1101, 1105 (6th Cir. 1983)). "The court need not, however, accept unwarranted factual inferences." *Id.* (citing *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987)).

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute exists on a material fact, and thus summary judgment is improper, if the evidence shows 'that a reasonable jury could return a verdict for the nonmoving party.'" *Olinger v. Corporation of the President of the Church,* 521 F. Supp. 2d 577, 582 (E.D. Ky. 2007) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986)). Stated another way, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252. "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Pennington,* 553 F.3d at 450 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986).

The moving party has the initial burden of demonstrating the basis for its motion and identifying those parts of the record that establish the absence of a genuine issue of material fact. *Chao v. Hall Holding Co., Inc.,* 285 F.3d 415, 424 (6th Cir. 2002). The movant may satisfy its burden by showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the movant has satisfied this burden, the non-moving party must go beyond the pleadings and come forward with specific facts demonstrating the existence of a genuine issue for trial. Fed. R. Civ. P. 56; *Hall Holding,* 285 F.3d at 424 (citing *Celotex,* 477 U.S. at 324). Moreover, "the nonmoving party must do more than show there is some metaphysical doubt as to the material fact. It must present significant probative evidence in support of its opposition to the motion for summary judgment." *Hall Holding,* 285 F.3d at 424 (internal citations omitted).

The Court "must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Pennington v. State Farm Mut. Automobile Ins. Co.,* 553 F.3d 447, 450 (6th Cir. 2009) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)). However, the Court is under no duty to "search the entire record to establish that it is bereft of a genuine issue of material fact." *In re Morris,* 260 F.3d 654, 655 (6th Cir. 2001). Rather, "the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Id.*

2. DELEGATION OF POWER

"The Constitution vests '[a]ll legislative Powers herein granted' in the United States Congress—not in

another branch of government nor in a private entity." *Nat'l Horsemen's,* 2022 WL 982464, at *11 (quoting U.S. Const. art 1, § 1). "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy v. United States,* 139 S. Ct. 2116, 2123 (2019) (plurality).

"Supreme Court precedent provides that if an act of Congress lays down an intelligible principle, then an agency does not wield any 'legislative power' when enacting binding rules according to that principle." *Nat'l Horsemen's,* 2022 WL 982464, at *11 (citing *City of Arlington v. FCC,* 569 U.S. 290, 304 n.4 (2013); *INS v. Chadha,* 462 U.S. 919, 953 n.16 (1983)). Agency rulemaking and adjudicating may take "'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive power.'" *City of Arlington,* 569 U.S. at 304 n.4. Therefore, "if Congress lays down an intelligible principle in a statute and also properly gives a private party power to help an agency administer that statute, no Article I delegation problem could arise," as the legislative power remains with Congress. *Nat'l Horsemen's,* 2022 WL 982464, at *11 (citing *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 213-14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Dixon v. United States,* 381 U.S. 68, 74 (1965))).

"An intelligible principle, however, 'cannot rescue a statute empowering private parties to wield regulatory authority.'" *Id.* at 12 (quoting *Amtrak I,* 721 F.3d at 671). Regulation is "necessarily a governmental

function." *Carter Coal Co.,* 298 U.S. at 310-11. "Private parties may play a role in the regulatory process only if they 'function subordinately' to an agency." *Nat'l Horsemen's,* 2022 WL 982464, at *12 (*Adkins,* 310 U.S. at 399). Accordingly, "HISA must contain an intelligible principle guiding the Authority and the FTC, ensuring that Congress has not given away its legislative power under Article I," and "the Authority must function subordinately to the FTC, subject to its authority and surveillance . . . ." *Id.* at 13.

a. INTELLIGIBLE PRINCIPLE

"[The Supreme] Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy,* 139 S. Ct. at 2129 (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928)). "[T]he Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" *Id.* (quoting *American Power & Light v. SEC,* 329 U.S. 90, 105 (1946). Generally, Congress is not second-guessed "'regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Id.* (quoting *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 474-475 (2001)). In fact, the Supreme Court has only found two delegations to be unconstitutional, *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), because "'Congress had failed to articulate *any* policy or standard' to confine discretion." *Id.* (quoting *Mistretta v. United States,* 488 U.S. 361, 373 n. 7 (1989)). However, "the Supreme Court has 'blessed delegations that authorize regulation in the 'public interest' or to 'protect the public health' or to

set 'fair and equitable' prices." *Nat'l Horsemen's,* 2022 WL 982464, at *14 (quoting *Big Time Vapes, Inc. v. Food & Drug Admin.,* 963 F.3d 436, 442 n.18 (5th Cir. 2020) (citing *Whitman,* 531 U.S. at 472; *Nat'l Broad Co. v. United States,* 319 U.S. 190, 225-26 (1943); *Yakus v. United States,* 321 U.S. 414, 426-27 (1944))).

Here, HISA's policy "expressly defines the FTC's and Authority's purposes and jurisdictional boundaries." *Id.* (citing § 3054). "Congress sought to develop an 'independent and exclusive national' scheme to protect 'the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces' through the 'horseracing anti-doping and medication control program and the racetrack safety program.'" *Id.* (quoting § 3054(a)). "This policy communicates Congress' desire to protect the safety and integrity of horseracing through nationalizing and streamlining regulation under two specific programs, which are outlined in greater detail in sections 3055 and 3056." *Id.* "HISA, however, does not affect existing federal and state regulation on any 'matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races.'" *Id.* (quoting § 3054(k)(3)). Additionally, "Congress both 'recognized' the Authority as a 'private, independent, self-regulatory, nonprofit corporation' for 'purposes of developing and implementing' HISA's two programs and tasked the FTC with 'oversight' so that only the FTC possessed the power to give draft rules the force of law." *Id.* at 15 (quoting §§ 3052(a), 3053).

In addition to a clearly defined policy, HISA sets clear boundaries for what is delegated to the Authority. "Under HISA, the FTC shall approve proposed rules if they are 'consistent with (A) this [statute] and (B) applicable rules approved by the [FTC].'" *Id.*

(quoting § 3053(c)(2)). "HISA limits the scope of rulemaking to medication control and racetrack safety." *Id.* (citing § 3052). "All other thoroughbred horseracing laws related to breeding, licensing, broadcasting, and the like remain 'unaffected.'" *Id.* (quoting § 3054(k)(3)). HISA then "outlines several 'considerations' the Authority must take into account in developing the horseracing and medication control program, the 'activities' of the program, and its baseline rules." *Id.* (quoting § 3055(b), (c), and (g)). "For the racetrack safety program, HISA requires the Authority to 'consider[ ]' existing safety standards, including those of three sources HISA lists; to incorporate twelve elements into the program; and to carry out specific 'activities' under the program." *Id.* (quoting § 3056 (a)-(c)). While these considerations are given to the Authority, they "apply equally to the FTC's review," because the FTC ultimately chooses whether to approve the Authority's proposed rules "if they are 'consistent with' the statute—and the statute contains those 'considerations.'" *Id.* (citing §§ 3053(c)(2); 3055(b)).

For the foregoing reasons, the Court agrees with the *Nat'l Horsemen's* Court that "[t]hese considerations, topics, and elements confine the bounds of Congress's delegated authority to provide a sufficient intelligible principle," and "HISA cabins Congress's delegation more than the many statutes the Supreme Court has upheld despite 'very broad delegations.'" 2022 WL 982464, at *16 (quoting *Gundy,* 139 S. Ct. at 2129). Next, the Court must determine whether HISA allows the FTC to maintain sufficient "'authority and surveillance'" over the Authority to ensure that it functions as a subordinate private entity. *See Id.* (quoting *Adkins,* 310 U.S. at 399).

b. SUBORDINATION

In *Carter Coal Co.,* the Supreme Court struck down the part of the Bituminous Coal Conservation Act of 1935 that allowed two-thirds of coal producers to set the maximum labor hours and minimum wages for the other coal producers and miners in the industry and found this was a "legislative delegation in its most obnoxious form" because it delegated power "to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 310-11.

Following the Supreme Court's decision in *Carter Coal Co.*, Congress passed the Bituminous Coal Act of 1937, which removed the provisions of the 1935 statute that the Supreme Court found unconstitutional and "'made other substantive and structural changes,'" including "removing the private parties' regulatory power over their competitors." *Nat'l Horsemen's,* 2022 WL 982464, at *12 (quoting *Adkins,* 310 U.S. at 387). "Instead, the statute allowed the private parties to 'propose minimum prices' and other related standards to a government agency that could 'approve[ ], disapprove[ ], or modif[y]' those rules." *Id.* (quoting *Adkins,* 310 U.S. at 388). The Supreme Court found the revised scheme to be "unquestionably valid." *Adkins,* 310 U.S. at 388. "Specifically, the Court held that Congress does not impermissibly delegate 'its legislative authority' to a private entity, when the entity 'function[s] subordinately" to a governmental agency." *Nat'l Horsemen's,* 2022 WL 982464, at *12 (quoting *Adkins,* 310 U.S. at 388). "When the agency retains the ability to 'determine the prices' and exercises 'authority and surveillance over' the private entity, 'law-making is not entrusted to the industry.'" *Id.*

"Lawmaking is also not entrusted to the industry when Congress conditions an agency's regulatory power on private party approval." *Id.* In *Currin v. Wallace,* "the Supreme Court upheld a scheme where a regulation could not take effect in a particular market without the approval of two-thirds of the regulated industry members in that market." *Id.* (citing *Currin v. Wallace,* 306 U.S. 1, 6, 15 (1939)). In *Currin,* the Supreme Court found, "[I]t is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 306 U.S. at 16. Likewise, in *Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, the Court of Appeals for the Sixth Circuit, relying on *Currin,* found, "[T]he horsemen's veto provision does not allow a private party to 'make the law and force it upon a minority'; rather, the veto is merely a condition established by Congress upon the application of Congress' general prohibition of interstate off-track betting." 20 F.3d 1406, 1416 (6th. Cir. 1994). The Sixth Circuit held that the horsemen's veto was a waiver power rather than a delegation of legislative power. *Id.*

In the present case, Plaintiffs argue HISA violates the private nondelegation doctrine by placing the FTC in a merely ministerial role where the FTC is forced to act as a rubber stamp for the Authority's proposed rules because HISA specifies that the FTC *"shall* approve" the Authority's proposed rules if they are "consistent with" HISA and the Authority's prior approved rules. 15 U.S.C. § 3053(c)(2) (emphasis added). However, as the FTC correctly asserts, "[T]he standard the FTC employed is the same standard under which the Securities and Exchange Commission [("SEC")] decides whether to approve rules proposed by a self-regulating private entity." [DE 102, at 3 (citing 15 U.S.C.

§ 78s(b)(2)(C)(i))]. The FTC further correctly states, "[E]very court of appeals to consider a non-delegation challenge to this framework has rejected it." [DE 102, at 3 (citing *Sorrell v. SEC,* 679 F.2d 1323 (9th Cir. 1982) (quoting *R.H. Johnson & Co. v. SEC,* 198 F.2d 690 (2d Cir. 1952)); Senator McConnell Amicus Br., ECF No. 53 at 1, 10-11, Case No. 21-cv-71 (E.D. Tex., Apr. 30, 2021) (explaining that "HISA is modeled on the Maloney Act,' which governs the SEC's relationship with FINRA")). Likewise, the *Nat'l Horsemen's* Court found, "HISA's consistency review tracks the SEC's review of FINRA rules," and "[u]nder the Maloney Act, the SEC 'shall approve a proposed rule change of a self-regulatory organization' if 'consistent with' the requirements of the Maloney Act and applicable rules." 2022 WL 982464, at *22 (quoting 15 U.S.C. § 78s(b)(2)(C)(i)).

Nevertheless, Plaintiffs takes issue with the fact that the FTC can only disapprove rules that are inconsistent with HISA while the Authority has the power to "fill up the details" of HISA. [DE 104, at 2]. "Filling up the details has long been recognized as the very business of regulating." *Nat'l Horsemen's,* 2022 WL 982464, at *22 (citing *United States v. Grimaud,* 220 U.S. 506, 517 (1911)). Meanwhile, the FTC's ability to "review for consistency resembles an adjudicative, rather than regulatory, function akin to courts reviewing agency action for whether it is 'in excess of statutory jurisdiction, authority, or limitations.'" *Id.* (quoting 5 U.S.C. § 706(2)(C)). Since "Congress withheld the FTC's ability to modify proposed rules, the Authority wields greater power than FINRA and the private entities in *Adkins*." *Id.* However, while HISA is distinct from the Maloney Act and schemes on which it is modeled, HISA's unique "features do not take HISA outside established constitutional limits." *Id.*

The FTC argues, "Plaintiffs identify no authority for the proposition that discretion to define the precise contours and policy of regulation is the defining feature of rulemaking," [DE 102, at 3], and the *Nat'l Horsemen's* Court agrees, finding, "the FTC has the power to approve, disapprove, and recommend modifications to the Authority's proposed standards, its inability to formally modify the Authority's rules is not fatal," 2022 WL 982464, at *23. As the *Nat'l Horsemen's* Court notes, "[T]he agency in *Currin* could not modify its regulation without industry approval. *See* 306 U.S. at 16. Nor could the FRA modify any standards without Amtrak's agreement, even after the arbitration provision had been severed. *See Amtrak IV,* 896 F.3d at 545." *Id.*

Plaintiffs contend the decision on this issue in *Nat'l Horsemen's* should not be relied upon by this Court because *Nat'l Horsemen's* was "constrained by precedent—in particular, *Texas v. Rettig,* 987 F.3d 518 (5th Cir. 2021)," which upheld a similar scheme that "'does not leave [the federal agency] free to disapprove or modify' the private entity's regulations." [DE 104, at 3 (citing *Nat'l Horsemen's,* 2022 WL 982464, at *23 (quoting *Texas v. Rettig,* 993 F.3d 408, 415 (5th Cir. 2021)))]. However, the *Nat'l Horsemen's* Court did not rely solely on *Rettig* to decide this issue. It also relied on the Supreme Court's decision in *Adkins,* which the Fifth Circuit and this Court agree "did not turn on the commission's ability to modify proposed rules," 2022 WL 982464, at *23, the Seventh Circuit's decision in *Aslin v. FINRA,* 704 F.3d 475, 476 (7th Cir. 2013), and the Third Circuit's decision in *Todd & Co., Inc. v. S.E.C.,* 557 F.2d 1008, 1012 (3d Cir. 1977), which found, "Because the Commission the Commission . . . has the power, according to reasonably fixed statutory standards, to approve or disapprove the

Association's rules . . . the court found no merit in the unconstitutional delegation argument. Considering *Adkins, Aslin,* and *Todd & Co.* alongside the Fifth Circuit precedent in *Rettig,* the *Nat'l Horsemen's* Court, considering binding and persuasive authority, correctly found, "[c]ourts have limited their rulemaking analyses to whether the agency could 'approve or disapprove' the private entity's rules," 2022 WL 982464, at *23, and the undersigned agrees.

Furthermore, even though the ability to modify is not a necessary consideration to the rulemaking analysis, "the FTC retains the power to approve or disapprove all rules and, 'in the case of disapproval,' it 'shall make recommendations to the Authority to modify the proposed rule.'" *Id.* (quoting § 3053(c)(3)(A)). If the FTC disapproves a rule and makes recommendations to modify the proposed rule, the Authority may resubmit the proposed rule "if they 'incorporate the modifications recommended' by the FTC." *Id.* (quoting § 3053(c)(3)(B)). In the event the Authority fails to incorporate the FTC's recommended modifications, the FTC has the power to disapprove the proposed rule until the Authority makes the recommended modification, meaning the FTC retains the ability to control what becomes a binding rule and can contribute to the language of the proposed rule through recommendations that must be made for the Authority to resubmit. "Though not the equivalent of drafting the rule itself, the power to approve, disapprove, or recommend modification subject to continued rejection ensures that the Authority still 'functions subordinately' to the FTC such that the FTC 'determines' the binding rules." *Id.* (quoting *Adkins,* 310 U.S. at 399). Therefore, HISA's rulemaking scheme does not violate the private nondelegation doctrine.

c. THE AUTHORITY'S ENFORCEMENT POWERS

In addition to Plaintiffs' arguments against HISA's rulemaking scheme, Plaintiffs argue the Authority's enforcement powers violate the private nondelegation doctrine. [DE 87, at 4547]. Specifically, Plaintiffs argue it is unconstitutional for the Authority to have the power to commence civil actions against regulated parties who violate HISA, 15 U.S.C. § 3054(j)(1), investigate potential violations and impose sanctions, 15 U.S.C. § 3054(c)(1)(A), and investigate, charge, and adjudicate potential anti-doping and medication control violations, 15 U.S.C. § 3055(c)(4)(B). [DE 87, at 45-47]. However, as held in *Nat'l Horsemen's*:

> The Authority may only investigate rule violations according to "uniform procedures" reviewed and approved by the FTC, and they cannot impose any penalty or sanctions without providing due process and an impartial tribunal. §§ 3054(c), 3057(c)(3). Thus, even prior to FTC review, due process is baked into the system. Moreover, any Authority decision with final, legal effect is subject to de novo review by an AU, whose decision may then be reviewed de novo by the FTC. *See* § 3058(b), (c). This de novo review includes the ability to "reverse, modify, [or] set aside" any sanction of the Authority. *Id.* And any determination by an AU J or the FTC is a "Final Decision" under the APA, enabling judicial review. § 3058(b)(3)(B); *see* § 3058(c)(2)(B); *see also* Administrative Procedure Act § 10, 5 U.S.C. § 704 (outlining judicial review of administrative agency decisions).

2022 WL 982464, at *24.

Moreover, such a delegation of power is not unheard of and has been upheld in similar instances. For example, "[t]he Maloney Act authorizes private entities to perform certain investigative and disciplinary functions, subject to the SEC's oversight." *Id.* (citing 15 U.S.C. § 78o-3(h)(3)), and "[t]his aspect of the Maloney Act has been upheld against constitutional challenges on many occasions," *Id.* (citing *Sorrell,* 679 F.2d at 1325-26; *Todd & Co.,* 557 F.2d at 1014; *R.H. Johnson & Co.,* 198 F.2d at 695). In these decisions, the courts focused "on the SEC's ability to review any disciplinary action de novo, which the FTC retains." *Id.* (citing *Sorrell,* 679 F.2d at 1326 & n.2 (citing *R.H. Johnson & Co.,* 198 F.2d at 695)). Like Plaintiffs' arguments regarding HISA's rulemaking scheme, Plaintiffs' enforcement power arguments also fail to show that HISA violates the private nondelegation doctrine.

3. THE AUTHORITY'S ALLEGED SELF-INTEREST

Plaintiffs also move for summary judgment because they argue HISA allows them to be regulated by self-interested competitors in violation of due process. [DE 87, at 53-54]. They correctly assert, "Due process forbids an 'economically self-interested actor' from 'regulat[ing] its competitors.'" *Id.* at 53 (quoting *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.* ("*Amtrak III*"), 821 F.3d 19, 23 (D.C. Cir. 2016). Plaintiffs are also correct that "the *Carter Coal* Court held the Coal Conservation Act unconstitutional not only because it was an improper delegation of legislative authority to a private entity, but also because the act gave the majority of the industry 'the power to regulate the affairs of an unwilling minority.'" *Id.* at 53-54 (quoting 298

U.S. at 311). HISA states that the Authority is a "private, independent, self-regulatory, nonprofit corporation." § 3052(a). Plaintiffs argue self-interest is evidence because "[flour of the nine members on the Authority's Board of Directors must be 'industry members selected from among the various equine constituencies.'" *Id.* at 54 (quoting 15 U.S.C. § 3052(b)(1)(B)).

As the *Nat'l Horsemen's* Court noted, and the parties in that case agreed, an inquiry regarding whether self-interest constitutes a due process violation is no different than an inquiry regarding the private nondelegation doctrine. 2022 WL 982464, at *25 (citing *Amtrak I,* 721 F.3d at 671 n.3). Accordingly, Plaintiffs' self-interest argument fails for the same reasons as its private nondelegation doctrine arguments discussed previously herein. Specifically, even assuming the Authority is, in whole or in part, comprised of self-interested competitors, the Authority is subordinate to the FTC in the regulatory process. Therefore, the Authority is not regulating its competitors in violation of due process.

4. THE ANTICOMMANDEERING DOCTRINE

Plaintiffs argue HISA unconstitutionally commandeers the States by requiring them to fund the Authority's operations and conscripting them into helping the Authority carry out its operations. [DE 87, at 33-39]. "The anticommandeering doctrine . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States" and is confirmed by the Tenth Amendment. *Murphy v. Nat'l Collegiate Athletic Ass'n,* 138 S. Ct. 1461, 1475-76 (2018). As this Court has recognized, "[T]he Supreme Court has

clearly stated that Congress may not pass legislation which requires a state to regulate or enforce a federal statute." *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.,* 9 F. Supp. 2d 766, 771-72 (E.D. Ky. 1998); *see also New York v. United States,* 112 S. Ct. 2408, 2429 (1992) ("[T]he Constitution simply does not give Congress the authority to require the States to regulate."); *Printz v. United States,* 521 U.S. 898, 935 (1997) ("Congress cannot . . . conscript[ ] the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

Here, the first provision Plaintiffs claim violates the anticommandeering doctrine is § 1203(f)(2), which provides that "states may 'elect[ ] to remit fees' on behalf of their members 'according to a schedule established in a rule developed by the Authority and approved by the' FTC." [DE 70, at 34 (quoting § 1203(f)(2))]. Plaintiffs claim this provision "require [si States . . . to remit State monies." [DE 87, at 34]. However, that is not the case. The States' remission of fees is clearly a choice they may elect to do so because § 1203(f)(3) provides that "[c]overed persons . . . shall be required to remit such fees to the Authority . . . [i]f a State racing commission does not elect" to collect the fees on their behalf. The provision neither requires the States to collect fees from covered persons nor does it involve state funds. Instead, it is merely a requirement on private entities, *i.e.*, the covered persons, to remit fees to the Authority. Any participation by the States regarding the collection of those fees is voluntary and would only involve money owed to the federal government, as opposed to State funds.

Under HISA, the consequence of a State not opting to collect the remitted fees from its members is that the State may not collect funds for related regulation of their own because HISA provides "'exclusive national authority' over covered activities and state[s] that Authority rules 'shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this Act.'" [DE 68, at 36 (quoting § 1205(a), (b)). Despite Plaintiffs claims to the contrary this is nothing more than a typical preemption scheme as outlined in *Murphy,* wherein the Supreme Court explained that preemption works as follows: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." 138 S. Ct. at 1480. As the Authority Defendants correctly assert, "HISA's funding provision 'operates just like any other federal law with preemptive effect' by 'confer[ing]on private entities (*i.e.*, covered [persons]) a federal right to engage in certain conduct subject only to certain (federal) constraints." [DE 68, at 36 (citing *Murphy,* 138 S. Ct. at 1480).

Next, Plaintiffs argue that HISA mandates the States cooperate with the Authority because § 1211(b) states that "[t]o avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State law, where conduct by any person subject to" HISA's medication control or racetrack safety program "may involve both a" HISA rule "violation and violation of Federal or State law, the Authority and Federal or State law enforcement authorities shall cooperate and share information." Plaintiffs argue that the inclusion of the phrase "the

Authority and Federal or State law enforcement authorities shall cooperate and share information," is best understood to require the States to cooperate with the Authority. However, as Defendants contend, the better reading is that § 1211(b) is simply a requirement for the Authority to cooperate with the States not the other way around, as Plaintiffs insist.

While Plaintiffs assert that the plain meaning of § 1211(b) confirms cooperation is mandated for both the Authority and the States, Plaintiffs' interpretation requires that the provision be read in a vacuum instead of considering it in the context of the statute in its entirety. The Federal Defendants are correct that the provisions meaning is clear since "HISA's primary objective is to create a framework for regulatory action; to that end, its provisions define the duties and obligations of the Authority, its relationship with the FTC, and the obligations of persons that would be subject to the rules under HISA." [DE 70, at 37 (citing HISA §§ 1203-1209)]; *see also Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) ("The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute."). Therefore, the Court finds that HISA does not violate the anticommandeering doctrine.

5. THE AUTHORITY AS A PUBLIC ENTITY

Plaintiffs make several alternative arguments in case the Court finds the Authority to be a public entity, including that its structure violates the Appointments Clause, its officers are not properly removable under Article II and the separation of powers, and it violates the public nondelegation doctrine. *See* [DE 87, at 54-61]. However, as repeatedly stated herein, in HISA, *see* § 3052(a), and in Plaintiffs' Amended

Complaint [DE 53, at 5, 17, 41, 42, 43, 44, 45, 51], the Authority is a private entity. Therefore, the Court need not consider Plaintiffs' alternative arguments regarding the Authority as a public entity.

II. CONCLUSION

The Court, having considered the matters fully, and being otherwise sufficiently advised,

IT IS ORDERED as follows:

(1) The Authority Defendants' Motion to Dismiss [DE 68] and the Federal Defendants' Motion to Dismiss [DE 70] are **DENIED IN PART**, insofar as they seek dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction, and **GRANTED IN PART**, insofar as they seek dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted;

(2) Plaintiffs' Motion for Summary Judgment [DE 87] is **DENIED**;

(3) This matter is **DISMISSED WITH PREJUDICE**; and

(4) This is a final and appealable order.

This 3rd day of June, 2022.

Signed By:
/s/ Joseph M. Hood
Senior U.S. District Judge

APPENDIX C

No. 22-5487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OKLAHOMA; OKLAHOMA HORSE RACING COMMISSION; TULSA COUNTY PUBLIC FACILITIES AUTHORITY, DBA FAIR MEADOWS RACING AND SPORTS BAR; STATE OF WEST VIRGINIA; WEST VIRGINIA RACING COMMISSION; HANOVER SHOE FARMS, INC.; OKLAHOMA QUARTER HORSE RACING ASSOCIATION; GLOBAL GAMING RP, LLC, DBA REMINGTON PARK; WILL ROGERS DOWNS, LLC; UNITED STATES TROTTING ASSOCIATION; STATE OF LOUISIANA, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, ET AL., Defendants-Appellees.	ORDER May 18, 2023

BEFORE: SUTTON, Chief Judge; COLE and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

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[*] Judge Bush recused himself from participation in this ruling.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1.

The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 2.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. III, § 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain

and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

15 U.S.C. § 3051. Definitions

In this chapter the following definitions apply:

(1) Authority

The term "Authority" means the Horse-racing Integrity and Safety Authority designated by section 3052(a) of this title.

(2) Breeder

The term "breeder" means a person who is in the business of breeding covered horses.

(3) Commission

The term "Commission" means the Federal Trade Commission.

(4) Covered horse

The term "covered horse" means any Thoroughbred horse, or any other horse made subject to this chapter by election of the applicable State racing commission or the breed governing organization for such horse under section 3054(k)[1] of this title, during the period—

(A) beginning on the date of the horse's first timed and reported workout at a racetrack that participates in covered horseraces or at a training facility; and

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[1] So in original. Probably should be "section 3054(*l*)".

(B) ending on the date on which the Authority receives written notice that the horse has been retired.

(5) Covered horserace

The term "covered horserace" means any horserace involving covered horses that has a substantial relation to interstate commerce, including any Thoroughbred horserace that is the subject of interstate off-track or advance deposit wagers.

(6) Covered persons

The term "covered persons" means all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission and the agents, assigns, and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses.

(7) Equine constituencies

The term "equine constituencies" means, collectively, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys who are engaged in the care, training, or racing of covered horses.

(8) Equine industry representative

The term "equine industry representative" means an organization regularly and significantly engaged in the equine industry, including organizations that represent the interests of, and whose membership consists of, owners, breeders, trainers, racetracks, veterinarians, State racing commissions, and jockeys.

(9) Horseracing anti-doping and medication control program

The term "horseracing anti-doping and medication control program" means the antidoping and medication program established under section 3055(a) of this title.

(10) Immediate family member

The term "immediate family member" shall include a spouse, domestic partner, mother, father, aunt, uncle, sibling, or child.

(11) Interstate off-track wager

The term "interstate off-track wager" has the meaning given such term in section 3002 of this title.

(12) Jockey

The term "jockey" means a rider or driver of a covered horse in covered horseraces.

(13) Owner

The term "owner" means a person who holds an ownership interest in one or more covered horses.

(14) Program effective date

The term "program effective date" means July 1, 2022.

(15) Racetrack

The term "racetrack" means an organization licensed by a State racing commission to conduct covered horseraces.

(16) Racetrack safety program

The term "racetrack safety program" means the program established under section 3056(a) of this title.

(17) Stakes race

The term "stakes race" means any race so designated by the racetrack at which such race is run, including, without limitation, the races comprising the Breeders' Cup World Championships and the races designated as graded stakes by the American Graded Stakes Committee of the Thoroughbred Owners and Breeders Association.

(18) State racing commission

The term "State racing commission" means an entity designated by State law or regulation that has jurisdiction over the conduct of horseracing within the applicable State.

(19) Trainer

The term "trainer" means an individual engaged in the training of covered horses.

(20) Training facility

The term "training facility" means a location that is not a racetrack licensed by a State racing commission that operates primarily to house covered horses and conduct official timed workouts.

(21) Veterinarian

The term "veterinarian" means a licensed veterinarian who provides veterinary services to covered horses.

(22) Workout

The term "workout" means a timed running of a horse over a predetermined distance not associated with a race or its first qualifying race, if such race is made subject to this chapter by election under section 3054(k)[1] of this title of the horse's breed governing organization or the applicable State racing commission.

15 U.S.C. § 3052. Recognition of the Horseracing Integrity and Safety Authority

(a) In general

The private, independent, self-regulatory, nonprofit corporation, to be known as the "Horse-racing Integrity and Safety Authority", is recognized for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces.

(b) Board of directors

(1) Membership

The Authority shall be governed by a board of directors (in this section referred to as the "Board") comprised of nine members as follows:

(A) Independent members

Five members of the Board shall be independent members selected from outside the equine industry.

(B) Industry members

(i) In general

Four members of the Board shall be industry members selected from among the various equine constituencies.

(ii) Representation of equine constituencies

The industry members shall be representative of the various equine constituencies, and shall include not more than one industry member from any one equine constituency.

(2) Chair

The chair of the Board shall be an independent member described in paragraph (1)(A).

(3) Bylaws

The Board of the Authority shall be governed by bylaws for the operation of the Authority with respect to—

(A) the administrative structure and employees of the Authority;

(B) the establishment of standing committees;

(C) the procedures for filling vacancies on the Board and the standing committees;

(D) term limits for members and termination of membership; and

(E) any other matter the Board considers necessary.

(c) Standing committees

(1) Anti-doping and medication control standing committee

(A) In general

The Authority shall establish an antidoping and medication control standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the horseracing antidoping and medication control program.

(B) Membership

The anti-doping and medication control standing committee shall be comprised of seven members as follows:

(i) Independent members

A majority of the members shall be independent members selected from outside the equine industry.

(ii) Industry members

A minority of the members shall be industry members selected to represent the various equine constituencies, and shall include not more than one industry member from any one equine constituency.

(iii) Qualification

A majority of individuals selected to serve on the anti-doping and medication control standing committee shall have significant, recent experience in anti-doping and medication control rules.

(C) Chair

The chair of the anti-doping and medication control standing committee shall be an independent member of the Board described in subsection (b)(1)(A).

(2) Racetrack safety standing committee

(A) In general

The Authority shall establish a racetrack safety standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the racetrack safety program.

(B) Membership

The racetrack safety standing committee shall be comprised of seven members as follows:

(i) Independent members

A majority of the members shall be independent members selected from outside the equine industry.

(ii) Industry members

A minority of the members shall be industry members selected to represent the various equine constituencies.

(C) Chair

The chair of the racetrack safety standing committee shall be an industry member of the Board described in subsection (b)(1)(B).

(d) Nominating committee

(1) Membership

(A) In general

The nominating committee of the Authority shall be comprised of seven independent members selected from business, sports, and academia.

(B) Initial membership

The initial nominating committee members shall be set forth in the governing corporate documents of the Authority.

(C) Vacancies

After the initial committee members are appointed in accordance with subparagraph (B), vacancies shall be filled by the Board pursuant to rules established by the Authority.

(2) Chair

The chair of the nominating committee shall be selected by the nominating committee from among the members of the nominating committee.

(3) Selection of members of the Board and standing committees

(A) Initial members

The nominating committee shall select the initial members of the Board and the standing committees described in subsection (c).

(B) Subsequent members

The nominating committee shall recommend individuals to fill any vacancy on the Board or on such standing committees.

(e) Conflicts of interest

To avoid conflicts of interest, the following individuals may not be selected as a member of the Board or as an independent member of a nominating or standing committee under this section:

(1) An individual who has a financial interest in, or provides goods or services to, covered horses.

(2) An official or officer—

(A) of an equine industry representative; or

(B) who serves in a governance or policy-making capacity for an equine industry representative.

(3) An employee of, or an individual who has a business or commercial relationship with, an individual described in paragraph (1) or (2).

(4) An immediate family member of an individual described in paragraph (1) or (2).

(f) Funding

(1) Initial funding

(A) In general

Initial funding to establish the Authority and underwrite its operations before the program effective date shall be provided by loans obtained by the Authority.

(B) Borrowing

The Authority may borrow funds toward the funding of its operations.

(C) Annual calculation of amounts required

(i) In general

Not later than the date that is 90 days before the program effective date, and not later than November 1 each year thereafter, the Authority shall determine and provide to each State racing commission the estimated amount required from the State—

(I) to fund the State's proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year; and

(II) to liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year.

(ii) Basis of calculation

The amounts calculated under clause (i) shall—

(I) be based on—

(aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and

(bb) the projected amount of covered racing starts for the year in each State; and

(II) take into account other sources of Authority revenue.

(iii) Requirements regarding budgets of Authority

(I) Initial budget

The initial budget of the Authority shall require the approval of $^2/_3$ of the Board.

(II) Subsequent budgets

Any subsequent budget that exceeds the budget of the preceding calendar year by more than 5 percent shall require the approval of $^2/_3$ of the Board.

(iv) Rate increases

(I) In general

A proposed increase in the amount required under this subparagraph shall be reported to the Commission.

(II) Notice and comment

The Commission shall publish in the Federal Register such a proposed increase and provide an opportunity for public comment.

(2) Assessment and collection of fees by States

(A) Notice of election

Any State racing commission that elects to remit fees pursuant to this subsection shall notify the Authority of such election not later than 60 days before the program effective date.

(B) Requirement to remit fees

After a State racing commission makes a notification under subparagraph (A), the election shall remain in effect and the State racing commission shall be required to remit fees pursuant to this subsection according to a schedule established in rule developed by the Authority and approved by the Commission.

(C) Withdrawal of election

A State racing commission may cease remitting fees under this subsection not earlier than one year after notifying the Authority of the intent of the State racing commission to do so.

(D) Determination of methods

Each State racing commission shall determine, subject to the applicable laws, regulations, and contracts of the State, the method by which the requisite amount of fees, such as foal registration fees, sales contributions, starter fees, and track fees, and other fees on covered persons, shall be allocated, assessed, and collected.

(3) Assessment and collection of fees by the Authority

(A) Calculation

If a State racing commission does not elect to remit fees pursuant to paragraph (2) or withdraws its election under such paragraph, the Authority shall, not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month.

(B) Allocation

The Authority shall allocate equitably the amount calculated under subparagraph (A) collected among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate.

(C) Assessment and collection

(i) In general

The Authority shall assess a fee equal to the allocation made under subparagraph (B) and shall collect such fee according to such rules as the Authority may promulgate.

(ii) Remittance of fees

Covered persons described in subparagraph (B) shall be required to remit such fees to the Authority.

(D) Limitation

A State racing commission that does not elect to remit fees pursuant to paragraph (2)

or that withdraws its election under such paragraph shall not impose or collect from any person a fee or tax relating to antidoping and medication control or racetrack safety matters for covered horseraces.

(4) Fees and fines

Fees and fines imposed by the Authority shall be allocated toward funding of the Authority and its activities.

(5) Rule of construction

Nothing in this chapter shall be construed to require—

(A) the appropriation of any amount to the Authority; or

(B) the Federal Government to guarantee the debts of the Authority.

(g) Quorum

For all items where Board approval is required, the Authority shall have present a majority of independent members.

15 U.S.C. § 3053. Federal Trade Commission oversight

(a) In general

The Authority shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of title 5, any proposed rule, or proposed modification to a rule, of the Authority relating to—

(1) the bylaws of the Authority;

(2) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods;

(3) laboratory standards for accreditation and protocols;

(4) standards for racing surface quality maintenance;

(5) racetrack safety standards and protocols;

(6) a program for injury and fatality data analysis;

(7) a program of research and education on safety, performance, and anti-doping and medication control;

(8) a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons;

(9) a schedule of civil sanctions for violations;

(10) a process or procedures for disciplinary hearings; and

(11) a formula or methodology for determining assessments described in section 3052(f) of this title.

(b) Publication and comment

(1) In general

The Commission shall—

(A) publish in the Federal Register each proposed rule or modification submitted under subsection (a); and

(B) provide an opportunity for public comment.

(2) Approval required

A proposed rule, or a proposed modification to a rule, of the Authority shall not take effect unless the proposed rule or modification has been approved by the Commission.

(c) Decision on proposed rule or modification to a rule

(1) In general

Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.

(2) Conditions

The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—

(A) this chapter; and

(B) applicable rules approved by the Commission.

(3) Revision of proposed rule or modification

(A) In general

In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Authority to modify the proposed rule or modification.

(B) Resubmission

The Authority may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A).

(d) Proposed standards and procedures

(1) In general

The Authority shall submit to the Commission any proposed rule, standard, or procedure developed by the Authority to carry out the horseracing anti-doping and medication control program or the racetrack safety program.

(2) Notice and comment

The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

(e) Interim final rules

The Commission may adopt an interim final rule, to take effect immediately, under conditions specified in section 553(b)(B) of title 5, if the Commission finds that such a rule is necessary to protect—

(1) the health and safety of covered horses; or

(2) the integrity of covered horseraces and wagering on those horseraces.

15 U.S.C. § 3054. Jurisdiction of the Commission and the Horseracing Integrity and Safety Authority

(a) In general

Beginning on the program effective date, the Commission, the Authority, and the anti-doping and medication control enforcement agency, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j),[1] shall—

(1) implement and enforce the horseracing anti-doping and medication control program and the racetrack safety program;

(2) exercise independent and exclusive national authority over—

(A) the safety, welfare, and integrity of covered horses, covered persons, and covered horseraces; and

(B) all horseracing safety, performance, and anti-doping and medication control matters for covered horses, covered persons, and covered horseraces; and

(3) have safety, performance, and antidoping and medication control authority over covered persons similar to such authority of the State racing commissions before the program effective date.

(b) Preemption

The rules of the Authority promulgated in accordance with this chapter shall preempt any provision of State law or regulation with respect to matters within

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[1] So in original. Probably should be "subsection (k)".

the jurisdiction of the Authority under this chapter, as limited by sub-section (j).[1] Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

(c) Duties

(1) In general

The Authority—

(A) shall develop uniform procedures and rules authorizing—

(i) access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses;

(ii) issuance and enforcement of subpoenas and subpoenas duces tecum; and

(iii) other investigatory powers of the nature and scope exercised by State racing commissions before the program effective date; and

(B) with respect to an unfair or deceptive act or practice described in section 3059 of this title, may recommend that the Commission commence an enforcement action.

(2) Approval of Commission

The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

(d) Registration of covered persons with Authority

(1) In general

As a condition of participating in covered races and in the care, ownership, treatment, and training of covered horses, a covered person shall register with the Authority in accordance with rules promulgated by the Authority and approved by the Commission in accordance with section 3053 of this title.

(2) Agreement with respect to Authority rules, standards, and procedures

Registration under this subsection shall include an agreement by the covered person to be subject to and comply with the rules, standards, and procedures developed and approved under subsection (c).

(3) Cooperation

A covered person registered under this subsection shall, at all times—

(A) cooperate with the Commission, the Authority, the anti-doping and medication control enforcement agency, and any respective designee, during any civil investigation; and

(B) respond truthfully and completely to the best of the knowledge of the covered person if questioned by the Commission, the Authority, the anti-doping and medication control enforcement agency, or any respective designee.

(4) Failure to comply

Any failure of a covered person to comply with this subsection shall be a violation of section 3057(a)(2)(G) of this title.

(e) Enforcement of programs

(1) Anti-doping and medication control enforcement agency

(A) Agreement with USADA

The Authority shall seek to enter into an agreement with the United States Anti-Doping Agency under which the Agency acts as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(B) Agreement with other entity

If the Authority and the United States Anti-Doping Agency are unable to enter into the agreement described in subparagraph (A), the Authority shall enter into an agreement with an entity that is nationally recognized as being a medication regulation agency equal in qualification to the United States Anti-Doping Agency to act as the anti-doping and medication control enforcement agency under this chapter for services consistent with the horseracing anti-doping and medication control program.

(C) Negotiations

Any negotiations under this paragraph shall be conducted in good faith and designed to achieve efficient, effective best practices for

anti-doping and medication control and enforcement on commercially reasonable terms.

(D) Elements of agreement

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets of the United States Anti-Doping Agency while acting as the antidoping and medication control enforcement agency under this chapter, as well as a provision for the revision of the agreement to increase in the scope of work as provided for in subsection (k),[1] and any other matter the Authority considers appropriate.

(E) Duties and powers of enforcement agency

The anti-doping and medication control enforcement agency under an agreement under this paragraph shall—

(i) serve as the independent anti-doping and medication control enforcement organization for covered horses, covered persons, and covered horseraces, implementing the anti-doping and medication control program on behalf of the Authority;

(ii) ensure that covered horses and covered persons are deterred from using or administering medications, substances, and methods in violation of the rules established in accordance with this chapter;

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[1] So in original.

(iii) implement anti-doping education, research, testing, compliance and adjudication programs designed to prevent covered persons and covered horses from using or administering medications, substances, and methods in violation of the rules established in accordance with this chapter;

(iv) exercise the powers specified in section 3055(c)(4) of this title in accordance with that section; and

(v) implement and undertake any other responsibilities specified in the agreement.

(F) Term and extension

(i) Term of initial agreement

The initial agreement entered into by the Authority under this paragraph shall be in effect for the 5-year period beginning on the program effective date.

(ii) Extension

At the end of the 5-year period described in clause (i), the Authority may—

(I) extend the term of the initial agreement under this paragraph for such additional term as is provided by the rules of the Authority and consistent with this chapter; or

(II) enter into an agreement meeting the requirements of this paragraph with an entity described by subparagraph (B) for such term as is

provided by such rules and consistent with this chapter.

(2) Agreements for enforcement by State racing commissions

(A) State racing commissions

(i) Racetrack safety program

The Authority may enter into agreements with State racing commissions for services consistent with the enforcement of the racetrack safety program.

(ii) Anti-doping and medication control program

The anti-doping and medication control enforcement agency may enter into agreements with State racing commissions for services consistent with the enforcement of the anti-doping and medication control program.

(B) Elements of agreements

Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, budgets, and any other matter the Authority considers appropriate.

(3) Enforcement of standards

The Authority may coordinate with State racing commissions and other State regulatory agencies to monitor and enforce racetrack compliance with the standards developed under paragraphs (1) and (2) of section 3056(c) of this title.

(f) Procedures with respect to rules of Authority

(1) Anti-doping and medication control

(A) In general

Recommendations for rules regarding antidoping and medication control shall be developed in accordance with section 3055 of this title.

(B) Consultation

The anti-doping and medication control enforcement agency shall consult with the anti-doping and medication control standing committee and the Board of the Authority on all anti-doping and medication control rules of the Authority.

(2) Racetrack safety

Recommendations for rules regarding racetrack safety shall be developed by the racetrack safety standing committee of the Authority.

(g) Issuance of guidance

(1) The Authority may issue guidance that—

(A) sets forth—

(i) an interpretation of an existing rule, standard, or procedure of the Authority; or

(ii) a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure; and

(B) relates solely to—

(i) the administration of the Authority; or

(ii) any other matter, as specified by the Commission, by rule, consistent with the public interest and the purposes of this subsection.

(2) Submittal to Commission

The Authority shall submit to the Commission any guidance issued under paragraph (1).

(3) Immediate effect

Guidance issued under paragraph (1) shall take effect on the date on which the guidance is submitted to the Commission under paragraph (2).

(h) Subpoena and investigatory authority

The Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

(i) Civil penalties

The Authority shall develop a list of civil penalties with respect to the enforcement of rules for covered persons and covered horseraces under its jurisdiction.

(j) Civil actions

(1) In general

In addition to civil sanctions imposed under section 3057 of this title, the Authority may commence a civil action against a covered person or racetrack that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States

courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Authority may be entitled.

(2) Injunctions and restraining orders

With respect to a civil action commenced under paragraph (1), upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(k) Limitations on authority

(1) Prospective application

The jurisdiction and authority of the Authority and the Commission with respect to the horseracing anti-doping and medication control program and the racetrack safety program shall be prospective only.

(2) Previous matters

(A) In general

The Authority and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the horse-racing anti-doping and medication control program and the racetrack safety program that occurs before the program effective date.

(B) State racing commission

With respect to conduct described in subparagraph (A), the applicable State racing commission shall retain authority until the final resolution of the matter.

(3) Other laws unaffected

This chapter shall not be construed to modify, impair or restrict the operation of the general laws or regulations, as may be amended from time to time, of the United States, the States and their political subdivisions relating to criminal conduct, cruelty to animals, matters unrelated to antidoping, medication control and racetrack and racing safety of covered horses and covered races, and the use of medication in human participants in covered races.

(*l*) Election for other breed coverage under chapter

(1) In general

A State racing commission or a breed governing organization for a breed of horses other than Thoroughbred horses may elect to have such breed be covered by this chapter by the filing of a designated election form and subsequent approval by the Authority. A State racing commission may elect to have a breed covered by this chapter for the applicable State only.

(2) Election conditional on funding mechanism

A commission or organization may not make an election under paragraph (1) unless the commission or organization has in place a mechanism to provide sufficient funds to cover the costs of the administration of this chapter with respect to the horses that will be covered by this chapter as a result of the election.

(3) Apportionment

The Authority shall apportion costs described in paragraph (2) in connection with an election under paragraph (1) fairly among all impacted segments of the horseracing industry, subject to approval by the Commission in accordance with section 3053 of this title. Such apportionment may not provide for the allocation of costs or funds among breeds of horses.

15 U.S.C. § 3055. Horseracing anti-doping and medication control program

(a) Program required

(1) In general

Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority shall establish a horseracing anti-doping and medication control program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Consideration of other breeds

In developing the horseracing anti-doping and medication control program with respect to a breed of horse that is made subject to this chapter by election of a State racing commission or the breed governing organization for such horse under section 3054(k)[1] of this title, the Authority shall consider the unique characteristics of such breed.

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[1] So in original. Probably should be "section 3054(*l*)".

(b) Considerations in development of program

In developing the horseracing anti-doping and medication control program, the Authority shall take into consideration the following:

(1) Covered horses should compete only when they are free from the influence of medications, other foreign substances, and methods that affect their performance.

(2) Covered horses that are injured or unsound should not train or participate in covered races, and the use of medications, other foreign substances, and treatment methods that mask or deaden pain in order to allow injured or unsound horses to train or race should be prohibited.

(3) Rules, standards, procedures, and protocols regulating medication and treatment methods for covered horses and covered races should be uniform and uniformly administered nationally.

(4) To the extent consistent with this chapter, consideration should be given to international anti-doping and medication control standards of the International Federation of Horseracing Authorities and the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association.

(5) The administration of medications and treatment methods to covered horses should be based upon an examination and diagnosis that identifies an issue requiring treatment for which the medication or method represents an appropriate component of treatment.

(6) The amount of therapeutic medication that a covered horse receives should be the

minimum necessary to address the diagnosed health concerns identified during the examination and diagnostic process.

(7) The welfare of covered horses, the integrity of the sport, and the confidence of the betting public require full disclosure to regulatory authorities regarding the administration of medications and treatments to covered horses.

(c) Activities

The following activities shall be carried out under the horseracing anti-doping and medication control program:

(1) Standards for anti-doping and medication control

Not later than 120 days before the program effective date, the Authority shall issue, by rule—

(A) uniform standards for—

(i) the administration of medication to covered horses by covered persons; and

(ii) laboratory testing accreditation and protocols; and

(B) a list of permitted and prohibited medications, substances, and methods, including allowable limits of permitted medications, substances, and methods.

(2) Review process for administration of medication

The development of a review process for the administration of any medication to a covered horse during the 48-hour period preceding the next racing start of the covered horse.

(3) Agreement requirements

The development of requirements with respect to agreements under section 3054(e) of this title.

(4) Anti-doping and medication control enforcement agency

(A) Control rules, protocols, etc.

Except as provided in paragraph (5), the anti-doping and medication control program enforcement agency under section 3054(e) of this title shall, in consultation with the anti-doping and medication control standing committee of the Authority and consistent with international best practices, develop and recommend anti-doping and medication control rules, protocols, policies, and guidelines for approval by the Authority.

(B) Results management

The anti-doping and medication control enforcement agency shall conduct and oversee anti-doping and medication control results management, including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations. Any final decision or civil sanction of the anti-doping and medication control enforcement agency under this subparagraph shall be the final decision or civil sanction of the Authority, subject to review in accordance with section 3058 of this title.

(C) Testing

The anti-doping enforcement agency shall perform and manage test distribution planning (including intelligence-based testing), the sample collection process, and in-competition and out-of-competition testing (including no-advance-notice testing).

(D) Testing laboratories

The anti-doping and medication control enforcement agency shall accredit testing laboratories based upon the standards established under this chapter, and shall monitor, test, and audit accredited laboratories to ensure continuing compliance with accreditation standards.

(5) Anti-doping and medication control standing committee

The anti-doping and medication control standing committee shall, in consultation with the anti-doping and medication control enforcement agency, develop lists of permitted and prohibited medications, methods, and substances for recommendation to, and approval by, the Authority. Any such list may prohibit the administration of any substance or method to a horse at any time after such horse becomes a covered horse if the Authority determines such substance or method has a long-term degrading effect on the soundness of a horse.

(d) Prohibition

Except as provided in subsections (e) and (f), the horseracing anti-doping and medication control program shall prohibit the administration of any

prohibited or otherwise permitted substance to a covered horse within 48 hours of its next racing start, effective as of the program effective date.

(e) Advisory committee study and report

(1) In general

Not later than the program effective date, the Authority shall convene an advisory committee comprised of horseracing anti-doping and medication control industry experts, including a member designated by the antidoping and medication control enforcement agency, to conduct a study on the use of furosemide on horses during the 48-hour period before the start of a race, including the effect of furosemide on equine health and the integrity of competition and any other matter the Authority considers appropriate.

(2) Report

Not later than three years after the program effective date, the Authority shall direct the advisory committee convened under paragraph (1) to submit to the Authority a written report on the study conducted under that paragraph that includes recommended changes, if any, to the prohibition in subsection (d).

(3) Modification of prohibition

(A) In general

After receipt of the report required by paragraph (2), the Authority may, by unanimous vote of the Board of the Authority, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification shall apply to all States beginning on the date

that is three years after the program effective date.

(B) Condition

In order for a unanimous vote described in subparagraph (A) to effect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

(i) That the modification is warranted.

(ii) That the modification is in the best interests of horse racing.

(iii) That furosemide has no performance enhancing effect on individual horses.

(iv) That public confidence in the integrity and safety of racing would not be adversely affected by the modification.

(f) Exemption

(1) In general

Except as provided in paragraph (2), only during the three-year period beginning on the program effective date, a State racing commission may submit to the Authority, at such time and in such manner as the Authority may require, a request for an exemption from the prohibition in subsection (d) with respect to the use of furosemide on covered horses during such period.

(2) Exceptions

An exemption under paragraph (1) may not be requested for—

(A) two-year-old covered horses; or

(B) covered horses competing in stakes races.

(3) Contents of request

A request under paragraph (1) shall specify the applicable State racing commission's requested limitations on the use of furosemide that would apply to the State under the horse-racing anti-doping and medication control program during such period. Such limitations shall be no less restrictive on the use and administration of furosemide than the restrictions set forth in State's laws and regulations in effect as of September 1, 2020.

(4) Grant of exemption

Subject to subsection (e)(3), the Authority shall grant an exemption requested under paragraph (1) for the remainder of such period and shall allow the use of furosemide on covered horses in the applicable State, in accordance with the requested limitations.

(g) Baseline anti-doping and medication control rules

(1) In general

Subject to paragraph (3), the baseline antidoping and medication control rules described in paragraph (2) shall—

(A) constitute the initial rules of the horseracing anti-doping and medication control program; and

(B) except as exempted pursuant to subsections (e) and (f), remain in effect at all times after the program effective date.

(2) Baseline anti-doping medication control rules described

(A) In general

The baseline anti-doping and medication control rules described in this paragraph are the following:

(i) The lists of permitted and prohibited substances (including drugs, medications, and naturally occurring substances and synthetically occurring substances) in effect for the International Federation of Horseracing Authorities, including the International Federation of Horseracing Authorities International Screening Limits for urine, dated May 2019, and the International Federation of Horseracing Authorities International Screening Limits for plasma, dated May 2019.

(ii) The World Anti-Doping Agency International Standard for Laboratories (version 10.0), dated November 12, 2019.

(iii) The Association of Racing Commissioners International out-of-competition testing standards, Model Rules of Racing (version 9.2).

(iv) The Association of Racing Commissioners International penalty and multiple medication violation rules, Model Rules of Racing (version 6.2).

(B) Conflict of rules

In the case of a conflict among the rules described in subparagraph (A), the most stringent rule shall apply.

(3) Modifications to baseline rules

(A) Development by anti-doping and medication control standing committee

The anti-doping and medication control standing committee, in consultation with the anti-doping and medication control enforcement agency, may develop and submit to the Authority for approval by the Authority proposed modifications to the baseline anti-doping and medication control rules.

(B) Authority approval

If the Authority approves a proposed modification under this paragraph, the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

(C) Anti-doping and medication control enforcement agency veto authority

The Authority shall not approve any proposed modification that renders an antidoping and medication control rule less stringent than the baseline anti-doping and medication control rules described in paragraph (2) (including by increasing permitted medication thresholds, adding permitted medications, removing prohibited medications, or weakening enforcement mechanisms) without the

approval of the antidoping and medication control enforcement agency.

15 U.S.C. § 3056. Racetrack safety program

(a) Establishment and considerations

(1) In general

Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority shall establish a racetrack safety program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 3054(d) of this title.

(2) Considerations in development of safety program

In the development of the horseracing safety program for covered horses, covered persons, and covered horseraces, the Authority and the Commission shall take into consideration existing safety standards including the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards, the International Federation of Horseracing Authority's International Agreement on Breeding, Racing, and Wagering, and the British Horseracing Authority's Equine Health and Welfare program.

(b) Elements of horseracing safety program

The horseracing safety program shall include the following:

(1) A set of training and racing safety standards and protocols taking into account regional

differences and the character of differing racing facilities.

(2) A uniform set of training and racing safety standards and protocols consistent with the humane treatment of covered horses, which may include lists of permitted and prohibited practices or methods (such as crop use).

(3) A racing surface quality maintenance system that—

(A) takes into account regional differences and the character of differing racing facilities; and

(B) may include requirements for track surface design and consistency and established standard operating procedures related to track surface, monitoring, and maintenance (such as standardized seasonal assessment, daily tracking, and measurement).

(4) A uniform set of track safety standards and protocols, that may include rules governing oversight and movement of covered horses and human and equine injury reporting and prevention.

(5) Programs for injury and fatality data analysis, that may include pre- and post-training and race inspections, use of a veterinarian's list, and concussion protocols.

(6) The undertaking of investigations at racetrack and non-racetrack facilities related to safety violations.

(7) Procedures for investigating, charging, and adjudicating violations and for the enforcement of civil sanctions for violations.

(8) A schedule of civil sanctions for violations.

(9) Disciplinary hearings, which may include binding arbitration, civil sanctions, and research.

(10)Management of violation results.

(11)Programs relating to safety and performance research and education.

(12)An evaluation and accreditation program that ensures that racetracks in the United States meet the standards described in the elements of the Horseracing Safety Program.

(c) Activities

The following activities shall be carried out under the racetrack safety program:

(1) Standards for racetrack safety

The development, by the racetrack safety standing committee of the Authority in section 3052(c)(2) of this title of uniform standards for racetrack and horseracing safety.

(2) Standards for safety and performance accreditation

(A) In general

Not later than 120 days before the program effective date, the Authority, in consultation with the racetrack safety standing committee, shall issue, by rule in accordance with section 3053 of this title—

(i) safety and performance standards of accreditation for racetracks; and

(ii) the process by which a racetrack may achieve and maintain accreditation by the Authority.

(B) Modifications

(i) In general

The Authority may modify rules establishing the standards issued under subparagraph (A), as the Authority considers appropriate.

(ii) Notice and comment

The Commission shall publish in the Federal Register any proposed rule of the Authority, and provide an opportunity for public comment with respect to, any modification under clause (i) in accordance with section 3053 of this title.

(C) Extension of provisional or interim accreditation

The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a racetrack accredited by the National Thoroughbred Racing Association Safety and Integrity Alliance on a date before the program effective date.

(3) Nationwide safety and performance database

(A) In general

Not later than one year after the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority, in consultation with the Commission, shall develop and maintain a nationwide database of racehorse safety, performance, health, and injury

information for the purpose of conducting an epidemiological study.

(B) Collection of information

In accordance with the registration of covered persons under section 3054(d) of this title, the Authority may require covered persons to collect and submit to the database described in subparagraph (A) such information as the Authority may require to further the goal of increased racehorse welfare.

15 U.S.C. § 3057. Rule violations and civil sanctions

(a) Description of rule violations

(1) In general

The Authority shall issue, by rule in accordance with section 3053 of this title, a description of safety, performance, and anti-doping and medication control rule violations applicable to covered horses and covered persons.

(2) Elements

The description of rule violations established under paragraph (1) may include the following:

(A) With respect to a covered horse, strict liability for covered trainers for—

(i) the presence of a prohibited substance or method in a sample or the use of a prohibited substance or method;

(ii) the presence of a permitted substance in a sample in excess of the amount

allowed by the horseracing anti-doping and medication control program; and

(iii) the use of a permitted method in violation of the applicable limitations established under the horseracing antidoping and medication control program.

(B) Attempted use of a prohibited substance or method on a covered horse.

(C) Possession of any prohibited substance or method.

(D) Attempted possession of any prohibited substance or method.

(E) Administration or attempted administration of any prohibited substance or method on a covered horse.

(F) Refusal or failure, without compelling justification, to submit a covered horse for sample collection.

(G) Failure to cooperate with the Authority or an agent of the Authority during any investigation.

(H) Failure to respond truthfully, to the best of a covered person's knowledge, to a question of the Authority or an agent of the Authority with respect to any matter under the jurisdiction of the Authority.

(I) Tampering or attempted tampering with the application of the safety, performance, or anti-doping and medication control rules or process adopted by the Authority, including—

(i) the intentional interference, or an attempt to interfere, with an official or agent of the Authority;

(ii) the procurement or the provision of fraudulent information to the Authority or agent; and

(iii) the intimidation of, or an attempt to intimidate, a potential witness.

(J) Trafficking or attempted trafficking in any prohibited substance or method.

(K) Assisting, encouraging, aiding, abetting, conspiring, covering up, or any other type of intentional complicity involving a safety, performance, or anti-doping and medication control rule violation or the violation of a period of suspension or eligibility.

(L) Threatening or seeking to intimidate a person with the intent of discouraging the person from the good faith reporting to the Authority, an agent of the Authority or the Commission, or the anti-doping and medication control enforcement agency under section 3054(e) of this title, of information that relates to—

(i) an alleged safety, performance, or anti-doping and medication control rule violation; or

(ii) alleged noncompliance with a safety, performance, or anti-doping and medication control rule.

(b) Testing laboratories

(1) Accreditation and standards

Not later than 120 days before the program effective date, the Authority shall, in consultation with the anti-doping and medication control enforcement agency, establish, by rule in accordance with section 3053 of this title—

(A) standards of accreditation for laboratories involved in testing samples from covered horses;

(B) the process for achieving and maintaining accreditation; and

(C) the standards and protocols for testing such samples.

(2) Administration

The accreditation of laboratories and the conduct of audits of accredited laboratories to ensure compliance with Authority rules shall be administered by the anti-doping and medication control enforcement agency. The antidoping and medication control enforcement agency shall have the authority to require specific test samples to be directed to and tested by laboratories having special expertise in the required tests.

(3) Extension of provisional or interim accreditation

The Authority may, by rule in accordance with section 3053 of this title, extend provisional or interim accreditation to a laboratory accredited by the Racing Medication and Testing Consortium, Inc., on a date before the program effective date.

(4) Selection of laboratories

(A) In general

Except as provided in paragraph (2), a State racing commission may select a laboratory accredited in accordance with the standards established under paragraph (1) to test samples taken in the applicable State.

(B) Selection by the authority

If a State racing commission does not select an accredited laboratory under subparagraph (A), the Authority shall select such a laboratory to test samples taken in the State concerned.

(c) Results management and disciplinary process

(1) In general

Not later than 120 days before the program effective date, the Authority shall establish in accordance with section 3053 of this title—

(A) rules for safety, performance, and antidoping and medication control results management; and

(B) the disciplinary process for safety, performance, and anti-doping and medication control rule violations.

(2) Elements

The rules and process established under paragraph (1) shall include the following:

(A) Provisions for notification of safety, performance, and anti-doping and medication control rule violations.

(B) Hearing procedures.

(C) Standards for burden of proof.

(D) Presumptions.

(E) Evidentiary rules.

(F) Appeals.

(G) Guidelines for confidentiality and public reporting of decisions.

(3) Due process

The rules established under paragraph (1) shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation.

(d) Civil sanctions

(1) In general

The Authority shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against covered persons or covered horses for safety, performance, and anti-doping and medication control rule violations.

(2) Requirements

The rules established under paragraph (1) shall—

(A) take into account the unique aspects of horseracing;

(B) be designed to ensure fair and transparent horseraces; and

(C) deter safety, performance, and anti-doping and medication control rule violations.

(3) Severity

The civil sanctions under paragraph (1) may include—

(A) lifetime bans from horseracing, disgorgement of purses, monetary fines and penalties, and changes to the order of finish in covered races; and

(B) with respect to anti-doping and medication control rule violators, an opportunity to reduce the applicable civil sanctions that is comparable to the opportunity provided by the Protocol for Olympic Movement Testing of the United States Anti-Doping Agency.

(e) Modifications

The Authority may propose a modification to any rule established under this section as the Authority considers appropriate, and the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

15 U.S.C. § 3058. Review of final decisions of the Authority

(a) Notice of civil sanctions

If the Authority imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Authority, the Authority shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.

(b) Review by administrative law judge

(1) In general

With respect to a final civil sanction imposed by the Authority, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

(2) Nature of review

(A) In general

In matters reviewed under this subsection, the administrative law judge shall determine whether—

(i) a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted;

(ii) such acts, practices, or omissions are in violation of this chapter or the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(iii) the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) Conduct of hearing

An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by

rule, which shall conform to section 556 of title 5.

(3) Decision by administrative law judge

(A) In general

With respect to a matter reviewed under this subsection, an administrative law judge—

(i) shall render a decision not later than 60 days after the conclusion of the hearing;

(ii) may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Authority; and

(iii) may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

(B) Final decision

A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

(c) Review by Commission

(1) Notice of review by Commission

The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Authority and any interested party not later than 30 days after the date on

which the administrative law judge issues the decision.

(2) Application for review

(A) In general

The Authority or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.

(B) Effect of denial of application for review

If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

(C) Discretion of Commission

(i) In general

A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

(ii) Matters to be considered

In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that—

(I) a prejudicial error was committed in the conduct of the proceeding; or

(II) the decision involved—

(aa) an erroneous application of the anti-doping and medication control or racetrack safety rules approved by the Commission; or

(bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

(3) Nature of review

(A) In general

In matters reviewed under this subsection, the Commission may—

(i) affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

(ii) make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.

(B) De novo review

The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

(C) Consideration of additional evidence

(i) Motion by Commission

The Commission may, on its own motion, allow the consideration of additional evidence.

(ii) Motion by a party

(I) In general

A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that—

(aa) such additional evidence is material; and

(bb) there were reasonable grounds for failure to submit the evidence previously.

(II) Procedure

The Commission may—

(aa) accept or hear additional evidence; or

(bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

(d) Stay of proceedings

Review by an administrative law judge or the Commission under this section shall not operate as a stay of a final civil sanction of the Authority unless the administrative law judge or Commission orders such a stay.

15 U.S.C. § 3059. Unfair or deceptive acts or practices

The sale of a covered horse, or of any other horse in anticipation of its future participation in a covered

race, shall be considered an unfair or deceptive act or practice in or affecting commerce under section 45(a) of this title if the seller—

(1) knows or has reason to know the horse has been administered—

(A) a bisphosphonate prior to the horse's fourth birthday; or

(B) any other substance or method the Authority determines has a long-term degrading effect on the soundness of the covered horse; and

(2) fails to disclose to the buyer the administration of the bisphosphonate or other substance or method described in paragraph (1)(B).

15 U.S.C. § 3060. State delegation; cooperation

(a) State delegation

(1) In general

The Authority may enter into an agreement with a State racing commission to implement, within the jurisdiction of the State racing commission, a component of the racetrack safety program or, with the concurrence of the anti-doping and medication control enforcement agency under section 3054(e) of this title, a component of the horseracing anti-doping and medication control program, if the Authority determines that the State racing commission has the ability to implement such component in accordance with the rules, standards, and requirements established by the Authority.

(2) Implementation by State racing commission

A State racing commission or other appropriate regulatory body of a State may not implement such a component in a manner less restrictive than the rule, standard, or requirement established by the Authority.

(b) Cooperation

To avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State law, where conduct by any person subject to the horseracing medication control program or the racetrack safety program may involve both a medication control or racetrack safety rule violation and violation of Federal or State law, the Authority and Federal or State law enforcement authorities shall cooperate and share information.

Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, § 701, 136 Stat. 4459, 5231–32 (2022).

Section 1204(e) of the Horseracing Integrity and Safety Act of 2020 (15 U.S.C. 3053(e)) is amended to read as follows:

"(e) AMENDMENT BY COMMISSION OF RULES OF AUTHORITY.—The Commission, by rule in accordance with section 553 of title 5, United States Code, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and

applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act.".

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

ORDER APPROVING THE ENFORCEMENT RULE PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY

March 25, 2022

I. Decision of the Commission: HISA's Enforcement Rule Is Approved

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060, recognizes a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority ("HISA" or the "Authority"), which is charged with developing proposed rules on a variety of subjects. *See id.* § 3053(a). Those proposed rules and later proposed rule modifications take effect only if approved by the Federal Trade Commission ("Commission"). *See id.* § 3053(b)(2). The Authority submitted and the Commission published for public comment in the Federal Register[1] the text and explanation of a proposed rule by the Horseracing Integrity and Safety Authority concerning Enforcement (the "Notice"),

[1] *See* Fed. Trade Comm'n, *Notice of HISA Enforcement Proposed Rule* ("Notice"), 87 Fed. Reg. 4,023 (Jan. 26, 2022).

which is required by the Act. *See id.* § 3057(c)(1). "The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with" the Act and the Commission's procedural rule. *Id.* § 3053(c)(2).

By this Order, for the reasons that follow, the Commission finds that the Enforcement proposed rule is consistent with the Act and the Commission's procedural rule and therefore approves the proposed rule, which will take effect on July 1, 2022.

II. Discussion of Comments and the Commission's Findings

Under the Act, the Commission must approve a proposed rule if it finds that the proposed rule is consistent with the Act and the Commission's procedural rule, 16 C.F.R. §§ 1.140-1.144. As a threshold matter, the Commission finds that the Authority's proposed Enforcement rule is consistent with the procedural rule. As with the Commission's earlier order approving the Authority's Racetrack Safety proposed rule,[2] this finding formally confirms the previous determination made by the Office of the Secretary of the Commission that the Authority's submission of its proposal was consistent with the FTC's procedural rule.[3]

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[2] *See* Fed. Trade Comm'n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority ("Racetrack Safety Order") at 2, __ F.T.C. __ (Mar. 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf.

[3] *See* Notice, 87 Fed. Reg. at 4,023 & n.5. The Secretary's determination that a submission complies with the procedural rule is required before its publication. *See* 16 C.F.R. § 1.143(e) ("The

One commenter, the Florida Department of Business & Professional Regulation's Division of Pari-Mutuel Wagering ("Florida Division"), expressly argued that the submission was inconsistent with the procedural rule, but its concerns do not identify any component of the procedural rule with which the submission was inconsistent.[4] The remainder of this Order discusses

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Secretary of the Commission may reject a document for filing that fails to comply with the Commission's rules for filing . . . .").

[4] *See* Letter from Louis Trombetta, Director, Fla. Div. of Pari-Mutuel Wagering, Dep't of Bus. & Prof. Reg., ("Fla. Dep't Bus.") (Feb. 9, 2022), at 1-2, https://www.regulations.gov/comment/FTC-2022-0009-0009. In particular, the Florida Division asserts four ways in which the Authority's proposed rule does "not comply with the Procedures for Submission of Rules Under the Horseracing Integrity and Safety Act." *Id.* Those alleged inconsistencies are: (1) that the Enforcement proposed rule references other rules not yet proposed; (2) that it is "vague" for failing to "specify whether the timeframe is computed using calendar or business days and does not specify what happens if the last day falls on a weekend or holiday"; (3) fails to define "Arbitral Body" or "National Stewards Panel"; and (4) "does not enumerate how the rule [specifying a violation for failure to register] would be applied, or how it would be enforceable against unregistered persons." *Id.* As to the piecemeal nature of the Authority's proposals the Florida Department (and other commenters) disfavor, the Commission explained in its Racetrack Safety Order that the Act in fact requires the Authority to propose its rules piecemeal and on different timeframes. *See* Racetrack Safety Order at 6-9 (describing statutory timelines requiring piecemeal submissions and directing Authority to review Racetrack Safety and Assessment Methodology together for proposed rule modifications within one year). The other three objections sound in policy differences and do not identify any portion of the procedural rule with which the Authority's submission was inconsistent. Another commenter, the Texas Racing Commission ("Texas Commission"), although not expressly identifying an inconsistency with

whether the Enforcement proposed rule is "consistent with" the Act.

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the procedural rule, stated, in a footnote, with respect to the Texas Commission's view that there could be inconsistency among consent decrees, "No alternatives were proffered for the FTC review although all racing states have alternatives between them." *See* Letter from Virigina S. Fields, General Counsel, Tex. Racing Comm'n ("Tex. Comm'n"), (Feb. 8, 2022), at 4 n.17, https://www.regulations.gov/comment/FTC-2022-0009-0005.
This statement could allude to the procedural rule's requirement that the Authority's submission include a "description of any reasonable alternatives to the proposed rule or modification that may accomplish the stated objective." 16 C.F.R. § 1.142(a)(3). But there is no inconsistency here. In the Notice, the Authority described why it sought "flexibility in developing decrees," Notice, 87 Fed. Reg. at 4,027, as its preferred alternative to what Texas would have liked—"a strictly defined process for consistency of application," Tex. Comm'n at 4. The procedural rule's requirement that the Authority describe alternatives is not a mechanistic requirement that it exhaustively describe every possible alternative—here, the two reasonable alternatives identified were to be more prescriptive or less prescriptive with respect to consent decrees, and the Authority identified why, even if the Texas Commission and other commenters disagreed, it favored flexibility over the reasonable alternative of strict consistency. A similar inference could be drawn that another commenter, the Thoroughbred Horsemen's Association, Inc. et al., implicitly identified an inconsistency with the procedural rule when it described the "procedural rule [as] requir[ing] a significant amount of information to justify rules, including evidence." Letter from Alan M. Foreman, Thoroughbred Horsemen's Associations, Inc. et al. ("Thoroughbred Horsemen"), (Feb. 9, 2022), at 2, https://www.regulations.gov/comment/FTC-2022-0009-0010.
The Commission previously addressed this concern from other commenters. See Racetrack Safety Order at 2 n.3 (describing the procedural rule as modeled on the Administrative Procedure Act, which requires a "concise general statement," 5 U.S.C. § 553(c)).

In deciding whether to approve or disapprove the Authority's proposed rule, the Commission reviewed the Act's text, the proposed rule's text and the Authority's explanation contained in the Notice, public comments,[5] and the Authority's response to those comments.[6] The Commission considered 12 public comments. Some comments were opposed to the proposed rule (sometimes for reasons unrelated to the two decisional criteria[7]) or offered detailed suggestions or asked clarifying questions without stating support or

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[5] Public comments, which were accepted until February 9, 2022, are available at https://www.regulations.gov/docket/FTC-2022-0009/comments.

[6] The Authority's response, dated February 21, 2022 ("Authority's Response"), is available on the Authority's website, https://hisaus.org, and permanently at https://perma.cc/7GVR-3XR6. The Commission appreciates the Authority's discussion of the public comments and finds its responses useful, although not controlling or definitive, in evaluating the public comments and the decisional criteria. Considering the Authority's Response is consistent with the process the Securities and Exchange Commission uses in approving or disapproving proposed rules from self-regulatory organizations under its purview, such as the Financial Industry Regulatory Authority. The Act's sponsors "closely modeled" the Act after SEC's oversight of FINRA. See Fed. Trade Comm'n, Procedures for Submission of Rules Under the Horseracing Integrity and Safely Act, 86 Fed. Reg. 54,819, 54,822 (Oct. 5, 2021).

[7] *See, e.g.,* Letter from U.S. Trotting Ass'n (Feb. 8, 2022), at 1-4, https://www.regulations.gov/comment/FTC-2022-0009-0004 (alleging constitutional defects with the Act); Letter from Kelly Cathey, Exec. Dir., Okla. Horse Racing Comm'n ("Okla. Comm'n") (Feb. 9, 2022), at 1-2, https://www.regulations.gov/comment/FTC-2022-0009-0011 (same).

opposition,[8] while others expressed overall support for the proposal.[9] In total, the Commission heard from seven state agencies, four industry groups or companies, and one animal-welfare organization.

As explained above and in the Notice, the Commission's statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule "is consistent with" the Act and the Commission's procedural rule.[10] The Commission stated that it would therefore focus on those comments that discussed the statutory decisional criteria: whether the proposed rule was consistent with "the specific requirements, factors, standards, or considerations in the text of the Act and the Commission's procedural rule."[11] Nevertheless, the Commission received many comments that were unrelated to whether the proposed rule is consistent

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[8] *See, e.g.,* Letter from Ky. Horse Racing Comm'n ("Ky. Comm'n") (Feb. 7, 2022), https://www.regulations.gov/comment/FTC-2022-0009-0003 (more than 20 specific suggestions); Letter from Humane Soc'y of U.S. ("Humane Soc'y"), (Feb. 9, 2022), https://www.regulations.gov/comment/FTC-2022-0009-0006 (asking four clarifying questions).

[9] *See, e.g.,* Letter from Scott Chaney, Director, Cal. Horse Racing Bd. ("Cal. Bd.") (Feb. 3, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0009-0002 (expressing enthusiasm for the Act's implementation and providing constructive suggestions to four rule provisions).

[10] 15 U.S.C. § 3053(c)(2).

[11] Notice, 87 Fed. Reg. at 4,027. The Notice also gave guidance to would-be public commenters whose comments would not address the statutory decisional criteria but instead would more generally "bear on protecting the health and safety of horses or the integrity of horseraces and wagering on horseraces." *Id.*

with the Act or procedural rule, and those comments have little bearing on the Commission's determination.[12] In this Order, the Commission canvasses the most weighty substantive comments it received, including many that do not directly address the statutory criteria, and the Authority's responses to them, but it does not delve into every issue raised by commenters, especially when unrelated to the statutory criteria.

Several recurring concerns expressed by commenters merit only brief mention at the outset; because they were addressed extensively by the Commission's Racetrack Safety Order, which was issued after this comment period closed, these commenters were unable to benefit from its analysis. Several commenters again criticized the comment period as too short.[13] Others again decried the piecemeal

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[12] As the commission previously noted, such comments may still be "helpful or productive to the broader effort of improving the safety and integrity of horseracing. In many instances, comments advanced specific suggestions for improving the rules, and the Authority has stated that it will use those comments when it proposes future rule modifications." Racetrack Safety Order at 4 n.12.

[13] *See, e.g.*, Letter from Jared Easterling, Remington Park & Lone Star Park ("Remington Park") (Feb. 9, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0009-0013 ("However, we will stress again that the public comment period is extremely limited, and we would urge the Commission to extend the public comment and review period to ensure proper review of all comments and input from industry stakeholders."); Letter from Andy Belfiore, Exec. Dir., Fla. Horsemen's Benevolent & Prot. Ass'n ("Fla. Horsemen") (Feb. 9, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0009-0007 ("We would petition the Commission to provide an extended

submission of proposed rules, which deprives commenters of the ability to review them holistically.[14]

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comment period when additional rules are posted."). As the Commission previously explained, despite these entirely "reasonable" requests, the Act gives the Commission only 60 days from the date of the proposed rule's publication by the Federal Register, so the public-comment period "counts against the clock that the Commission is on to make a decision." Racetrack Safety Order at 5 (identifying this "unforgiving" statutory timeline as the reason the procedural rule encourages informal notice and comment by the Authority before it submits rules).

[14] *See, e.g.,* Fla. Dep't Bus. at 1 ("However, we are concerned that the HISA rules have not been released in their entirety."); Letter from Thomas F. Chuckas, Jr., Director, Bureau of Thoroughbred Horse Racing, Pennsylvania State Horse Racing Commission ("Pa. Comm'n") (Feb. 9, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0009-0008 ("First, the PHRC is concerned with the Authority's ongoing piecemeal submission of regulations which makes a thorough, comprehensive and meaningful review nearly impossible."); Okla. Comm'n at 2-3 ("HISA has submitted to the Commission only a subset of the rules that the Statute requires. . . . HISA has been delayed in submitting its anti-doping and medication-control rules because HISA failed to reach an agreement with the United States Anti-Doping Agency."). As the Commission previously explained, the Act not only permits but expressly requires seriatim submission of proposed rules by the Authority to the Commission. *See* Racetrack Safety Order at 7-8. As for the Authority's failure to submit a proposed rule on anti-doping and medication-control because of the incomplete negotiations with the U.S. Anti-Doping Agency, the Commission, in the Notice, observed that "cross-references to forthcoming rule proposals will be effective if such rules are proposed by the Authority and approved by the Commission under the same process as this proposed rule." Notice, 87 Fed. Reg. at 4,028 n.15. Despite the Act's piecemeal start-up phase, the Commission recognized commenters' "reasonable desires" to look at rules holistically and accordingly directed the Authority to submit proposed rule modifications to both Racetrack Safety and

And another raised again the question of whether the Authority's bylaws are invalid because they have not been published for public comment.[15] For the reasons previously given in the Racetrack Safety Order, the Commission finds that these concerns do not identify any inconsistency between the Authority's Enforcement proposed rule and the Act. Moreover, to address concerns that the statutory timeline prevented commenters from providing comments holistically addressing all the rules, including how the Racetrack Safety and Assessment Methodology rules interact with each other, the Commission directed the Authority to submit proposed rule modifications to those two rules by March 3, 2023.[16]

This Order turns now to the specific provisions of the Enforcement proposed rule. The Act's direction to the Authority is to develop an Enforcement proposed rule that would cover two main subjects: "(A) rules for safety, performance, and anti-doping and medication control results management; and (B) the disciplinary process for safety, performance, and anti-doping and medication control rule violations." 15 U.S.C. § 3057(c)(1). The rule "shall include" seven elements:

Assessment Methodology (if approved) by March 3, 2023. The Commission anticipates providing further direction to the Authority with respect to the schedule and substance of submissions of proposed rule modifications following the program effective date of July 1, 2022.

[15] *See* Remington Park at 1. The Commission previously explained that, because the Authority's bylaws were in effect before the Act's passage and codified in the Act, only future proposed modifications to the Authority's bylaws need to be submitted to the Commission for approval or disapproval after publication in the Federal Register and public comment. *See* Racetrack Safety Order at 9-10 & n.27 (citing bylaws adopted September 30, 2020).

[16] *See* Racetrack Safety Order at 9.

"Provisions for notification of safety, performance, and anti-doping and medication control rule violations"; "Hearing procedures"; "Standards for burden of proof"; "Presumptions"; "Evidentiary rules"; "Appeals"; and "Guidelines for confidentiality and public reporting of decisions." *Id.* § 3057(c)(2)(A)–(G). Finally, the rule "shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation." *id.* § 3057(c)(3). Principally, these are "the specific requirements, factors, standards, or considerations in the text of the Act" with which the Commission will assess the consistency of the Authority's Enforcement proposed rule.[17]

a. *Rule 8100—Violations*

Proposed Rule 8100 forbids ten practices as violations, which are, in broad strokes: (1) the failure to cooperate with the Authority during an investigation; (2) failure to respond truthfully to a question of the Authority; (3) tampering, interference, or intimidation; (4) aiding and abetting violations of the Racetrack Safety rule; (5) issuing threats to discourage reporting of a Racetrack Safety violation; (6) failure to comply with an order of the Authority; (7) failing to register with the Authority, provide truthful information, or provide timely updates; (8) committing fraud or misrepresentation in connection with the care of a horse; (9) failure to remit fees (for states that elect to remit fees); and (10) failure to collect equitable

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[17] Notice, 87 Fed. Reg. at 4,027.

assessments (by racetracks in states that do not elect to remit fees).[18]

Five commenters offered specific feedback on proposed Rule 8100. The Kentucky Horse Racing Commission ("Kentucky Commission") suggested "interference" replace "intentional interference" in proposed Rule 8100(c) because "it can be difficult to prove mens rea."[19] The Kentucky Commission had the same concern with proposed Rule 8100(d) and further encouraged that the word "attempting" be used instead of "seeking" in Rule 8100(e). The California Horse Racing Board ("California Board") questioned whether "covering up" is redundant alongside "aiding, abetting, conspiring" in proposed Rule 8100(d).[20] The Pennsylvania State Horse Racing Commission ("Pennsylvania Commission") commented on proposed Rule 8100(f)–(g), asserting that "pertaining to a racing matter or investigation" is broader than the Authority's jurisdiction and that similarly the Authority encroaches on state territory by defining a "failure to register" as a violation when states are the issuers of licenses.[21] The Florida Division also expressed concern with proposed Rule 8100(g)'s registration requirements.[22] Finally, the Texas Commission objected to the Authority's narrative description, in explaining

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[18] *See id.* at 4,028 (proposed Rule 8100(a)–(j)).

[19] Ky. Comm'n at 1.

[20] Cal. Bd. at 1.

[21] Pa. Comm'n. at 2.

[22] Fla. Dep't Bus. at 2 ("It is unclear from this rule what individuals would be considered to have committed a violation, and what authority HISA has over unregistered individuals.").

why failure to remit fees or collect assessments should be a violation under Rule 8100(i)–(j), of itself as having a "unique role" because, in the Texas Commission's view, the Authority is merely "[d]uplicating the state racing commission's role."[23]

The Authority's Response covered each of these comments except the Texas Commission's, which (1) did not object to the proposed rule provision but instead to its narrative description in the Notice, (2) reiterated its policy objection to the enactment of the Act by Congress, and (3) was unrelated to the Commission's decisional criteria. As to the alternative language proposed by the Kentucky Commission and apparent redundancy raised by the California Board, the Authority noted that its proposed language comes directly from the Act, namely 15 U.S.C. § 3057(a)(2)(I)(i) ("intentional interference"), § 3057(a)(2)(K) ("covering up"; "intentional"), and § 3057(a)(2)(L) ("seeking").[24] Responding to the Pennsylvania Commission's concern about "racing matter" being vague or overbroad, the Authority both defended the choice as present in many state racing laws (even if not in Pennsylvania's) and expressed an openness to considering alternatives: "[T]his comment will be taken into consideration by the Authority and may be addressed in future rulemaking."[25] As for the Pennsylvania Commission's and Florida Division's concern about registration requirements, the Authority responded that only those who are defined as "Covered Persons" under the Act

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[23] Tex. Comm'n at 4.

[24] *See* Authority's Response at 3.

[25] *Id* at 4.

are required to register and that those who commit the violation of failing to register are then subject to the disciplinary procedures of proposed Rule 8300.[26]

The Commission finds that proposed Rule 8100 is consistent with the Act. The phrases used in the proposed rule provisions to which commenters objected are drawn directly from the Act, with the exception of "racing matters," a term that the Authority will revisit but that, even if not used in Pennsylvania's state laws, is not inconsistent with the federal Act. No commenter identified any way in which the proposed rule provisions are inconsistent with the Act.

b. *Rule 8200—Schedule 4 Sanctions for Violations; Consent Decrees; Notice 4 Suspected or Actual Violation*

Proposed Rule 8200 outlines the schedule of sanctions for violations, provides that violations may be resolved through consent decrees, and specifies the contents of notifications of suspected or actual violations contemplated by 15 U.S.C. § 3057(c)(2)(A). It specifically exempts from its purview violations of a future rule on anti-doping and medication control, which the Authority has denominated as the Rule 3000 Series and has not yet proposed (and which presumably will come with its own schedule of sanctions for violations).[27] The proposed schedule includes fine ranges of up to $50,000 for a first-time violation and of between $50,000 and $100,000 for repeat violators or for violations that pose "an actual or potential threat of harm to the safety, health, and welfare of Covered

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[26] *See id.*

[27] *See* Notice, 87 Fed. Reg. at 4,028-29.

Persons, Covered Horses, or the integrity of Covered Horseraces."[28] It also contemplates temporary or permanent bans on registration, suspensions, cease-and-desist orders, forfeiture of purse money and disqualification, censure, and other remedial actions or sanctions.[29] The Authority and a Covered Person may enter a consent decree: "The Authority shall have the discretion to enter into a consent decree or other similar agreement with a Covered Person as necessary to promote the safety, welfare, and integrity of Covered Horses, Covered Persons, and Covered Horseraces."[30] Finally, proposed Rule 8200(d) provides for a "Notice of Suspected or Actual Violation" that identify the potential violation, its factual basis, and a deadline for a written response, to include an admission or denial, its factual basis and all relevant details, and any remedial plan proposed.

Three industry groups and six state agencies addressed proposed Rule 8200. Five commenters[31] expressed opposition to or confusion about the multiple entities listed and the cross-reference in proposed Rule 8200(b) to a yet-to-be-proposed Rule 7000 Series: "The Authority, the Racetrack Safety Committee, the stewards, any steward or body of stewards selected from the National Stewards Panel, or an Arbitral Body, after any hearing required to be conducted in accordance with the Rule 7000 Series and upon

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[28] *Id* at 4,028.

[29] *See id.* at 4,028-29.

[30] *Id.* at 4,029.

[31] *See* Remington Park at 2; Cal. Bd. at 2; Fla. Dep't Bus. at 1–2; Ky. Comm'n at 1; Pa. Comm'n at 2.

finding a violation or failure to comply with the regulations of the Authority, . . . may impose" sanctions from among twelve options listed.[32] Remington Park feared that these entities "can sanction Covered Persons without having a hearing," objected to the idea that they could impose "any other sanction" under the catchall of proposed Rule 8200(b)(12), and suggested 20 days instead of 7 days as the default response period as well as further explication of "how service on Covered Persons and the Authority will be determined."[33] Several industry commenters criticized the $50,000 minimum penalty for second violations as unnecessarily high.[34] One suggested that the Authority classify "abuse of horse" behavior and refer such behavior to criminal authorities, adding such a referral to the list of available sanctions in Rule 8200(b).[35]

The state agencies expressed other concerns,[36] with the Kentucky and Pennsylvania Commissions both providing numerous, detailed suggestions. The Kentucky Commission suggested: that proposed Rule 8200(b) include "potential mitigating circumstances"; that the cross-references be clarified; that stewards be given guidance regarding fines, such as "a list of

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[32] Notice, 87 Fed. Reg. at 4,028.

[33] Remington Park at 2.

[34] *See* Thoroughbred Horsemen at 3 ("setting a minimum fine of $50,000 for a second violation unreasonably limits the discretion of the Authority or other entity if a fine less than $50,000 is warranted"); Fla. Horsemen at 2 (stating that the "minimum fines are far too punitive" and suggesting instead of $50,000 a minimum penalty of $1,000 for a second offense).

[35] *See* Thoroughbred Horsemen at 7.

[36] This Order noted earlier the Texas Commission's disagreement with the Authority's preference for flexibility instead of strict consistency in developing consent decrees. *See supra* n.4.

factors or a rubric," which Kentucky does "for each type of medication violation at 810 KAR 8:030"; that the nature of cease-and-desist orders, "remedial or other action," and censure, all possible sanctions, be clarified; and that proposed Rule 8200(d), regarding notices, "provide more information about what happens after the Covered Person provides his or her response," such as whether the matter proceeds to a hearing and if so before whom. The Pennsylvania Commission objected: that proposed Rule 8200(b) "is poorly drafted and substantially unclear," especially with respect to "who is in charge and what process is to be followed on the effective date"; that proposed Rule 8200(b)(3)–(4)'s sanctions of denial, suspension, or revocation of registration usurps the state licensing function; that proposed Rule 8200(b)(5)'s sanction of a "lifetime ban from registration" "is a licensing matter and beyond the Authority's statutory power"; that both censure and cease-and-desist orders are "unclear"; and that proposed Rule 8200(d), regarding notices, "requires significant amendment, including detailed definitions and description of the process."[37]

The California Board suggested that "state racing commission" be among the entities with the ability to impose sanctions on covered persons and issue notices to that effect.[38] The Minnesota Racing Commission ("Minnesota Commission") flagged three language concerns: (1) that "associating" in proposed Rule 8200(b)(6) is "very" broad so should be defined more

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[37] Pa. Comm'n at 2 ("Is the 'notice' process in lieu of an administrative hearing? What are the factors to trigger the use of the notice of violation provision?").

[38] *See* Cal Bd. at 1-2.

narrowly; (2) that "may" in proposed Rule 8200(d)(1), concerning notices, "is problematic"; and (3) that proposed Rule 8200(d)(1)(iii) allow additional time to respond for reasons beyond those listed including "illness, consultation with counsel, etc."[39]

The Authority's Response explained that it "wishes to provide each of the various adjudicative bodies designated in the rules a wide range of options in determining the sanction most appropriate to the particular case before them."[40] The rule does not provide for the imposition of a sanction without a hearing, as Remington Park feared.[41] The Authority recognized that proposed Rule 8200(b)'s reference to a "National Stewards Panel" and an "Arbitral Body" depend on later action to become effective because those bodies will be defined in a future proposed rule: "Prior to that time, the Authority will not be utilizing the National Stewards Panel, the Arbitral Body, or the

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[39] "Letter from Steve May, Exec. Dir., Minn. Racing Comm'n ("Minn. Comm'n") (Feb. 9,2022), at 1, https://www.regulations.gov/comment/FTC-2022-0009-0012. The Kentucky Commission also raised the first two of these. *See* Ky. Comm'n at 1-2.

[40] Authority's Response at 4.

[41] *See id.* at 5 (noting that—in addition to the "detailed procedures for the conduct of hearings, including provisions in the nature of appellate review," in proposed Rule Series 8300—the Act, in 15 U.S.C. § 3058, also provides for appeals to the commission's administrative law judge and thereafter the full commission). The Authority was unpersuaded by Remington Park's suggestion to delete the catchall provision of proposed Rule 8200(b)(12) but agreed to study whether a 20-day instead of 7-day default schedule should apply to Covered Persons responding to Notices of Suspected or Actual Violation. *See id.* at 8.

Arbitration Procedures in any enforcement action against a Covered Person."[42]

As for California's suggestion to add "state racing commission" to the list of entities that may impose sanctions, the Authority disagreed, because state racing commissions "will not be involved in imposing the sanctions listed in Rule 8200," and any stewards who are involved will be state stewards acting under an agreement between the Authority and state racing commission.[43] The Authority also disagreed with the Kentucky Commission's suggestion to identify "potential mitigating circumstances" for stewards to consider in imposing sanctions, noting that they expect the sanctioning entities to do so as a matter of course.[44] As for the Kentucky Commission's stated confusion about which rule violations are covered by Rule 8200's schedule of sanctions, the Authority said that it was clear enough that violations of Rule 8100 and Rule 2000 Series (Racetrack Safety) are covered, but it will endeavor to keep this clear in future

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[42] *Id* at 5.

[43] *Id.* The Authority provided the same rationale for keeping proposed Rule 8200(d)'s notice provisions as proposed. *See id.* at 9 ("a reference to a state racing commission would not be appropriate in the Rule 8200(d)").

[44] *See id.* at 6 ("Courts and other adjudicative bodies routinely consider all of the evidence on record in determining appropriate sanctions, and of necessity their determination in disciplinary hearings includes the consideration of aggravating and mitigating circumstances. The Authority believes the rule is appropriate as written, but the comment will be taken into consideration by the Authority in the future and may be addressed in future proposed rules.").

proposed rules.[45] The Kentucky Commission's suggestion of a "list of factors or a rubric" to guide stewards in imposing sanctions was well received: "[T]he Authority will consider in future rulemaking whether to include a list of factors as suggested."[46]

The Authority agreed with the Minnesota and Kentucky Commissions that its proposed sanction in proposed Rule 8200(b)(6) of barring a violator "from associating with all Covered Persons" missed the mark: "The Authority concurs with the commentators and will consider revision of the rule in future rule modifications."[47] With respect to the Pennsylvania and Kentucky Commissions' concerns that the sanctions of a "cease and desist order" and "remedial or other action" in proposed Rule 8200(b)(6)–(7) are unclear, the Authority committed that any sanctions issued "will precisely state the conduct or action that is prohibited" or required.[48] As for these commenters' lack of clarity about the effect of "censure," the Authority replied that the "term is widely understood as a statement publicly condemning specified activity, but without imposing a further sanction."[49] The Authority was unpersuaded by the Pennsylvania Commission's allegation that sanctions that temporarily or

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[45] *See id.* ("All additional rules series promulgated in the future by the Authority will make clear whether the Rule Series 8000 applies to that body of rules.")

[46] *Id.*

[47] *Id.*

[48] *Id.* at 7.

[49] *Id.*

permanent suspend, bar, or revoke registration intrude on the states' sovereignty.[50]

The Authority defended proposed Rule 8200(d)'s notice provisions. As for commenters' questions about what happens after the notice and response, the Authority answered that proposed Rule 8300 Series applies, and the existence of a violation is adjudicated using the applicable process.[51] The Minnesota Commission thought that proposed Rule 8200(d)(1)'s use of "may" to describe the issuance of a Notice of Suspected or Actual Violation was a defect, but the Authority described it as a feature of prosecutorial discretion: "Both criminal and civil authorities have the discretion to determine whether the facts of a case justify the initiation of enforcement procedures."[52] As for the Minnesota Commission's suggestion to include other reasons beyond the seriousness of the violation or imminence of the risk for extending beyond seven days the time period for a response to a notice, "the Authority will give consideration to modifying or supplementing the response time provisions in future rulemaking."[53]

Finally, the Authority defended as "sound" its proposed ranges of fines for first-time violations, repeat violations, and severe violations, which several industry commenters had criticized as too high, but also committed to remain open to revising them: "[T]hese comments will be taken into consideration by the

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[50] *See id.* at 8.

[51] *See id.* at 8-9.

[52] *Id* at 9.

[53] *Id.*

Authority in the future and may be addressed in future proposed rules."[54] The Authority felt that it did not need to enumerate criminal-enforcement referrals for "abuse of horse" among the sanctions of Proposed Rule 8200(b), as the Thoroughbred Horsemen had suggested: "No specific provision is needed to authorize Authority officials to inform law enforcement authorities of any abuse of horses that rises to the level of criminality. The Authority will contact criminal law enforcement authorities in appropriate circumstances."[55]

The Commission finds that proposed Rule 8200 is consistent with the Act. The list of available sanctions satisfies the Act's requirement of a "a schedule of civil sanctions for violations." 15 U.S.C. § 3052(a)(8). The notice provisions satisfy another requirement of the Act: "Provisions for notification of . . . rule violations." *Id.* § 3057(c)(2)(A). Proposed Rule 8200 has many provisions that are flexible and designed to be tailored to the facts of each possible violation, but this is in keeping with the § 3057's emphasis on equitable principles, using words such as "commensurate" to describe the intuition that the amount of process should correspond to the seriousness of the conduct and sanction at issue.[56] Although commenters expressed desires for small and large changes to proposed Rule 8200, none identified any way in which the proposed rule provisions are inconsistent with the Act. Still, many suggested useful additions or clarifications, which the Authority has committed to considering.

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[54] *Id. at 10.*

[55] *Id.*

[56] 15 U.S.C. § 3057(c)(3).

The Authority concurred with commenters that the potential sanction in proposed Rule 8200(b)(6), which could "bar a Covered Person from associating with all Covered Persons concerning any matter under the jurisdiction of the Commission and the Authority during the period of a suspension," was overbroad. Accordingly, the Commission directs the Authority to not impose this sanction on a covered person until such time as the Authority has proposed, and the Commission has approved, a rule modification that is more narrowly tailored.

c. *Rule Series 8300—Disciplinary Hearings and Accreditation Procedures*

Proposed Rule Series 8300 sets forth seven specific rule provisions detailing the processes by which substantive violations are adjudicated, appealed, and punished. These provisions address the requirements of 15 U.S.C. § 3057(c)(2)(B)–(F), such as hearing procedures, standards for burdens of proof, presumptions, evidentiary rules, appeals, and confidentiality and public reporting of decisions, as well as the overarching requirement of § 3057(c)(3) that there be "adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged . . . violation and the possible civil sanctions." The public comments and the Authority's responses are summarized below for each provision, followed by the Commission's findings on the proposed Rule 8300 Series.

1. *Rule 8310—Application*

No public comments specifically addressed proposed Rule 8310, so the Authority's Response did not address it.[57]

2. *Rules 8320—Adjudication of Violations in the Rule 2200 Series*[58]

3. *Rule 8330—Adjudication of Rule 8100 Violations*

Proposed Rules 8320 and 8330 are similar, covering initial hearings for most violations of Racetrack Safety and Enforcement rules, respectively, as were the comments each received, so this Order addresses them jointly. Proposed Rule 8320 first provides that violations of Rules 2271(b), 2272, 2273, and 2280 of the approved Racetrack Safety rule determined by stewards may be appealed to the Authority's Board of Directors under proposed Rule 8330.[59] For all other violations of the Rule 2200 Series, the Authority's Racetrack Safety Committee "may, at its discretion and taking into account the seriousness of the alleged violation and the facts of the case," conduct a hearing itself or refer the matter to the National Stewards Panel, Arbitral Body, or state stewards for adjudication under state procedures.[60] Proposed Rule 8330 provides the option, like proposed Rule 8320, for the

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[57] *See* Authority's Response at 11.

[58] The Kentucky Commission correctly identified a scrivener's error, *see* Ky. Comm'n at 2, which the Authority acknowledged, *see* Authority's Response at 11.

[59] *See* Notice, 87 Fed. Reg. at 4,029.

[60] *Id.*

Authority's Board of Directors to, with respect to possible violations of proposed Rule 8100, conduct a hearing itself or refer the matter to the National Stewards Panel, Arbitral Body, or state stewards.

Six comments addressed proposed Rule 8320. Remington Park suggested that the "Board" was undefined and objected to the "delegation" of adjudication to the National Stewards Panel.[61] The other five commenters were state agencies. The Florida Division asserted that the reference to "Racetrack Safety Committee" is a scrivener's error that should be the "Racetrack Safety and Welfare Committee" required by Rule 2121.[62] The California Board suggested that instead of just "Racetrack Safety Committee," proposed Rule 8320(b) should add "or Board of Stewards."[63] The Texas Commission objected that there "are no required timeframes for actions involving revocation of racetrack accreditation" and that the "proposed rule grants all adjudicative tribunal decisions to the discretion of the Racetrack Safety Committee without any governmental agency oversight to insure due process."[64] The Pennsylvania Commission faulted proposed Rule 8320 for failing to "specify the parameters as to how and why the Racetrack Safety Committee 'in its discretion' refers matters" and for allowing the referral of a "'federal' matter . . . to state stewards."[65] The Kentucky Commission contended that proposed

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[61] *See* Remington Park at 2.

[62] Fla. Dep't Bus. at 2.

[63] Cal Bd. at 2.

[64] Tex. Comm'n at 4.

[65] Pa. Comm'n at 3.

Rule 8320 "should set forth what factors make a case more appropriate for a given venue" to avoid the appearance of "forum shopping."[66] It advanced the same concern as the Pennsylvania Commission over possibly sending a federal violation to state stewards.[67]

The Authority disagreed with most of these comments: "Board" plainly refers to the Board of Directors of the Authority, which is given that short-form by the Act in 15 U.S.C. § 3052(b); as with other cross-references to not-yet-proposed rules, "the Authority will not utilize the National Stewards Panel in any enforcement action against a Covered Person" until the Rule 7000 Series has been proposed and approved; and the referral of violations of the Authority's rules to state stewards will occur "only if there is an agreement in place with a state racing commission under which that commission participates in the enforcement of Authority rules."[68]

The Authority found the forum-selection comments useful and committed to taking them into consideration for future proposed rule modifications.[69] The Authority also provided additional information

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[66] Ky. Comm'n at 2.

[67] *See id.*

[68] *See* Authority's Response at 11–12. The Authority did not specifically address the Florida Division's assertion of a scrivener's error, namely its view that instead of Racetrack Safety Committee the Authority meant "Racetrack Safety and Welfare Committee" as required of covered racetracks by Rule 2121. But this was not a scrivener's error—the Authority meant and correctly named its own Racetrack Safety Committee, a standing Committee required by the Act. *See* 15 U.S.C. § 3052(c)(2).

[69] *See* Authority's Response at 11–12.

about how it anticipates approaching those decisions: "[I]n matters concerning complex racetrack surface safety issues, the Committee itself will likely be the venue most appropriate to the case, [whereas c]ases involving complex questions of law might be more suited to the Arbitral Body."[70]

Three commenters specifically addressed proposed Rule 8330. The Kentucky Commission reiterated its concern about proposed Rule 8320 about venue-selection and having state stewards adjudicate "federal" violations.[71] The Pennsylvania Commission also reiterated its concern about proposed Rule 8320 relating to referring Authority matters to state stewards.[72] Finally, the Thoroughbred Horsemen expressed the concern that "National Stewards Panel" and "Arbitral Body" are undefined and that the "Authority should be required to submit proposed definitions of those terms as part of forthcoming rule submissions, and those panels should include veterinary or other relevant experts."[73]

The Authority's responses, like the comments, about proposed Rule 8330 were similar to its responses to proposed Rule 8320: "As stated previously in response to similar comments . . . , the Racetrack Safety Committee [sic] will take into account the seriousness of the violation and the facts of the case. An important consideration will be to determine which body has the most expertise to enable it to properly

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[70] *Id.*

[71] *See* Ky. Comm'n at 2.

[72] *See* Pa. Comm'n at 3.

[73] Thoroughbred Horsemen at 7.

assess the subject matter of the case. If the stewards refer a case to the state stewards in a particular jurisdiction, the stewards will utilize the procedures set forth in that jurisdiction's regulations."[74]

4. *Rule 8340—Initial Hearings Conducted Before the Racetrack Safety Committee or the Board Gf the Authority*

Proposed Rule 8340 provides that initial hearings be conducted, in the case of the Racetrack Safety Committee, by no less than a quorum of the Committee, and, in the case of the Board, by a panel of three of its members appointed by the Board chair. A notice of the hearing, describing its time, place, and nature as well as the violations alleged, must reach its required audience at least 20 days before the hearing. The Committee or Board may require written briefing, and witnesses must testify under oath. "The burden of proof shall be on the party alleging the violation to show, by a preponderance of the evidence, that the Covered Person has violated or failed to comply with a provision of or is responsible for a violation of a provision of the Authority's regulations."[75] The technical rules of evidence do not apply, but rules of privilege do. "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such limited cross-examination as may be required for a full and true disclosure

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[74] Authority's Response at 12 (mentioning Racetrack Safety Committee, which makes the election under proposed Rule 8320, but presumably meaning the Authority's Board of Directors, the relevant decisionmaker under proposed Rule 8330).

[75] Notice, 87 Fed. Reg. at 4,030.

of the facts."[76] Within 30 days of the hearing's conclusion, the Board or Committee must issue "a written decision setting forth findings of fact, conclusions of law, and the disposition of the matter including any penalty imposed."[77]

Two industry participants and four state agencies commented on proposed Rule 8340. Remington Park offered five recommendations: define "Board"; remove from proposed Rule 8340(f) the phrase "or failed to comply with a provision of or is responsible for a violation of a provision"; exclude hearsay; "clarify whether parties subject to adjudication can call their own witnesses or compel the attendance of witnesses pursuant to subpoena"; and provide that each written decision include a "notice of appeal rights" with information about how to file an appeal.[78] The Thoroughbred Horsemen objected to the ability of a mere quorum of the Racetrack Safety Committee or a three-member panel of the Board to adjudicate disputes because it's possible that "no veterinary or other relevant expert may be included on any individual hearing panel."[79]

The California Board objected that proposed Rule 8340 "completely changes how safety violations are heard" and that the Authority's Racetrack Safety Committee "is not as well qualified as a jurisdiction's Board of Stewards to hear these types of cases."[80] It

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[76] *Id.*

[77] *Id.*

[78] Remington Park at 2-3.

[79] Thoroughbred Horsemen at 6.

[80] Cal. Bd. at 2.

also proposed replacing the Authority's proposal of allowing hearsay evidence if it "is of a type that is commonly relied on by reasonably prudent people" with California's allowance of hearsay "for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."[81] The Minnesota Commission suggested explicitly specifying that a person may be represented by legal counsel.[82]

The Kentucky Commission had "questions about the practicalities of how hearings under the Rule would be conducted," in particular: "Would these hearing[s] proceed like a stewards' hearing, or would a designated hearing officer or administrative law judge preside? Additionally, would HISA use its own attorney to present its case to the Safety Committee or the Board?"[83] And the Pennsylvania Commission had its own: "Are the Board members attorneys or will there be a hearing officer/presiding officer present? Are covered persons allowed to appear pro se or must they be represented by counsel? Who determines where the initial matter should be properly before the Board or the Racetrack Safety Committee?"[84]

The Authority responded again that the Act refers to the Authority's Board of Directors as the "Board."[85] The Authority defended the fact that some panels of

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[81] *Id.*

[82] *See* Minn. Comm'n at 1.

[83] Ky. Comm'n at 2.

[84] Pa. Comm'n at 3.

[85] *See* Authority's Response at 12.

the Board or permutations of a quorum of its Racetrack Safety Committee would not contain an expert in every conceivable factual question to be adjudicated: "It is anticipated that qualified experts will participate as witnesses in adjudications before the various adjudicatory bodies referenced in the Series 8000 Rules."[86] The Authority rejected Remington Park's suggestion to exclude categorically all hearsay evidence: "Hearsay evidence is routinely admitted in administrative adjudications, subject to certain requirements and restrictions intended to ensure reliability. Administrative rules or procedures are generally more relaxed than the Rules of Civil Procedure used in state and federal courts."[87]

The Authority had a general response to those commenters who sought additional process pertaining "to the role of attorneys and witnesses for the Authority and Covered Persons, and various rules of practice that might be included in the rules," namely that the "hearings provided in the proposed Rule 8000 Series are not intended to duplicate the full breadth of the federal procedures."[88] And "a full due process hearing is available on appeal to all Covered Persons, to be conducted by the Commission rather than the Authority."[89] Still, the Authority expressed openness to consider these comments in developing future proposed rule modifications.[90]

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[86] *Id.* at 13.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See id.*

5. Rule 8350—Appeal to the Board

Proposed Rule 8350 provides that any decision of the entities subordinate to the Authority's Board of Directors—the Racetrack Safety Committee, state stewards, the National Stewards Panel, or Arbitral Body—is subject to appeal to the Board.[91] So too any decision of a three-member panel of the Board is subject to appeal to the entire Board (minus the three original panelists).[92] Appeals may be taken by a party to the decision, by filing a written request within 10 days of the decision, or on the Board's own initiative.[93] An appeal does not automatically stay the decision.[94] The standard of review disfavors reversal: "[T]he Board shall uphold the decision unless it is clearly erroneous or not supported by the evidence or applicable law."[95] The Board can accept, reject, or modify the decision as well as remand it for further proceedings below or conduct its own further proceedings.[96] The final decision of the Board is "the final decision of the Authority."[97]

Four commenters addressed proposed Rule 8350. Remington Park asked for clarification of the word "Board" and an extension from 10 days to 30 days of the deadline to file an appeal from the decision

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[91] *See* Notice, 87 Fed. Reg. at 4,030.

[92] *See id.*

[93] *See id.*

[94] *See id.*

[95] *Id.*

[96] *See id.*

[97] *Id.*

following the initial hearing.[98] The Kentucky Commission suggested that the Authority elucidate "the factors that would inform [the Board's] choice to review a decision" on its own initiative.[99] The Pennsylvania Commission asked for more information about the "type of hearing" the Board will conduct: Is it "similar to oral argument or is new evidence admissible," and, if further proceedings are determined appropriate, "is this a *de novo* proceeding or an 'appellate' review of the record?"[100]

The Authority responded that it will consider extending the deadline for taking an appeal in future proposed rule modifications.[101] "Board," here as elsewhere, refers to the Board of Directors of the Authority. Generally, the Board's appellate review is "in the nature of appellate review," that is, with oral argument at the Board's discretion and based on a fixed record developed below in the initial hearing.[102] The Board would decide to hear an appeal on its own initiative if it had reason to think that the standard of review—whether the decision following the initial hearing is clearly erroneous or not supported by the evidence or applicable law—might be met.[103]

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[98] *See* Remington Park at 3.

[99] Ky. Comm'n at 2.

[100] Pa. Comm'n at 3.

[101] *See* Authority's Response at 14.

[102] *Id.*

[103] *See id.*

6. *Rule 8360—Accreditation Procedures*

Proposed Rule 8360 provides that any decision by the Authority to deny or revoke a racetrack's accreditation may be appealed by the racetrack within ten days or heard by the Board on its own initiative.[104] Unlike with appeals by covered persons under proposed Rule 8350, the "Authority's order revoking accreditation shall be stayed automatically pending review of the decision by the Authority."[105] In hearing the appeal, the Authority may "consider any additional information from any source that may assist in the review," hear a presentation from the racetrack about its remedial efforts, and consider any "factors the Authority deems relevant to its review."[106] After that, the Authority can deny or revoke a racetrack's accreditation by a two-thirds vote, reinstate the racetrack's accreditation "subject to any requirements the Authority deems necessary to ensure that horseracing will be conducted in a manner consistent with racetrack safety and integrity," impose a fine of no more than $50,000, require periodic reporting, and prohibit a racetrack from conducting any covered horserace.[107]

Four commenters addressed proposed Rule 8360. The Minnesota Commission suggested that "possible suspension of accreditation" be added to proposed Rule 8360(f)(1)'s list of consequences, which lists only denial and revocation of accreditation.[108] Remington

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[104] *See* Notice, 87 Fed. Reg. at 4,030.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 4,030–31.

[108] Minn. Comm'n at 2.

Park urged that a hearing be required "prior to 'revoking' any racetrack accreditation. This rule assumes the Authority designees have the authority to revoke a racetrack accreditation without any due process whatsoever."[109] It further proposed "a distinction between the appeal procedures associated with a revocation and those associated with a denial," namely that "revocation should proceed under due process procedures subject to appeal."[110]

The Humane Society of the United States, Humane Society Veterinary Medical Association, and Humane Society Legislative Fund ("Humane Society"), which focused its comment on these provisions, asked whether racetracks benefited from too many procedural protections. It posed a series of questions about the reasons the Authority would review a decision to deny or revoke accreditation, the timeline of such a review, the duration of sanctions against racetracks, and the circumstances under which a sanctioned racetrack would be allowed to resume racing.'[111] And its submission asked whether "the decision to reinstate or approve accreditation ha[s] to be made by a vote of two-thirds . . . , as with the decision to deny or revoke accreditation?"[112] The Florida Horsemen's Benevolent and Protective Association ("Florida Horsemen") also perceived an inequality, pointing out that "there is no minimum fine" for racetracks under proposed Rule 8360(9(2), whereas

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[109] Remington Park at 3.

[110] *Id.*

[111] *See* Humane Soc'y at 2.

[112] *Id.*

covered persons face a minimum fine of $50,000 for repeat or severe violations.[113]

The Authority responded that many of these questions and objections are answered by viewing proposed Rule 8360 in tandem with Rule 2110 et seq., which provides the accreditation process within the Racetrack Safety rule.[114] "Together, these rules require the Authority to give racetracks notice of noncompliance with the racetrack safety rules, as well as an opportunity to remedy any deficiencies, prior to suspension or revocation of accreditation."[115] This answered Remington Park's concern about pre-revocation process. As for Remington Park's assertion that the due process is lacking overall, the Authority countered that, in "addition to this process, the HISA Act itself provides that a full due process hearing is available to all Covered Persons, including racetracks, on appeal to the Commission."[116] The Authority specifically complimented the comments provided by the Humane Society as "constructive and insightful, and the Authority will consider them in the course of making any necessary modifications or supplements to the accreditation rules."[117] And the Authority explained that the answer to the Humane Society's question about whether the two-thirds vote is required only for

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[113] Fla. Horsemen at 2.

[114] *See* Authority's Response at 15.

[115] *Id.* (citing Rule 2116).

[116] *Id.*

[117] *Id.*

revocation or denial was "yes."[118] The Authority did not address the Florida Horsemen's complaint about the perceived disparate treatment of racetracks and covered persons.

7. *Rule 83 70—Final Civil Sanction*

No public comments specifically addressed proposed Rule 8370, so the Authority's Response did not address it.[119]

The Commission finds that the proposed Rule 8300 Series is consistent with the Act. Various of its components map directly onto the Act, such as proposed Rules 8310 and 8320, which provide procedures for initial hearings, *see* 15 U.S.C. § 3057(c)(2)(B) ("Hearing procedures."); proposed Rule 8340(f), which spells out a burden of proof, *see* § 3057(c)(2)(C) ("Standards for burden of proof"); proposed Rule 8340(g), which describes relaxed rules of evidence, such as allowing hearsay ordinarily relied on by reasonably prudent people, *see* § 3057(c)(2)(E) ("Evidentiary rules."); and proposed Rules 8350 and 8360,

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[118] *See id.* ("All other votes set forth in the rules require a simple majority of a quorum. The members referred to in Rule 8360(f)(1) are members of the Board of the Authority.").

[119] *See id. N.B.,* the Texas Commission mentions proposed Rule 8370, but its complaint is with the whole proposed Rule 8300 Series, which, in its view, is "[e]ssentially giving a private actor adjudicative power over competitors and friends in the industry. This is a far cry from integrity or impartiality in the adjudicative process." Tex. Comm'n. 5. All that proposed Rule 8370 does is specify that decisions rendered under proposed Rules 8350 and 8360 "constitute a final civil sanction subject to appeal" to the Commission under 15 U.S.C. § 3058. Notice, 87 Fed. Reg. at 4,031.

which provide appellate processes, *see* § 3057(c)(2)(F) ("Appeals.").[120]

Under the Act, the Commission reviews the Authority's proposals for their consistency with the Act and the Commission's rule, not for general policy. As with most proposed rule provisions, most comments offered policy recommendations without identifying any inconsistency between the proposed rule provisions and the Act. With respect to proposed Rule 8300 Series, however, several commenters did assert an inconsistency with the Act by arguing that the Rule 8300 Series in total or in certain aspects would fail to provide due process. Part of the Authority's response, that the "Act itself provides that a full due process hearing [ ] available to all Covered Persons, including racetracks, on appeal to the Commission," missed the mark.[121] The Act requires "adequate due process," 15 U.S.C. § 3057(c)(3), *not* from the overall statutory scheme including review by the Commission but from "[t]he rules established under paragraph (1)" of § 3057(c), which govern only the Authority's process before any later appeal to the Commission.

Still, the Authority suggested this inaccurate reason to find adequate due process "[i]n addition to" the extensive processes provided, including notice with sufficient information to mount a defense and an opportunity to be heard. As the Supreme Court put it in a famous decision, "For more than a century the central meaning of procedural due process has been clear:

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[120] *Compare* 15 U.S.C. § 3057(c)(2)(B)–(F), *with* Notice, 87 Fed. Reg. at 4,029-30.

[121] Authority's Response at 15.

Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[122] No commenter raised a serious concern that the Board or its distinguished Racetrack Safety Committee are or will be anything other than "impartial." 15 U.S.C. § 3057(c)(3).[123] These essential hallmarks of due process are present here along with numerous additional protections, from appeal rights for all parties to a super-majority-vote requirement for the revocation or denial of a racetrack's accreditation. That certain formalities are relaxed, such as the formal rules of evidence, is comfortably in keeping with the Act's command that *"adequate* due process" be "commensurate with . . . the possible civil sanctions for such violation." *Id.* (emphasis added). Maximum fines for first-time violators are $50,000 or, for severe violations, $100,000. If the only available sanction in the schedule the Authority proposed were, say, a lifetime ban from the industry, "adequate due process" would likely require more. But with the sliding-scale approach to discipline evidenced in its proposals, the Authority's Enforcement proposed rule provides "adequate due process" that is "commensurate" with the available sanctions. As for the Florida Horsemen's complaint about disparate treatment of covered persons and racetracks, to which the Authority did not respond, it raises no inconsistency with the Act. In any event, such a disparity is hardly irrational: A covered person who commits a violation faces serious sanctions including the possible loss of his or her livelihood, but a racetrack's

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[122] *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972) (internal quotation marks and citation omitted).

[123] *See also Fuentes*, 407 U.S. at 83 (due process requires "an informed evaluation by a neutral official").

shuttering would bring serious consequences to innocent people and companies, such as concession vendors, and inflict harm across the local economy. The Authority's future proposed rule modifications, informed by the helpful comments, may continue to refine its processes so that it is even better than "adequate."

The Commission makes a final observation, even though no commenter raised these issues, about two provisions in § 3057(c)(2) without an obvious corollary in the proposed rule provisions.[124] The Commission is uncertain what Congress meant by "presumptions." 15 U.S.C. § 3057(c)(2)(D). It could possibly refer to the appellate standard of review, as in there is a "presumption" in proposed Rule 8350(f) that the initial decision will stand since the Board "shall uphold the decision unless it is clearly erroneous or not supported by the evidence or applicable law."[125] Possibly it alludes to the classical criminal-law "presumption of innocence," inasmuch as proposed Rule 8340(f) places the "burden . . . on the party alleging the violation" (similar to the state's burden to prove guilt).[126] In

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[124] The Act says that the Enforcement rule "shall include" a list of items, most of which are clearly included in the Authority's proposal. *See* 15 U.S.C. § 3057(c)(2). It is unclear from the context whether "shall" here means "may" or "must," which is why the use of the ambiguous "shall" is so strongly disfavored. *See* Plainlanguage.gov, Shall and must, https://www.plainlanguage.gov/guidelines/conversationalishall-and-must/ ("'Shall' is ambiguous" yet still a favorite crutch for legal drafters; Bryan Garner concludes that it is occasionally a synonym for the permissive "may" rather than the mandatory "must.").

[125] Notice, 87 Fed. Reg. at 4,030

[126] *Id.*

either case, the Commission is satisfied that the proposed rule provisions are not inconsistent with the Act's element of "presumptions."

The Act also lists as an element "[g]uidelines for confidentiality and public reporting of decisions." 15 U.S.C. § 3057(c)(2)(G). The Commission does not observe any such guidelines in the Enforcement proposed rule. To wit, proposed Rules 8340(i) and 8350(h) provide that written decisions following initial hearings conducted by the Board or Racetrack Safety Committee will be "issue[d] to all parties" and that a written copy of an appeal resolved by the Board will be "served upon all parties."[127] Do these provisions for private reporting of decisions implicitly forego all "public reporting of decisions"? It is difficult to say. With no comments on this apparent omission, an ambiguous provision that is not unambiguously required will not compel the Commission to identify an inconsistency and disapprove the Enforcement proposed rule. Nevertheless, the Authority can and should provide explicit guidelines for confidentiality and public reporting of decisions. These are not trivial issues: Public reporting of decisions is a crucial way to develop the law and inform regulated parties and the public at large about how the Authority's rules will be applied in practice. So, too, confidentiality policies can preserve important privacy interests, especially before a violation is alleged or found. A careful balance between confidentiality and transparency is important to find. Accordingly, the Commission directs the Authority to file with the Commission by July 1, 2022 a supplemental proposed rule modification explicitly stating guidelines for confidentiality

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[127] Notice, 87 Fed. Reg. at 4,030.

and public reporting at the different stages of the processes outlined in the Enforcement rule. The Commission will then publish the proposed rule modification for public comment before approving or disapproving it under 15 U.S.C. § 3053.

d. ***Rule 8400—Investigatory Powers***

Proposed Rule 8400 specifies that the Commission and the Authority (and their designees) have the right to access the files and facilities of Covered Persons and those who own or perform services on a Covered Horse as well as the right to seize evidence of suspected violations.[128] It requires Covered Persons to respond truthfully and cooperate with the Commission and the Authority and forbids hindering an investigation.[129] It further specifies that the Commission or the Authority may issue subpoenas, which must be complied with, for both things and people, who may be required to testify under oath.

Proposed Rule 8400 implements a different provision of the Act than the rest of the Enforcement proposed rule: 15 U.S.C. § 3054(h) specifies that the "Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." More specifically, § 3054(c)(1)(A) requires the Authority to propose "uniform procedures and rules authorizing—(i) access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses; (ii) issuance and enforcement of subpoenas and subpoenas duces tecum; and (iii) other

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[128] *See id.* at 4,031.

[129] *See id.*

investigatory powers of the nature and scope exercised by State racing commissions before the program effective date." With respect to proposed Rule 8400, § 3054(c)(1)(A) and (h) principally provides the "the specific requirements, factors, standards, or considerations in the text of the Act" with which the Commission assesses the proposed rule's consistency.[130]

Eight of the comments expressly addressed proposed Rule 8400. The Florida Horsemen stated: "It is unconstitutional to grant the Commission, Authority, or designee unfettered access to the books, records, offices, facilities, and other places of business for any person who owns a Covered Horse."[131] The Florida Horsemen recommended that the right of access be eliminated as to owners of Covered Horses, with only subpoena power available for the files and facilities of owners. The Thoroughbred Horsemen agreed with the Florida Horsemen: "'Investigatory authority' does not imply the ability to 'freely access' the place of business of any person who owns a Covered Horse or performs service on a Covered Horse, apparently for any purpose."[132] Their proposal would go further, stripping the access power down to just "racetrack facilities, barn areas, and vehicles under control" of owners and service providers.[133] Remington Park raised the concern that the access power has "no limitation or cause requirement before officers or designees of the Commission or the Authority can enter onto the

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[130] Notice, 87 Fed. Reg. at 4,027.

[131] Fla. Horsemen at 2.

[132] Thoroughbred Horsemen at 5 (emphasis omitted).

[133] *Id.*

premises of Covered Persons and apparently review and take information at will.[134] Its preference was "to institute parameters around information requests and timing of on-site review."[135]

Five state racing regulators also commented on proposed Rule 8400. "These seizures are permitted outside the constitutional limits of the 4th Amendment and one's reasonable expectation to privacy," opined the Texas Commission.[136] The Pennsylvania Commission contended that the proposed access rights are "overly broad" and do "not appear to be statutorily permissible."[137] It also asked whether access rights apply "to every location in which a covered person transacts business (personal home, farm, etc.)? What type of warrant will be used?"[138] The Oklahoma Commission contended that the powers of proposed Rule 8400 "far exceed[ ] any regulatory authority [it] has per Oklahoma statute," which "is limited to the enclosure of licensed racetracks and to licensed individuals or entities."[139] The Minnesota Commission agreed: It "is limited in our jurisdiction to only premises licensed by the Minnesota Racing Commission, and this would be a vast expansion of that jurisdiction that would conflict with current Minnesota statutes and rules."[140] Finally, the Kentucky Commission not only agreed

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134 Remington Park at 3.

135 *Id.*

136 Tex. Comm'n at 5.

137 Pa. Comm'n at 3.

138 *Id.*

139 Okla. Comm'n at 3.

140 Minn. Comm'n at 2.

that proposed Rule 8400(a)(1)'s access powers "appears to be an overreach" but also offered specific feedback to other provisions. First, the Kentucky Commission sought clarification on the meaning of "device" in proposed Rule 8400(a)(2)'s seizure powers and the related terms "device," "equipment," and "instrumentalities" in proposed Rule 8400(d).[141] Second, it suggested that the cross-reference in proposed Rule 8400(e) "is an example of the [Kentucky Commission's] overall concern that the Authority's regulations are disjointed and require a reader to look in several locations to ascertain what conduct is prohibited and the penalties for same."[142]

The Authority disagreed that its proposal was unconstitutional and responded to commenters' concerns, noting: "These comments and proposals have been carefully reviewed, and the Authority will give consideration to modifying or supplementing certain provisions in Rule 8400 in future . . . rulemaking."[143] It separately addressed the Kentucky Commission's suggestion with respect to further defining "devices" and "instrumentalities" to specify, for example, goading instruments, shock wave machines, and transcutaneous carbon dioxide-measuring devices: "The suggested revision has been noted will be considered in future modification of the rules."[144]

The Commission finds that proposed Rule 8400 is consistent with the Act. Some commenters expressed grave concern with the breadth of the access rights

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[141] Ky. Comm'n at 2.

[142] *Id.* at 3.

[143] Authority's Response at 16.

[144] *Id.*

provided by proposed Rule 8400(a)(1), but the language of the proposed rule closely mirrors the language of the Act. Notably, the limitation in the Act that investigatory powers be "of the nature and scope exercised by State racing commissions before the program effective date" applies only to the catchall "other investigatory powers" of § 3054(c)(1)(A)(iii) and not to the access power or subpoena power provided by § 3054(c)(1)(A)(i) and (ii). Accordingly, the state agencies that argued that the proposed Rule 8400(a)(1) access rights are broader than corresponding state laws have identified a policy difference but not an inconsistency with the Act.

The principal distinction between the Enforcement proposed rule's language on access rights and the text of the Act is that the latter provides for "access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses" whereas proposed Rule 8400(a)(1) reiterates the Act's language and then further specifies that access applies also "to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse."[145] These descriptions

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[145] *Compare* Notice, 87 Fed. Reg. at 4,027 ("access to the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, training, and racing of Covered Horses, and to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse"), *with* 15 U.S.C. § 3054(c)(1)(A)(i) ("access to offices, racetrack facilities, other places of business, books, records, and personal property of

differ in detail but not substance—the Authority's elongated provision includes two additional categories of people, "any person who owns a Covered Horse or performs services on a Covered Horse," beyond the Act's "covered persons," but owners of and service-providers for covered horses *are* covered persons under the Act.[146] The objections to proposed Rule 8400(a)(1), in other words, are really objections to § 3054(c)(1)(A)(i), and they do not identify any way in which the proposed rule provisions are inconsistent with the Act.

The seizure power of proposed Rule 8400(a)(2), by contrast, is not provided for expressly in the Act, but it falls comfortably within the "other investigatory powers of the nature and scope exercised by" the state

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covered persons that are used in the care, treatment, training, and racing of covered horses").

[146] *See* 15 U.S.C. § 3051(6) ("The term 'covered persons' means all . . . owners, . . . veterinarians, . . . and other horse support personnel who are engaged in the care, training, or racing of covered horses."). *N.B.,* to the extent that the services provided in fact go beyond "the care, training, or racing of covered horses," those who provide such services would not be subject to the proposed Rule 8400(a)(1)'s access rights. For example, a photographer who places flowers in a horse's mane before a photo shoot theoretically performs services on a Covered Horse but not services that concern the care, training, or racing of covered horses. It also bears repeating that the Authority's "subpoena and investigatory authority" exists only with respect to investigating "civil violations committed under its jurisdiction." *Id.* § 3054(h). Accordingly, the Authority cannot inspect the books of the owner of a covered horse or a veterinarian to uncover, for example, violations of the securities or tax laws, and the Act makes this clear.

agencies.[147] 15 U.S.C. § 3054(c)(1)(A)(iii). Notably, while many commenters identified proposed Rule 8400(a)(1)'s access power as exceeding their state investigatory powers, none did so for the seizure power of proposed Rule 8400(a)(2). Similarly, no commenter attempted to argue that proposed Rule 8400(e) and (f) 's subpoena and enforcement provisions were inconsistent with the Act's requirement of a provision authorizing "issuance and enforcement of subpoenas and subpoenas duces tecum." *Id.* § 3054(c)(1)(A)(ii).

Although the Commission finds that the seizure power of proposed Rule 8400(a)(2) is consistent with the Act's text, the Commission is concerned that the seizure power, without further development from a future proposed rule modification, could be used in an unanticipated manner that could offend the due process required by § 3057(c)(3). Accordingly, the Commission directs the Authority to submit to the Commission a supplemental proposed rule modification by July 1, 2022, in which the Authority further defines the meaning of "object" and "device" within proposed Rule 8400(a)(2)'s list of items eligible for seizure ("medication, drug, substance, paraphernalia, object, or device") and that provides a process for the return of seized property if no violation is found.[148] The Commission believes that the Authority intended "object" and "device" to be read under the principle of e*jusdem*

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[147] *See, e.g.*, Minn. Stat. § 609.762, subdivision 1 ("The following are subject to forfeiture: . . . property used or intended to be used to illegally influence the outcome of a horse race.") & *id.,* subdivision 2 ("Property subject to forfeiture under subdivision 1 may be seized . . . without process" in many circumstances).

[148] Notice, 87 Fed. Reg. at 4,031.

generis, such that "object" and "device" are understood to be of a similar nature to "medication, drug, substance, [and] paraphernalia." Because both "object" and "device" are capacious words, however, a qualification would materially improve the clarity of the seizure power under the rule.[149] Such a qualification in a proposed rule modification could clarify, for example, that "object" and "device" do not include telephones, computers, or other repositories of electronic data, which are more suitable for production under a subpoena duces tecum because they are not objects or devices that are themselves evidence of a possible violation.

* * *

For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority's proposed rule on Enforcement is consistent with the Horseracing Integrity and Safety Act of 2020 and the Commission's procedural rule governing submissions by the Authority. Accordingly, the Enforcement rule is APPROVED. The Commission directs the Authority (1) to not impose the proposed sanction in Rule 8200(b)(6) on a covered person until such time as the Authority has proposed, and the Commission has approved, a rule modification that is more narrowly tailored; (2) to file with the Commission, by July 1, 2022, a supplemental proposed rule modification explicitly stating guidelines for confidentiality and public reporting at the different stages of the processes outlined in the Enforcement rule; and (3) to file with the

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[149] *Cf. Yates v. United States,* 574 U.S. 528, 545 (2015) (applying *ejusdem generis* in deciding that the Sarbanes-Oxley Act's prohibition on the destruction of "tangible objects" did not extend to the destruction of fish).

Commission, by July 1, 2022, a supplemental proposed rule modification in which the Authority further defines the meaning of "object" and "device" within proposed Rule 8400(a)(2)'s list of items eligible for seizure and provides a process for the return of seized property if no violation is found.

By the Commission.

April J. Tabor
Secretary

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

ORDER APPROVING THE ASSESSMENT METHODOLOGY RULE PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY

April 1, 2022

I. Decision of the Commission: HISA's Assessment Methodology Rule Is Approved

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051–3060, recognizes a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority ("HISA" or the "Authority"), which is charged with developing proposed rules on a variety of subjects. *See id.* § 3053(a). Those proposed rules and later proposed rule modifications take effect only if approved by the Federal Trade Commission ("Commission"). *See id.* § 3053(b)(2). The Authority submitted and the Commission published for public comment in the Federal Register[1] the text and explanation of a proposed rule by the Horseracing Integrity and Safety Authority concerning Assessment Methodology (the

[1] *See* Fed. Trade Comm'n, Notice of HISA Assessment Methodology Proposed Rule ("Notice"), 87 Fed. Reg. 9,349 (Feb. 18, 2022).

"Notice"), which is required by the Act. *See id.* § 3052(f). "The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with" the Act and the Commission's procedural rule. *Id.* § 3053(c)(2).

By this Order, for the reasons that follow, the Commission finds that the Assessment Methodology proposed rule is consistent with the Act and the Commission's procedural rule and therefore approves the proposed rule.

II. Discussion of Comments and the Commission's Findings

Under the Act, the Commission must approve a proposed rule if it finds that the proposed rule is consistent with the Act and the Commission's procedural rule, 16 C.F.R. §§ 1.140–1.144. As a threshold matter, the Commission finds that the Authority's proposed Enforcement rule is consistent with the procedural rule. As with the Commission's earlier orders approving the Authority's Racetrack Safety and Enforcement proposed rules,[2] this finding formally confirms the previous determination made by the Office of the Secretary of the Commission that the Authority's

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[2] *See* Fed. Trade Comm'n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority ("Racetrack Safety Order") at 2, __ F.T.C. __ (Mar. 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf; Fed. Trade Comm'n, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority ("Enforcement Rule Order") at 2, __ F.T.C. __ (Mar. 25, 2022), https://perma.cc/H9SJ-F9WA.

submission of its proposal was consistent with the FTC's procedural rule.[3] The remainder of this Order discusses whether the Enforcement proposed rule is "consistent with" the Act.

In deciding whether to approve or disapprove the Authority's proposed rule, the Commission reviewed the Act's text, the proposed rule's text and the Authority's explanation contained in the Notice, the Authority's supporting documentation,[4] ten public comments,[5] and the Authority's response to those comments.[6] In total, the Commission received five

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[3] *See* Notice, 87 Fed. Reg. at 9,349 & n.5. The Secretary's determination that a submission complies with the procedural rule is required before its publication. *See* 16 C.F.R. § 1.143(e) ("The Secretary of the Commission may reject a document for filing that fails to comply with the Commission's rules for filing. . . . .")

[4] *See* Horseracing Integrity & Safety Auth., *Methodology Rule Proposal Supporting Documentation*, https://www.regulations.gov/document/FTC-2022-0014-0002 (containing Equibase data for 2019 showing (1) number of starts and total purses per state and (2) number of starts and total purses per racetrack) ("Equibase Data").

[5] Public comments, which were accepted until March 4, 2022, are available at https://www.regulations.gov/docket/FTC-2022-0009/comments. Although the docket shows eleven comments, two are from the American Association for Laboratory Accreditation, with one of those having no attachment. *Compare* Cmt. of Am. Ass'n for Lab. Accreditation (Feb. 22, 2022), https://www.regulations.gov/comment/FTC-2022-0014-0003 (no attachment), *with* Cmt. of Am. Ass'n for Lab. Accreditation ("Lab. Accreditation Cmt.") (Mar. 4, 2022), https://www.regulations.gov/comment/FTC-2022-0014-0003 (attachment).

[6] The Authority's response, dated March 14, 2022 ("Authority's Response"), is available on the Authority's website, https://hisaus.org, and permanently at https://perma.cc/9H48-

comments from state agencies and five from industry participants, with views ranging from general support to outright opposition.[7]

As explained above and in the Notice, the Commission's statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule "is consistent with" the Act and the Commission's procedural rule.[8] The Commission stated that it would therefore focus on those comments that discuss the statutory decisional criteria: whether the proposed rule is consistent with "the specific requirements, factors, standards, or considerations in the text of the Act and the Commission's

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FRWL. The Commission appreciates the Authority's discussion of the public comments and finds its responses useful, although not controlling or definitive, in evaluating the public comments and the decisional criteria. As it has explained in earlier orders, the Commission's consideration of the Authority's Response is consistent with the process the Securities and Exchange Commission uses in approving or disapproving proposed rules from self-regulatory organizations under its purview, such as the Financial Industry Regulatory Authority. HISA's sponsors "closely modeled" the Act after SEC's oversight of FINRA. *See* Fed. Trade Comm'n, *Procedures for Submission of Rules Under the Horseracing Integrity and Safety Act*, 86 Fed. Reg. 54,819, 54,822 (Oct. 5, 2021).

[7] *Compare* Lab. Accreditation Cmt. at 1 ("We are generally supportive of the proposed rules."), *with* Cmt. of Thoroughbred Horsemen's Assocs., Inc. et al. ("Thoroughbred Horsemen Cmt.") (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0010 ("[T]he Authority's proposed methodologies for assessments on both the interstate and intrastate level are inconsistent with the Act, fundamentally flawed, and lack the necessary evidentiary support for adoption.").

[8] 15 U.S.C. § 3053(c)(2).

procedural rule."[9] Nevertheless, the Commission received some comments that were unrelated to whether the proposed rule is consistent with the Act or procedural rule, and those comments have little bearing on the Commission's determination.[10]

Several recurring concerns expressed by commenters merit only brief mention at the outset; because they were addressed extensively by the Commission's Racetrack Safety Order, which was published toward the end of this comment period, these commenters may have been unable to benefit from its analysis. Several commenters again criticized the comment period as too short.[11] Others again decried

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[9] Notice, 87 Fed. Reg. at 444. The Notice also gave guidance to would-be public commenters whose comments would not address the statutory decisional criteria but instead would more generally "bear on protecting the health and safety of horses or the integrity of horseraces and wagering on horseraces." *Id.*

[10] As the Commission previously noted, such comments may still be "helpful or productive to the broader effort of improving the safety and integrity of horseracing. In many instances, comments advanced specific suggestions for improving the rules, and the Authority has stated that it will use those comments when it proposes future rule modifications." Racetrack Safety Order at 4 n.12.

[11] *See, e.g.*, Cmt. of Jared Easterling, Remington Park & Lone Star Park ("Remington Park Cmt.") (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0008 ("We will stress here again that the public comment period is extremely short, and we would urge the Commission to extend the public comment and review period to ensure proper review of all comments and input from industry stakeholders."). As the Commission previously explained, despite these entirely reasonable requests, the Act gives the Commission only 60 days from the date of the proposed rule's publication by the Federal Register,

the piecemeal submission of proposed rules, which deprives commenters of the ability to review them holistically, or the fact that the Authority has not submitted its bylaws for Commission approval.[12] For the reasons previously given in the Racetrack Safety Order, the Commission finds that these concerns do not identify any inconsistency between the Authority's Assessment Methodology proposed rule and the Act. Moreover, to address concerns that the statutory timelines prevented commenters from providing comments holistically addressing multiple rules, including how the approved Racetrack Safety rule and this Assessment Methodology rule interact with each other, the Commission has directed the Authority to submit proposed rule modifications to those two rules by March 3, 2023.[13]

The Order turns now to the specific provisions of the Assessment Methodology proposed rule. The Act's direction to the Authority was to develop a proposed rule containing "a formula or methodology for

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so the public-comment period "counts against the clock that the Commission is on to make a decision." Racetrack Safety Order at 5 (identifying this "unforgiving" statutory timeline as the reason the procedural rule encourages informal notice and comment by the Authority before it submits rules).

[12] *See, e.g.*, Remington Park Cmt. at 1. As the Commission previously explained, the Authority's bylaws were in effect before the Act's passage and codified in the Act, only future proposed modifications to the Authority's bylaws need to be submitted to the Commission for approval or disapproval after publication in the Federal Register and public comment. *See* Racetrack Safety Order at 9–10 & n.27 (citing bylaws adopted September 30, 2020).

[13] *See* Racetrack Safety Order at 8.

determining assessments described in section 3052(f)." 15 U.S.C. § 3053(a)(11). Section 3052(f) outlines the assessments that need a methodology.[14] First, by April 2, 2022 and by November 1 of future years, "the Authority shall determine and provide to each State racing commission the estimated amount required from the State—(I) to fund the State's proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year; and (II) to liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year." 15 U.S.C. § 3052(f)(1)(C)(i). The amount each state pays "shall be based on (aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and (bb) the projected amount of covered racing starts for the year in each State" and "take into account other sources of Authority revenue." 15 U.S.C. § 3052(f)(1)(C)(ii). "Covered racing starts" is undefined, and the Act does not give guidance on how to calculate a "projected amount" of them. It does say that, whenever the Authority proposes to increase the "amount required" from each state, it must notify the Commission, which must "publish in the Federal Register such a proposed increase and provide an opportunity for public comment." 15 U.S.C. § 3052(f)(1)(C)(iv).

State racing commissions have the option to collect and remit the amount required: They can "elect[ ] to remit fees" if they notify the Authority of their election to do so by May 2, 2022. 15 U.S.C. § 3052(f)(2)(A).

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[14] "Initial funding" for the Authority's operations before July 1, 2022 comes from "loans obtained by the Authority." 15 U.S.C. § 3052(f)(1).

This election requires the state racing commission "to remit fees pursuant to this subsection according to a schedule established in rule developed by the Authority and approved by the Commission," 15 U.S.C. § 3052(f)(2)(B), although a state can elect to stop remitting with one year's notice. State racing commissions that make the election to remit fees retain broad discretion on how to collect the funds: "Each State racing commission shall determine, subject to the applicable laws, regulations, and contracts of the State, the method by which the requisite amount of fees, such as foal registration fees, sales contributions, starter fees, and track fees, and other fees on covered persons, shall be allocated, assessed, and collected." 15 U.S.C. § 3052(f)(2)(D).

As for those states where the state racing commission does not elect to remit fees, the Authority collects the fees: "the Authority shall, not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month." 15 U.S.C. § 3052(f)(3)(A). The Authority must "allocate equitably" the applicable fee "among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate." 15 U.S.C. § 3052(f)(3)(B). The Authority then assesses the equitably allocated fee on covered persons and collects the fee assessed "according to such rules as the Authority may promulgate." 15 U.S.C. § 3052(f)(3)(C)(i). State racing commissions that do not elect to remit fees "shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces." 15 U.S.C. § 3052(f)(3)(D). Principally, these are "the specific requirements, factors, standards, or considerations in the text of the Act" with which the

Commission will assess the consistency of the Authority's Assessment Methodology proposed rule.[15]

Proposed Rule 8510 incorporates definitions from the Act for "Covered Horserace" and "Racetrack" and introduces three newly defined terms that build on one another: "*Projected Starts* means the number of starts in Covered Horseraces in the previous 12 months as reported by Equibase, after taking into consideration alterations in the racing calendar of the relevant State(s) for the following calendar year"; "*Projected Purse Starts* means (i) The total amount of purses for Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State(s) for the following calendar year, divided by (ii) the Projected Starts for the following calendar year"; and "*Annual Covered Racing Starts* means, for the following calendar year, the sum of: (i) 50 percent of the number of Projected Starts; plus (ii) 50 percent of the number of Projected Purse Starts."[16]

Proposed Rule 8520 is entitled "Annual Calculation of Amounts Required." Proposed Rule 8520(a)–(b) provides the processes for state racing commissions to make the election to remit fees[17] and for the Authority to inform those states of each annual

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[15] Notice, 87 Fed. Reg. at 9,351.

[16] *Id.* at 9,352.

[17] The Act does not appear to provide a method for states to elect to remit fees after 2022, and neither does the proposed Rule 8520(a): "[T]he State racing commission shall notify the Authority in writing on or before May 2, 2022 of its decision to elect to remit fees." *Id.*

amount required, and proposed Rule 8520(d) specifies that such states remit one-twelfth of the annual amount required each month.[18] Proposed rule 8520(f) identifies the physical mailing address and email address to which notices directed to the Authority should be sent.

The methodology for calculating the annual amount required of a state racing commission that elects to remit fees is provided by proposed Rule 8520(c), while proposed Rule 8520(e) specifies the methodology for states that do not elect to remit fees.[19] These two provisions received the most public comments, so this Order reproduces them here:

> 8520(c)
>
> Upon the approval of the budget for the following calendar year by the Board of the Authority, and after taking into account other sources of Authority revenue, the Authority shall allocate the calculation due from each State pursuant to 15 U.S.C. 3052(f)(1)(C)(i) proportionally by each State's respective percentage of the Annual Covered Racing Starts. The proportional calculation for each State's respective percentage of the Annual Covered Racing Starts shall be calculated as follows:
>
> (1) The total amount due from all States pursuant to 15 U.S.C. 3052(f)(1)(C)(i) shall be divided by the Projected Starts of all Covered Horseraces; then

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[18] *See id.*

[19] *See id.*

(2) 50 percent of the quotient calculated in (c)(1) is multiplied by the quotient of

(i) the relevant State's percentage of the total amount of purses for all Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State for the following calendar year; divided by

(ii) the relevant State's percentage of the Projected Starts of all Covered Horseraces starts; then

(3) the sum of the product of the calculation in (c)(2) and 50 percent of the quotient calculated in (c)(1) is multiplied by the Projected Starts in the applicable State.

Provided however, that no State's allocation shall exceed 10 percent of the total amount of purses for Covered Horseraces as reported by Equibase in the State (not including the Breeders' Cup World Championships Races). All amounts in excess of the 10 percent maximum shall be allocated proportionally to all States that do not exceed the maximum, based on each State's respective percentage of the Annual Covered Racing Starts.

8520(e)

If a State racing commission does not elect to remit fees pursuant to 15 U.S.C. 3052(f)(2):

(1) The Authority shall on a monthly basis calculate and notify each Racetrack in the State of the applicable fee per racing start for the

next month based upon the following calculations:

(i) Calculate the amount due from the State as if the State had elected to remit fees pursuant to 15 U.S.C. 3052(f)(2) (the "Annual Calculation").

(ii) Calculate the number of starts in Covered Horseraces in the previous twelve months as reported by Equibase (the "Total Starts").

(iii) Calculate the number of starts in Covered Horseraces in the previous month as reported by Equibase (the "Monthly Starts").

(iv) The applicable fee per racing start shall equal the quotient of Monthly Starts, divided by Total Starts, multiplied by the Annual Calculation.

(2) The Authority shall on a monthly basis calculate and notify each Racetrack in the jurisdiction of the following calculations:

(i) Multiply the number of starts in Covered Horseraces in the previous month by the applicable fee per racing start calculated pursuant to paragraph (e)(1)(iv) above.

(ii) The calculation set forth in 15 U.S.C. 3052(f)(3)(A) shall be equal to the amount calculated pursuant to paragraph (e)(2)(i) (the "Assessment Calculation").

(3) The Authority shall allocate the monthly Assessment Calculation proportionally based on each Racetrack's proportionate share in

the total purses in Covered Horseraces in the State over the next month and shall notify each Racetrack in the jurisdiction of the amount required from the Racetrack. Each Racetrack shall pay its share of the Assessment Calculation to the Authority within 30 days of the end of the monthly period.

(4) Not later than May 1, 2022 and not later than November 1 each year thereafter, each Racetrack in the State shall submit to the Authority its proposal for the allocation of the Assessment Calculation among covered persons involved with Covered Horseraces (the "Covered Persons Allocation"). On or before 30 days from the receipt of the Covered Persons Allocation from the Racetrack, the Authority shall determine whether the Covered Persons Allocation has been allocated equitably in accordance with 15 U.S.C. 3052(f)(3)(B), and, if so, the Authority shall notify the Racetrack that the Covered Persons Allocation is approved. If a Racetrack fails to submit its proposed Covered Person Allocation in accordance with the deadlines set forth in this paragraph, or if the Authority has not approved the Covered Persons Allocation in accordance with this paragraph, the Authority shall determine the Covered Persons Allocation for the Racetrack. Upon the approval of or the determination by the Authority of the Covered Persons Allocation, the Racetrack shall collect the Covered Persons Allocation

from the covered persons involved with Covered Horseraces.[20]

Some commenters denominated proposed Rule 8520(c) as the "interstate" methodology and proposed Rule 8520(e) as the "intrastate" methodology,[21] a useful shorthand this Order will employ. Because the new definitions of proposed Rule 8510 interrelate so directly with the two methodologies described, this Order will discuss the public comments, Authority's response, and Commission's findings organized by the two methodologies rather than by numerical rule provision.

a. ***Rule 8520(c)—Interstate Methodology***

Proposed Rule 8520(c)'s interstate methodology relies on a proposed definition of "Annual Covered Racing Starts," which itself relies on the novel proposed definitions of "Projected Starts" and "Projected Purse Starts." Under the proposed methodology, each state's fee assessment would be based on Annual Covered Racing Starts, considering both "Projected Starts" and "Projected Purse Starts."

Projected Starts is defined as the number of times that covered horses are projected to run in covered horseraces (races of Thoroughbreds on which wagers are placed) in the coming year (based on the previous year's number of starts as reported by an industry organization, Equibase).[22]

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[20] *Id.* at 9,352–53.

[21] *See, e.g.*, Thoroughbred Horsemen Cmt. at 1.

[22] Covered horseraces are those that involve wagering on "covered horses," which are, as of the Act's passage, Thoroughbreds

Projected Purse Starts relies on Equibase data for starts and total purses. By incorporating purses alongside Projected Starts into its definition of Annual Covered Racing Starts, the Authority's proposed interstate methodology assesses higher fees to states with bigger purses as well as to those with more starts. "The Authority was not in favor of simply treating all racing starts in a given State uniformly as a 'covered racing start' because this would result in an inequitable allocation of costs. For example, if all starts in all races at all tracks were treated equally, West Virginia would have a larger proportionate share than Kentucky, even though the purses and entry fees generated by the Kentucky races dwarf those generated by West Virginia races."[23] The Authority contended that using only Projected Starts would have been unfaithful to the Act, whose "requirements for proportionality among States, equitable allocation among Covered Persons within each State and the requirement imposed on the Authority to establish by rule 'a formula or methodology for determining assessments' demonstrate that basing allocations on starts alone would not meet the full requirements of the Act."[24]

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that have been timed in a workout and not yet retired, but in the future covered horses may include other kinds of horses depending on the affirmative election of a state racing commission or a "breed governing organization." 15 U.S.C. § 3051(4)–(5).

[23] Notice, 87 Fed. Reg. at 9,350. *See also id.* & n.13 ("Higher purses greatly influence the ability of Covered Persons to bear costs. It is also anticipated that stakes races and graded stakes races will have higher testing costs.")

[24] *Id.* at 9,350 n.14.

A final component of the proposed interstate methodology, in the final proviso of proposed Rule 8120(c), is a cap on any state's amount so that no state needs to pay more than 10% of its total purse. The Authority justified this cap, in the Notice, as necessary to "avoid an inequitable or skewed allocation."[25]

Nine of the ten commenters addressed the proposed interstate methodology, including all five state racing commissions. The California Horse Racing Board ("California Board") noted that, until the Authority sets its budget, it is impossible to know whether states might hit the 10% cap, which the California Board "doubts meets the Commission's criteria that the proposed rule is consistent with the Act."[26] Its comment reiterated the Act's three express considerations for the interstate assessment, which were the annual budget as approved by the Board, the projected amount of covered racing starts, and other sources of Authority revenue: "Whether ultimately equitable or not, the Act only refers to covered racing starts. In contrast, the Authority's proposed formula considers total purses, . . . which is not a basis of fee calculation under the Act."[27] The California Board parsed the Act and concluded that the Authority's references in the Notice to statutory language such as "proportionate share" and "equitably" were inapposite to the question of how to calculate each state's allocation. Ultimately, the California Board "agrees that

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[25] *Id.* at 9,350 n.16.

[26] Cmt. of Scott Chaney, Exec. Dir., Cal. Horse Racing Bd. (Mar. 3, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0004.

[27] *Id.* at 2.

there are more equitable ways to assess fees than what was designated in the Act, [but] . . . the Authority is usurping its powers and is promulgating a rule inconsistent with the Act."[28]

The Florida Division of Pari-Mutuel Wagering within its Department of Business and Professional Regulation ("Florida Division") shared similar thoughts, concluding that the proposed interstate methodology "unfairly and arbitrarily assesses costs on states far beyond what is provided in the" Act "and doesn't contain any ability for states to contest HISA's budget or the ultimate cost assessment."[29] The Florida Division stated that the proposed interstate methodology "focuses on a metric that is not part of the Act's basis of calculation of fees—purses."[30] The Florida Division similarly argued that "the legislature has emphasized the need for large purses and supplemented purses with funds from other areas of gaming," so in its view the proposal "arbitrarily punishes states with large purses."[31] The Florida Division also expressed alarm at the 10% cap and especially the effect it will have on large-purse states in the future: "[O]nce the Authority's budget reaches a certain amount, it is a guarantee that states with greater purses will take on

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[28] *Id.* at 3.

[29] Cmt. of Louis Trombetta, Dir., Fla. Div. of Pari-Mutuel Wagering, Dep't of Bus. & Prof. Regulation (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0011.

[30] *Id.*

[31] *Id.* at 2.

even more of a financial responsibility for funding the [A]uthority than originally contemplated."[32]

The Indiana Horse Racing Commission ("Indiana Commission") concurred, specifically identifying the difficulty of commenting on the proposed interstate methodology "without the release of the underlying budget assumptions."[33] The Indiana Commission described the Authority's inclusion of purse in Annual Covered Race Starts as "not equitable" because "one state makes 147% more covered starts than another, but has a per start fee that is 18% lower than the state that races less—this basically rewards poor purse structure and over-racing the horse population at the track."[34] And the Indiana Commission thought that the 10% cap was "[e]ven less equitable" because it could require high-purse states to subsidize low-purse states.[35]

The Oklahoma Horse Racing Commission ("Oklahoma Commission") did not object to the use of purse in Annual Covered Race Starts, but it instead raised an objection to the use of Equibase data: "There have been several instances with Equibase reporting inflated numbers in comparison to actual audited track and/or commission records. A section should be added to handle these types of discrepancies for correction by

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[32] *Id.* at 3.

[33] Cmt. of Deena Pitman, Exec. Dir., Ind. Horse Racing Comm'n (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0012.

[34] *Id.*

[35] *Id.*

actual audited records."[36] The Oklahoma Commission also supported the substance of the one pre-submission informal comment that the Authority had received, inquiring about whether states that enter into voluntary agreements with the Authority to conduct certain tasks will get credit for those costs.[37]

The Texas Racing Commission ("Texas Commission") reiterated many of its previously stated objections to the Act and the Authority.[38] With respect to the Assessment Methodology proposed rule, the Texas Commission objected to the 10% cap as providing "a clear advantage to the four (4) states that currently dominate horse racing: New York, Florida, Kentucky, and California."[39] The Texas Commission also noted that "the Authority has not provided any loan amounts to be repaid by States nor any annual budget necessary for the Authority to operate."[40] The Texas Commission joined the California Board, Florida

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[36] Cmt. of Kelly Cathey, Exec. Dir., Okla. Horse Racing Comm'n ("Okla. Comm'n cmt.") (Mar. 4, 2022), at 2, https://www.regulations.gov/comment/FTC-2022-0014-0012.

[37] *See* Notice, 87 Fed. Reg. at 9,351; Okla. Comm'n cmt. at 1. The Oklahoma Commission also reiterated its objections, stated in its previous comments to the Racetrack Safety and Enforcement proposed rules, to the Act's constitutionality. *See id.*

[38] *See* Cmt. of Amy Cook, Exec. Dir., Tex. Racing Comm'n ("Tex. Comm'n cmt.") (Mar. 4, 2022), at 1–3, 6–8, https://www.regulations.gov/comment/FTC-2022-0014-0012 (proposing that the Federal Trade Commission request statutory authority to administer a cooperative agreement and congressional allocations to fund grants, alleging that the Act violates the anti-commandeering doctrine).

[39] *Id.* at 4.

[40] *Id.*

Division, and Indiana Commission in objecting to the definition of Annual Covered Horse Race as going "beyond what Congress intended by including race purses."[41] The Texas Commission also alleged that some of the Equibase data were inaccurate because they include some horseraces that are not "covered horseraces."[42]

Four industry commenters also opposed the inclusion of purse in the definition of Annual Covered Horse Race. The Thoroughbred Horsemen's Associations, Inc. and four other industry participants ("Thoroughbred Horsemen") provided the most comprehensive comment. They contended that the Act requires that assessments "be proportionally allocated by the number of racing starts in each State."[43] The Thoroughbred Horsemen labeled the newly defined term Projected Purse Starts "a misnomer, because it is *not* a measurement of the number of starts but rather is a measure of *purse value* (on a per-start basis)."[44] The Thoroughbred Horsemen further argued that the proposed interstate methodology fails to achieve its own

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[41] *Id.*

[42] *See id.*

[43] Cmt. of Thoroughbred Horsemen's Assoc., Inc. et al. ("Thoroughbred Horsemen cmt.") (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0010. The Thoroughbred Horsemen also cited to several versions of the Act before the one that was passed, which contained clear language specifying that assessments be based on a base fee "multiplied by the number of racing starts in the State in the previous month." *Id.* at 5 n.4.

[44] *Id.* at 4. The Thoroughbred Horsemen also identified what they thought were math errors in the Equibase Data. *See id.* at 5 & n.3

stated goal of "equitable" outcomes, because it "treats similar states differently based on arbitrary factors that the Authority has apparently not considered."[45] The Thoroughbred Horsemen also shared the objection raised by several states that it is difficult to evaluate the proposal "without knowing the relative costs and anticipated funding allocations in each state."[46] And they explained their fear that the incentives created by the inclusion of purse in Annual Covered Racing Starts would undermine the Act's goals because states would run more races for lower purses and distribute money outside the purse structure, which would prove "dangerous to our most vulnerable horses."[47] The Thoroughbred Horsemen recommended an interim final rule that specifies an interstate methodology using only starts and not purses.[48]

The New York Thoroughbred Horsemen's Association, New York Racing Association, Inc., and New York Thoroughbred Breeders, Inc. ("New York Horsemen") wrote "to support and echo a number of critical points" made by the Thoroughbred Horsemen, with which they are affiliated, but also to object specifically to the "disproportionate amount of the financial

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[45] *Id.* at 3. The Thoroughbred Horsemen also pointed out that the term "equitably" appears not in the Act's provisions for interstate allocations but instead in the Act's provisions for intrastate allocations. *See id.* at 6. And they contended that the significant parts of the Authority's budget "will scale with the number of racings starts, because each horse will need to be tested—and they will have little or nothing to do with purse value." *Id.* at 8.

[46] *Id.* at 3.

[47] *Id.* at 8.

[48] *See id.* at 13.

burden that will fall on New York racing stakeholders."[49] The New York Horsemen also echoed the Thoroughbred Horsemen in urging the Commission to adopt an interim final rule.

The Florida Horsemen's Benevolent and Protective Association ("Florida Horsemen") echoed the views of other commenters: "There is no provision in the HISA statute to allow for consideration of purses in any given state when allocating cost, nor is there a provision to cap the cost and assess any shortfall to states where the assessment does not rise above the cap."[50] The Florida Horsemen shared other commenters' views that it was difficult to assess the proposed interstate methodology without "the ability to review the actual or even estimated HISA budget." The Florida Horsemen stated a concern about the Assessment Methodology proposed rule's "cost to the State of Florida," which "will be high" even though the "cost of doing business and the cost of living are high."[51]

Finally, the racetracks Remington Park and Lone Star Park ("Remington Park") expressed concern about the use of Equibase data, "a capitalized term that is not defined in the Rule or the Act."[52] As with the Oklahoma Commission, Remington Park

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[49] Cmt. of N.Y. Thoroughbred Horsemen's Assoc. et al. ("N.Y. Horsemen cmt.") (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0013.

[50] Cmt. of Fla. Horsemen's Benevolent & Prot. Assoc. ("Fla. Horsemen cmt.") (Mar. 4, 2022), at 1, https://www.regulations.gov/comment/FTC-2022-0014-0007.

[51] *Id.* at 3.

[52] Remington Park cmt. at 1.

contended that Equibase data are sometimes wrong and that the methodology needs "a mechanism to reconcile the delta between the actual number of starts and purse money versus the projected numbers initially reported."[53] Remington Park also shared the complaint of other commenters that it found commenting on the Assessment Methodology proposed rule difficult without knowing the Authority's projected budget.[54] Unlike most other commenters, however, Remington Park does "appreciate the Authority looking to purse money in addition to starts when it determines the allocation of the assessment."[55] But it objects to the 10% cap as "favorable to New York, Florida, Kentucky, and California."[56]

The Authority's response to these comments about its proposed interstate methodology disagreed with the majority of the commenters who contended that the consideration of purses alongside starts was inconsistent with the Act.[57] The Authority described the requirement of § 3053(a)(11) for "a formula or methodology for determining assessments" as a "broad directive."[58] Its response placed particular weight on § 3052(f)(1)(C)(ii)(I)'s phrase "based on" in the Act's command that the amount owed be "based on" the Authority's budget and "the projected amount of covered

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[53] *Id.* at 2.

[54] *See id.* at 1.

[55] *Id.* at 2.

[56] *Id.* at 2. Remington Park cites the same data as the Texas Commission. *Compare id. with* Tex. Comm'n cmt. at 4.

[57] *See* Authority's Response at 4–5.

[58] *Id.* at 4

racing starts for the year in each State." "If Congress had intended those two factors to constitute the entire and exclusive grounds for calculating assessments, there would have been no reason for it to direct the Authority to develop, and for the FTC to consider and approve, a rule setting forth 'a formula or methodology for determining assessments.'"[59] The Authority relied on three reported decisions from federal courts of appeals for its proposition that "based on" is synonymous with "arising from" and refers to a starting point or foundation—exactly the role, the Authority said, that "covered racing starts" plays in its Annual Covered Racing Starts.[60] It also contended that a contrary reading would lead to "absurd results."[61]

According to the Authority, the 10% cap was misunderstood by the Texas Commission and Remington Park, whose "contention that New York, Florida, Kentucky and California will unfairly benefit from the cap is incorrect."[62] The Authority's response explained why by proposing a hypothetical annual budget of $50,000,000 and using the 2019 Equibase data, in which the beneficiaries of the cap are small-purse states such as Idaho, Montana, North Dakota, Nebraska, Nevada, Oregon, and Wyoming—but those states in total would have their assessments reduced by only $139,384. The shift in the payments required

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[59] *Id.*

[60] *Id.*

[61] *Id.* In a similar vein, the Authority noted: "Curiously, [the Texas and Indiana Commissions] advance a statutory interpretation that will result in higher fees allocated to their states." *Id.* at 3 n.10.

[62] *Id.* at 6.

by the rest of the states would be proportionally small: The "cap would increase Florida's proportionate share from $5,073,794 to $5,088076, Indiana's proportionate share from $1,224,433 to $1,227,880, Oklahoma's proportionate share from $1,287616 to $1,291,241, and Texas's proportionate share from $826,034 to $828,359."[63] In short, the cap is designed to help small-purse states because it is a 10% cap on a state's assessment compared to the state's purse, not a state's purse compared to the national purse (as the Texas Commission and Remington Park inferred).

As for the concerns that the Oklahoma Commission and Remington Park raised about Equibase, the Authority responded: "Equibase is the official supplier of racing information and statistics to America's Best Racing, Breeders' Cup, Daily Racing Form, National Thoroughbred Racing Association, The Jockey Club, Thoroughbred Racing Associations of North America, Inc., TVG, and XpressBet," which represent together more than 85% of the total wagers in the United States and Canada.[64] "Nevertheless, the Authority will consider in future rulemaking whether to include a process that allows a racetrack to challenge the relevant Equibase numbers."[65]

The Authority explained that the timelines to which some commenters objected are driven by the Act and the Commission's rules to implement the Act's deadlines. "The Act requires the Authority no later than 90 days before the program effective date of

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[63] *Id.*

[64] *Id.* at 3.

[65] *Id.*

July 1, 2022, to determine and provide to each State racing commission the estimated amounts required from the State to fund HISA," and "the Authority will comply with the 90-day deadline imposed by Congress."[66] But because the Commission needs the 60 days that the Act affords it to take public comments on the Authority's proposed rules, consider those comments, and issue a reasoned decision approving or disapproving those rules, the Commission's procedural rule requires the Authority to prepare and submit the Assessment Methodology proposed rule well in advance of its statutory budget deadline.[67]

Despite several arguments in comments against considering purses in the definition of Annual Covered Race Starts, the Commission finds that the proposed interstate methodology is consistent with the Act, which requires the Authority to develop "a formula or methodology for determining assessments," § 3053(a)(11). These amounts owed "shall—(I) be based on—(aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and (bb) the projected amount of covered racing starts for the year in each State; and (II) take into account other sources of Authority revenue," § 3052(f)(1)(C)(i). The relevant provisions from proposed Rule 8520(c) are that, after the Authority's Board approves its budget and other sources of revenue are taken into account, "the Authority shall allocate the calculation due from each State pursuant to 15 U.S.C. § 3052(f)(1)(C)(i) proportionally by each State's respective percentage of the Annual Covered Racing

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[66] *Id.* at 2.

[67] *See id.*

Starts."[68] Annual Covered Racing Starts is defined in proposed Rule 8510 as equal parts Projected Starts and Projected Purse Starts, with the latter defined as total purse divided by Projected Starts.[69]

The statutory-consistency question before the Commission is thus whether the methodology of proposed Rule 8520(c) is consistent with the Act's requirement that it be "based on . . . the projected amount of covered racing starts for the year in each State," § 3052(f)(1)(C)(ii). The plain meaning of the phrase "based on" confirms that the proposed methodology is consistent with the Act; without a further restriction such as "solely" or "exclusively" in the Act's text, the phrase is naturally non-exhaustive. Here, "projected amount of covered racing starts" is undefined in the Act, and the Authority chose to define it as Annual Covered Racing Starts, while opponents of its approach would have defined it exclusively as the Authority defined Projected Starts (in other words, no consideration of purses). But the proposed interstate methodology is still "based on" Projected Starts: As a state's Projected Starts increase its assessment increases, and as a state's Projected Starts decrease its assessment decreases. Projected Starts are thus the starting point and the foundation of the amount owed.

Public commenters' arguments in favor of a finding of inconsistency were unpersuasive. The Thoroughbred Horsemen, for example, did not address the key, ambiguous phrase "based on," although they noted that Projected Purse Starts is a "misnomer" because it represents a financial number rather than

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[68] Notice, 78 Fed. Reg. at 9,352.

[69] *See id.*

starts. This may be true, but it does not compel a finding of inconsistency with the Act.

The Authority's response persuasively illustrated with examples that the Oklahoma Commission and Remington Park misunderstood the effect of the 10% cap in the proviso to proposed Rule 8520(c)—it does not benefit big-purse states such as California, Florida, Kentucky, and New York but instead will require them to marginally increase their allocations to ensure that no state pays more than 10% of its own total purse in assessments. The other commenters that objected to the 10% cap did not identify an inconsistency with the Act. While the potential inconsistency of including Projected Purse Starts alongside Projected Starts within the definition of Annual Covered Race Starts merited more discussion, the Commission finds that the minor adjustments that may be required to bring small-purse states' assessments below 10% of their total purses still leave each state's assessment "based on" covered race starts since the small-purse states' reductions "shall be allocated proportionally to all States that do not exceed the maximum, *based on* each State's respective percentage of the Annual Covered Racing Starts."[70]

While the Commission concludes that the interstate methodology proposed by the Authority is consistent with the Act, it is worth noting that there are likely multiple methodologies that the Authority could have proposed that would be consistent with the Act. Accordingly, the Commission encourages states that would prefer another methodology to continue engaging with the Authority, which in its response committed to keeping an open mind about the

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[70] Notice, 87 Fed. Reg. at 9,352 (emphasis added).

interstate methodology of the Assessment Methodology proposed rule: "The Authority will review [it] on an annual basis to ensure that the formula that forms the basis of the assessments is equitable and, as a part of this review, the Authority will consider the comments that argue otherwise." The Authority's first proposed rule modification to Assessment Methodology is due on March 3, 2023.[71]

b. ***Rule 8520(e)—Intrastate Methodology***

Proposed Rule 8520(e)'s intrastate methodology applies in states that do not elect to remit fees under § 3052(f)(2)(A). It builds on proposed Rule 8520(c)'s calculations and then relies on two new numbers: "Total Starts" is "the number of starts in Covered Horseraces in the previous twelve months as reported by Equibase" and "Monthly Starts" is the same number in the previous month.[72] The "applicable fee per racing start" that the Authority must calculate and provide monthly under § 3052(f)(3)(A) is calculated by taking the state's allocation from Rule 8520(c) as though it were remitting fees and multiplying it by Monthly Starts and then dividing it by Total Starts.[73] Each non-remitting state's monthly allocation owed is the "applicable fee per racing start" multiplied by the Monthly Starts.[74] Section 3052(f)(3)(B) states that the Authority "shall allocate equitably" this monthly allocation owed by collecting it "from among covered persons involved with covered horseraces pursuant to

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[71] *See* Racetrack Safety Order at 8.

[72] Notice, 87 Fed. Reg. at 9,352 (proposed Rule 8520(e)(1)).

[73] *See id.*

[74] *See id.* (proposed Rule 8520(e)(2)).

such rules as the Authority may promulgate." The Authority decided that it would achieve equitable allocation by collecting directly from the racetracks based on each racetrack's share of the total purse in that state over the next month.[75] Each racetrack, for its part, must submit an annual proposal to the Authority describing how it will equitably allocate its amount owed among covered persons involved with covered horseraces at the racetrack.[76] If a racetrack fails to timely submit a proposal or the Authority finds the proposal inequitable, the Authority determines the equitable allocation for the racetrack.[77]

The intrastate methodology received fewer comments than the interstate methodology.[78] Remington Park objected that the proposed intrastate methodology "places the burden of collection on the Racetrack."[79] Remington Park argued that this burden properly belongs with the Authority: "The Authority is responsible for collecting its fees and cannot delegate that obligation to the racetracks."[80]

The Florida Horsemen expressed a similar concern: "A racetrack does not have the legal authority to assess fees to Covered Persons or to collect such fees as suggested in the statute ('foal registration fees,

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[75] *See id.* (proposed Rule 8520(e)(3)).

[76] *See id.* (proposed Rule 8520(e)(4)).

[77] *See id.*

[78] Comments that might equally apply to both, such as distrust of Equibase data's reliability, were addressed in the discussion of comments about the interstate methodology.

[79] Remington Park cmt. at 3.

[80] *Id.*

sales contributions, starter fees, and track fees, and other fees on covered persons')."[81] A conflict of interest is inherent, stated the Florida Horsemen, in "allowing one stakeholder the ability to determine cost for all stakeholders, one that would leave the methodology vulnerable to litigation."[82] Finally, the Florida Horsemen objected to the use of purse to divide the monthly amount owed among racetracks in a state: "Under no circumstances should purse money be the ONLY factor used to determine the assessment of the cost of HISA. We do not believe it should be a part of the calculation at all. There is no justification, legal or otherwise, for penalizing one racetrack to the benefit of another."[83]

The Thoroughbred Horsemen identified "two flaws with the intrastate assessment mechanism: (1) it empowers one covered stakeholder (racetracks) to set and collect fees from other stakeholders, in a departure from existing practice and the Act's text, and (2) it relies entirely on purse-driven allocation formula, which also ignores the Act's text to consider racing starts as part of the allocation."[84] The Thoroughbred Horsemen argued that having racetracks take the lead for determining equitable allocation of assessments "sets the stage for discord . . . and could lead disaffected horsemen, for example, to invoke their protected rights under the Interstate Horseracing Act, and cause a cessation of racing and/or

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[81] Fla. Horsemen cmt. at 3 (quoting 15 U.S.C. § 3052(f)(2)(D)).

[82] *Id.*

[83] *Id.* at 4 (underlining and capitalization in original)

[84] Thoroughbred Horsemen cmt. at 9.

simulcasting."[85] The Thoroughbred Horsemen concluded that the intrastate methodology "is squarely inconsistent with the Act," which, in their view, places the burden on the Authority to "perform the allocation, assessment, and collection" and requires "per-start allocation" rather than one "based on a purse structure."[86] The New York Horsemen stated the same concern.[87]

The Authority's response defended its choice to place the responsibility on covered racetracks to collect fees, subject to its approval of the racetrack's proposal for equitably allocating assessments among covered persons.[88] As for several commenters' concerns about conflicts of interest that might arise from assigning racetracks this task, the Authority responded: "Rule 8520(e)(4) does not give the racetracks the unfettered discretion to determine the allocations for Covered Persons. The racetracks are required to submit a proposal of the allocation of the Assessment Calculation among Covered Persons to the Authority."[89] And the Authority stated that it will approve the proposals only if it determines that the proposal "allocated equitably."[90] If the Authority finds the standard unmet, then "the Authority determines the Covered Persons Allocation for the applicable racetrack."[91] The

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[85] *Id.* (citing 15 U.S.C. § 3004).

[86] *Id.* at 9–10.

[87] *See* N.Y. Horsemen at 5–6.

[88] *See* Authority's Response at 5–6.

[89] *Id.* at 5

[90] *Id.* at 6.

[91] *Id.*

Authority stated that it planned to issue guidance on the subject under 15 U.S.C. § 3054(g).

As for comments that argued that having racetracks collect the equitable allocations is inconsistent with the Act, the Authority replied that "the Act empowers the Authority to collect these fees 'according to such rules as the Authority may promulgate,' . . . precisely what Rule 8520(e)(4) does . . . [because] racetracks already have accounting systems in place to collect and disburse money from and to owners, jockeys, and trainers."[92]

The Commission finds that the Authority's proposed intrastate methodology is consistent with the Act. The commenters' contention that, by issuing a rule requiring covered racetracks to collect equitable allocations from covered persons under an Authority-approved proposal, the Authority has unlawfully delegated a statutory command is unavailing. Instead, the Authority is exercising the Act's permission for it to "collect such fee according to such rules as the Authority may promulgate." 15 U.S.C. § 3052(f)(3)(C)(i). That the Authority collects the assessed fee only from racetracks instead of from a broader set of covered persons is of no moment. So too for the complaint that the Authority unlawfully delegated the allocation required by § 3052(f)(3)(B)—it retains ultimate control over the equitable allocation, stepping in if a racetrack does not timely propose an equitable allocation or proposes an inequitable allocation, and no provision of the Act conflicts with the Authority-racetrack partnership.

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[92] *Id.* (quoting 15 U.S.C. § 3052(f)(3)(C)).

The Commission has previously noted that guidance, which the Authority is permitted to issue and said it plans to here, must be limited to the circumstances outlined in the Act.[93] The same concern arises here with the contemplated guidance concerning equitable allocations in states that elect not to remit fees. If the contemplated guidance is "an interpretation of an existing rule, standard, or procedure of the Authority; or (ii) a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure," that is allowed.[94] Guidance must "not have the force of law."[95] Anything that would have the force of law must be submitted to the Commission for public comment and approval or disapproval.

Two commenters, the Thoroughbred Horsemen and New York Horsemen, raised a plausible inconsistency about the interstate methodology's use of purse information. The Act provides that, in states that do not elect to remit fees, "the Authority shall, not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month." 15 U.S.C. § 3052(f)(3)(A). There is no "based

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[93] *See* Racetrack Safety Order at 28 ("The Commission notes, however, that Guidance may be an inappropriate vehicle for the Authority's future educational program proposals inasmuch as the educational programs are required—only proposed rules approved by the Commission can impose binding requirements, and the broader "horseracing safety program" of which the educational programs are one required element must, under the Act, follow formal notice and comment procedures like this Racetrack Safety proposed rule did.").

[94] 15 U.S.C. § 3054(g)(1)(A).

[95] 16 C.F.R. § 1.140 (definition of HISA Guidance).

on" in this statutory direction, and the number of racing starts in a state's preceding month is a direct multiplier. But "the applicable fee per racing start" is not defined elsewhere in the Act. Proposed Rule 8520(e) defines it in a reasonable way that includes taking the most recent month's starts ("Monthly Starts") divided by the most recent year's starts ("Total Starts") and multiplying that ratio by the amount the state would have remitted if it elected to remit fees. The point of the calculation obligation of § 3052(f)(3)(A) is to facilitate predictable monthly billing (as distinguished from the annual fees remitted by states), not to preclude the consideration of purses. So too the Authority's decision to use purses to allocate fees to racetracks within a state is reasonable and not precluded by any provision of the Act.

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For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority's proposed rule on Assessment Methodology is consistent with the Horseracing Integrity and Safety Act of 2020 and the Commission's procedural rule governing submissions under the Act. Accordingly, the Assessment Methodology rule is APPROVED.

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya

ORDER APPROVING THE ANTI-DOPING AND MEDICATION CONTROL RULE PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY

March 27, 2023

I. Decision of the Commission: HISA's Anti-Doping and Medication Control Rule Is Approved

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051–3060, charges a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority ("Authority"), with developing proposed rules on a variety of subjects. *See, e.g.*, *id.* § 3055(c)(1) (requiring an anti-doping and medication control rule). The Authority's proposed rules and proposed rule modifications take effect only if approved by the Federal Trade Commission ("Commission"). *See id.* § 3053(b)(2). As required by the Act, the Authority submitted and the Commission published for public comment in the Federal Register[1] the text and

[1] *See* Fed. Trade Comm'n, *Notice of HISA ADMC Proposed Rule* ("Notice"), 88 Fed. Reg. 5070 (Jan. 26, 2023),

explanation ("Notice") of a rule proposed by the Authority concerning Anti-Doping and Medication Control ("ADMC"). *See id*. §§ 3053(a), 3053(b), 3055(c)(1). "The Commission shall approve a proposed rule if the Commission finds that the proposed rule is consistent with" the Act and the applicable rules approved by the Commission. *Id.* § 3053(c)(2).[2]

By this Order, for the reasons that follow, the Commission finds that the ADMC proposed rule is consistent with the Act and the Commission's procedural rule, and therefore approves the proposed rule, which takes effect today.

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https://www.federalregister.gov/documents/2023/01/26/2023-00957/hisa-anti-doping-and-medication-control-rule.

[2] 15 U.S.C. § 3053(c)(2). An amendment made to the Act in December 2022 provides that the Commission may at any time exercise discretionary rulemaking authority to "abrogate, add to, or modify" an Authority rule, if it finds that doing so is "in furtherance of the purposes of the Act." 15 U.S.C. § 3053(e). But this new power extends only to changing existing Authority rules and does not allow the Commission to modify a proposed rule. Accordingly, here, the Commission's powers remain limited to approving or disapproving the proposed rule under § 3053(c). Once a rule is approved and goes into effect, the rule can be modified through a rule modification proceeding by the Authority under § 3053(a); by the Commission itself pursuant to § 3053(e) (in a rulemaking proceeding conducted in accordance with 5 U.S.C. § 553), if the Commission concludes that the Authority's rule does not reflect the policies that the Commission believes would best to protect horseracing integrity or safety; or through a public petition for the amendment of the rule under 16 C.F.R. § 1.31.

II. Discussion of Comments and the Commission's Findings

Under the Act, the Commission must approve a proposed rule if it finds that the proposed rule is consistent with the Act and "applicable rules approved by the Commission." 15 U.S.C. § 3053(c)(2). Here, the "applicable rules" are the ones issued by Commission that provide the procedures necessary for the Commission's Office of the Secretary to accept proposed rule or rule modification submissions under the Act. *See* 16 C.F.R. §§ 1.140–1.144 (Commission's procedural rule). Among other things, the materials submitted by the Authority for Commission review must explain how the proposal is "consistent with the Act" and "how [the Authority] considered the factors in 15 U.S.C. § 3055." *See* 16 C.F.R. § 1.142(a)(5). As a threshold matter, the Commission finds that the Authority's proposed ADMC rule is consistent with the procedural rule. This finding formally confirms the previous determination made by the Office of the Secretary of the Commission that the Authority's submission of its proposal was consistent with the FTC's procedural rule.[3] The remainder of this Order discusses whether the ADMC proposed rule is "consistent with" the Act.

In deciding whether to approve or disapprove the Authority's proposed rule, the Commission has reviewed the Act's text, the proposed rule's text, the

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[3] *See* Notice, 88 Fed. Reg. at 5070 & n.5. The Secretary's determination that a submission complies with the procedural rule is required before its publication. *See* 16 C.F.R. § 1.143(e) ("The Secretary of the Commission may reject a document for filing that fails to comply with the Commission's rules for filing . . . . ").

Authority's supporting documentation and rule explanation referenced in the Notice,[4] public comments,[5]

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[4] These materials, which were posted on January 26, 2023, include informal comments that the Authority solicited from stakeholders before submitting a proposed rule to the Commission, and they are available at https://www.regulations.gov/document/FTC-2023-0009-0002. The Commission previously published a substantially similar notice of a proposed rule submitted by the Authority. *See* Fed. Trade Comm'n, *Notice of HISA ADMC Proposed Rule*, 87 Fed. Reg. 65292 (Oct. 28, 2022), *as corrected*, 87 Fed. Reg. 66701 (Nov. 4, 2022). The Commission disapproved the proposed rule without prejudice to refile due to a ruling by the United States Court of Appeals for the Fifth Circuit, *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 884–90 (5th Cir. 2022) (holding that the Act violated the private non-delegation doctrine), which could have undermined the Act's animating principle of national uniformity. *See* Fed. Trade Comm'n, Order Disapproving the ADMC Rule Proposed by HISA (Dec. 12, 2022) ("Disapproval Order"), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_hisa_anti-doping_disapprove_without_prejudice_0.pdf. Shortly thereafter, Congress addressed the holding of the Fifth Circuit by amending 15 U.S.C. § 3053(e) to provide the Commission with the discretionary authority to "abrogate, add to, or modify the rules of the Authority . . . as the Commission finds necessary or appropriate " *See* Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong., Division O, Title VII (2022). In its December 12 Order, the Commission stated that, once "the legal uncertainty regarding the Act's constitutionality [is] resolved, the Authority may resubmit the proposed rule or a similar rule, and the Commission [would] consider all comments filed in [the initial] proceeding as well as any updated or new comments and filings." Disapproval Order at 2. The comments to the initial October 2022 notice are available at https://www.regulations.gov/docket/FTC-2022-0062/comments.

[5] Public comments in response to the Notice, which were accepted until February 9, 2023, are available at https://www.regulations.gov/docket/FTC-2023-0009/comments.

and the Authority's response to those comments.[6] The Commission has considered 130 public comments, which consisted of (i) 20 comments received in response to the October 28, 2022, Federal Register publication of a substantially similar proposed rule (as corrected on November 4, 2022), posted to the FTC-2022-0062 docket at https://www.regulations.gov/docket/FTC-2022-0062, and (ii) 110 comments received in response to the Notice, posted to the FTC-2023-0009 docket at https://www.regulations.gov/docket/FTC-2023-0009.[7] The comments

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[6] The Authority's response, dated February 21, 2023 ("Authority's Response"), which addressed comments filed in response to both the Notice and the October 2022 publication, is available on the Authority's website, https://hisaus.org/resources/responses-to-public-comments-on-admc-regulations-feb-21-2023, and permanently at https://perma.cc/52L6-JDYT. The Authority's Response was led by its ADMC Committee, a statutorily mandated standing body. *See* 15 U.S.C. § 3052(c)(1). The Commission appreciates the Authority's in-depth treatment of the public comments and finds its responses useful, although not controlling or definitive, in evaluating the public comments and the decisional criteria. Considering the Authority's Response is consistent with the process the Securities and Exchange Commission uses in approving or disapproving proposed rules from self-regulatory organizations under its purview, such as the Financial Industry Regulatory Authority ("FINRA"). HISA's sponsors "closely modeled" the Act after SEC's oversight of FINRA. *See* Fed. Trade Comm'n, *Procedures for Submission of Rules Under the Horseracing Integrity and Safety Act*, 86 Fed. Reg. 54819, 54822 (Oct. 5, 2021).

[7] The FTC received 915 comments on the Notice. *See* Regulations.gov, HISA ADMC, Dkt. No. FTC-2023-0009, https://www.regulations.gov/docket/FTC-2023-0009. Of those 915 submitted comments, 110 comments were posted on the rulemaking docket. *See id.* The other 805 comments were not posted

come from many corners of the horseracing industry, advocates, and concerned observers. Most of the comments express opposition to the proposed rule, often for reasons unrelated to the two decisional criteria,[8] while a few reflect broad support for the proposal.[9]

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because they were identified as duplicative of or substantially similar to other comments generated through mass-mailing campaigns; for these comments, exemplar comments are posted on regulations.gov and fully considered by the Commission. *See* Regulations.gov, Frequently Asked Questions, https://www.regulations.gov/faq. And even of the 110 posted comments, a significant majority are duplicative or nearly identical to other posted comments due in part to templates received through mass-mailing campaigns by two organizations (the National Horsemen and the North American Association of Racetrack Veterinarians ("NAARV")) advocating against the Commission's approval of the proposed rule. Two of those comments include the actual solicitation from NAARV or the National Horsemen to their members along with their comment template. *See* Cmt. of K. Myrick (Feb. 6, 2023) (including the National Horsemen's email solicitation and comment template), https://www.regulations.gov/comment/FTC-2023-0009-0073); Cmt. of Bill Yarbrough (Feb. 8, 2023) (including NAARV's email solicitation and comment template), https://www.regulations.gov/comment/FTC-2023-0009-0085.

[8] Many of these comments were sent by individuals who used templates provided by the National Horsemen or NAARV. *See supra* n.7.

[9] *See, e.g.*, Cmt. of Nat'l Thoroughbred Racing Ass'n ("NTRA Cmt.") (Feb. 9, 2023), at 1, https://www.regulations.gov/comment/FTC-2023-0009-0098 ("We appreciate FTC's efforts to understand the challenges the horse racing industry faces without this proposed rule" because the "industry has needed change for quite some time. . . . Since the passage and implementation of HISA's Racetrack Safety Program, the industry has made strides that can help preserve horse racing for future generations to enjoy. With the upcoming implementation of the [ADMC] rule, the

Comments range from those critical of any federal rules in an area traditionally regulated by the states to those recommending changes to particular rule provisions or supporting the proposed rule as protective of horse safety and horseracing integrity.

As explained above and in the Notice, the Commission's statutory mandate to approve or disapprove a proposed Authority rule is limited to considering only whether the proposed rule "is consistent with" the Act and the Commission's procedural rule. The Commission stated in the Notice that it would therefore focus on those comments that discuss the statutory decisional criteria: whether the proposed rule was consistent with "the specific requirements, factors, standards, or considerations in the text of the Act as well as the Commission's procedural rule."[10]

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industry will finally have a minimum standard of fairness . . . . This will lead to a safer sport for both our equine and human athletes" and provide confidence "that all those involved in the sport are playing by the same set of rules and regulations."); Cmt. of Animal Welfare Inst. 1 (Feb. 9, 2023) ("Second AWI Cmt."), https://www.regulations.gov/comment/FTC-2023-0009-0097 (appreciating the comprehensive nature of the proposed ADMC rules which represent "a significant undertaking as the first set of uniform and national rules governing the use of medications and performance-enhancing drugs in thoroughbred racing . . . . Given the complexity of the subject matter"); Cmt. of Animal Welfare Inst. 1 (Nov. 14, 2022) ("First AWI Cmt."), https://www.regulations.gov/comment/FTC-2022-0062-0007 (same).

[10] Notice, 88 Fed. Reg. at 5083–84. The Notice also gave guidance to would-be public commenters whose comments would not address the statutory decisional criteria but instead would more generally "bear on protecting the health and safety of horses and

Nevertheless, the Commission received many comments that are unrelated to whether the proposed rule is consistent with the Act or procedural rule, as well as other comments that offer conclusory assertions regarding the proposed rule's consistency with the decisional criteria—*i.e.*, provide no analysis in support of the assertions.[11] Because those comments do not address the statutory criteria that the Commission must use to determine whether to approve or to disapprove the proposed rule, they have little bearing on the Commission's determination.[12] In this Order, the Commission canvasses the most weighty substantive comments it received (including many that do not directly address the statutory criteria), as well as some comments with fewer remarks, and the Authority's responses to these comments, but it does not delve into every issue commenters raise, especially when unrelated to the statutory criteria.

One overarching preliminary issue merits mention at the outset. Some commenters complain that the ADMC rule was not proposed at the same time as other Authority rules, in particular the Racetrack

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jockeys, the integrity of horseraces and wagering on horseraces, and the administration of the Authority itself." *Id.* at 5084.

[11] *See, e.g.*, II.g, *infra*.

[12] This is not to say that such comments are not helpful or productive in the broader effort to improve the safety and integrity of horseracing. In many instances, comments advance specific suggestions for improving the Authority's rules, and the Commission expects that, in appropriate cases, the Authority will consider those comments in proposing rule modifications in the future, and the Commission will also consider them in deciding whether to exercise its discretionary authority to modify the Authority's rules.

Safety rule. The National Horsemen's Benevolent and Protective Association ("National Horsemen") and the Kentucky Horsemen's Benevolent and Protective Association ("Kentucky Horsemen") assert that Congress intended the ADMC rule to be submitted at the same time as the Racetrack Safety rule so they could "be evaluated together" and that "piecemeal submission makes it impossible for interested parties to know how these rules will be impacted by the additional proposed rules to come."[13] Even if Congress had intended the two rules to be enacted simultaneously, the Authority could not have submitted the ADMC proposed rule at the same time as the Racetrack Safety rule because the anti-doping and medication control enforcement agency ("Agency") had not been selected, and the Act required the input of the Agency (now the Horseracing Integrity & Welfare Unit of Drug-Free Sport International) to develop the ADMC rules as well as the list of prohibited substances. *See* 15 U.S.C. §§ 3054(f)(1)(B), 3055(c)(4)–(5).

Nonetheless, since the Authority's first submissions of proposed rules, the Commission has regularly heard from commenters that they find it difficult to evaluate a proposed rule, such as Racetrack Safety, in isolation, without also knowing the details of an expected later proposal, such as Assessment Methodology. The ADMC proposed rule is the last of the initial rules required by the Act, and although it is proposed against the backdrop of all of the rules of the

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[13] Cmt. of Nat'l Horsemen's Benevolent & Protective Ass'n 1 ("First Nat'l Horsemen Cmt.") (Nov. 14, 2022), https://www.regulations.gov/comment/FTC-2022-0062-0019; Cmt. of Ky. Horsemen's Protective & Benevolent Ass'n 1 ("Second Ky. Horsemen Cmt.") (Feb. 8, 2023) & Att. (Hiles Cmt.), https://www.regulations.gov/comment/FTC-2023-0009-0088.

Authority that the Commission has already approved, commenters continue to raise concerns about not having been able to evaluate all of the Authority's initial rule proposals in tandem.

The Commission agrees that there may be some benefit for all of the horseracing rules to be reviewed simultaneously once they have been in effect for enough time to provide all stakeholders with an opportunity to evaluate them. Accordingly, the Commission directs the Authority to review all of its existing rules (Racetrack Safety, Assessment Methodology, Enforcement, Registration, and ADMC) and submit any proposed rule modifications to the Commission by September 27, 2023.[14] In addition to satisfying the requirements of 16 C.F.R. §§ 1.140–1.144, the Authority's submissions in support of any proposed rule modification must discuss each of the suggestions made by commenters that the Authority committed to further consider and the reasons that the Authority did or did not adopt the suggestion within the text of the proposed rule modification.[15] In this way, by considering updates to all the rules at once, the Authority, the public, and the Commission will be able to evaluate

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[14] This directive supersedes the Commission's directive to the Authority in its Racetrack Safety Order regarding the simultaneous re-evaluation of only Racetrack Safety and Assessment Methodology. *See* Fed. Trade Comm'n, Order Approving Racetrack Safety Rule Proposed by Horseracing Integrity & Safety Auth. 8 & n.26 (Mar. 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf.

[15] If the Authority has no changes that it wants to propose to a given rule, it shall so state in a letter to the Secretary of the Commission that explains the reasons why it does not believe any changes are necessary.

how the rules interact in practice and to examine both sides of the "cost" and "benefit" ledger at the same time.

a. Rule Series 1000—General Provisions

The substantive proposed rules are supported by the general rules of interpretation (Proposed Rule 1010) and a list of defined terms (Proposed Rule 1020) to assist with clarity of meaning.

1. Rule 1020—Definitions

The Authority proposes a list of definitions to be applied to the Rule Series 3000, 4000, 5000, 6000, 7000, and the Protocol, many of which restated or were based on the Act's definitions.[16] Several proposed definitions elicited comments.

The Oklahoma Horse Racing Commission ("Oklahoma Commission") wonders whether the definition of *Analytical Testing Restriction* would "disincentiviz[e] labs to develop new methodologies for new substances."[17]

The Texas Racing Commission ("Texas Commission") objects that the definition of *Covered Horse* includes a "loophole" by not including young horses

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[16] 15 U.S.C. § 3051.

[17] Cmt. of Okla. Horse Racing Comm'n 1 ("Okla. Comm'n Cmt.") (Feb. 7, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0068. The ADMC proposed rule defines *Analytical Testing Restriction* to mean "a restriction on a Laboratory's application of specified Analytical Testing Procedure(s) or on the analysis of a particular class(es) of Prohibited Substances or Prohibited Methods to Samples, as determined by the Agency." Notice, 88 Fed. Reg. at 5085 (Proposed Rule 1020).

marketed at horse sales that have been the subject of "the rampant use and anabolic effects of beta-agonists, such as albuterol and clenbuterol."[18]

The Kentucky Horse Racing Commission ("Kentucky Commission") remarks that the definition of *Covered Persons* includes breeders (like other specified persons) only if they are licensed by state boards or commissions, and that therefore no Kentucky breeder will be a *Covered Person* under the Act because the Kentucky Commission does not license breeders.[19]

The Oklahoma Commission states that the definition of *Decision Limit* should "be based on objective science of substance testing and findings reported of Laboratories [because] [s]ubjective decision limits will

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[18] Cmt. of Tex. Racing Comm'n 1 ("Tex. Comm'n Cmt.") (Feb. 9, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0099. *Covered Horse* is defined as "any Thoroughbred horse, or any other horse made subject to the Act by election of the applicable State Racing Commission or the breed governing organization for such horse under section 3054(*l*), during the period: (A) beginning on the date of the horse's first Timed and Reported Workout at a Racetrack that participates in Covered Horseraces or at a training facility; and (B) ending on the date on which the horse is deemed retired pursuant to Rule 3050(b)." Notice, 88 Fed. Reg. at 5085 (Proposed Rule 1020).

[19] Cmt. of Ky. Horse Racing Comm'n 1 ("Ky. Comm'n Cmt.") (Feb. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0089. *Covered Person* is defined as "all Trainers, Owners, Breeders, Jockeys, Racetracks, Veterinarians, Persons licensed by a State Racing Commission, and the agents, assigns, and employees of such Persons; any other Persons required to be registered with the Authority; and any other horse support personnel who are engaged in the care, treatment, training, or racing of Covered Horses." Notice, 88 Fed. Reg. at 5085 (Proposed Rule 1020).

have less uniformity and effect [sic] testing program integrity."[20]

The Oklahoma Commission complains about the described sample size in formulating the *Detection Time* because "[u]sing small groups may have higher variability on confidence of data results."[21]

The Oklahoma Commission remarks that the *Screening Limit* "must be based on objective science and data."[22]

The Authority responds to each of these comments by reference to the statutory definition of the pertinent term or by demonstrating that its definition is proper. Regarding the Texas Commission's comment about "loopholes" from the definition of *Covered Horse* for young horses drugged with beta-agonists, the Authority cites the statutory definition in 15 U.S.C.

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[20] *See* Okla. Comm'n Cmt. 1. The proposed rule defines *Decision Limit* to mean "the value of the result for a Threshold Substance in a Sample, above which an Adverse Analytical Finding shall be reported." Notice, 88 Fed. Reg. at 5086 (Proposed Rule 1020).

[21] *Id*. at 1. *Detection Time* is defined, in relevant part, as "the interval after a medication is administered during which it is detectable in a specific matrix (serum, plasma, urine, or hair) from any member(s) of a group of test horses. Detection times are determined from analysis of samples collected at specific time points following an administration of a medication to group of, potentially as few as 2, test horses." Notice, 88 Fed. Reg at 5086 (Proposed Rule 1020).

[22] *Id. Screening Limit* is defined, in relevant part, as "a concentration to be used by Laboratories when screening for certain Non-Threshold Substances during the Initial Testing Procedure, below which a Laboratory will not pursue the possible presence of a Prohibited Substance." Notice, 88 Fed. Reg. at 5090 (Proposed Rule 1020).

§ 3051(4) and states that it lacked the power to alter the definition of *Covered Horse*.[23] The Authority defends its definitions of *Decision Limit* and *Screening Limit* (neither of which is defined in the Act) as based on objective scientific grounds. The *Decision Limit* is arrived at by determining the limit from the threshold level for a substance and then adding "the laboratory's Measurement of Uncertainty, which is the statistically determined maximum range of variation in results when testing for that substance."[24] The Authority's "Screening Limits for substances having legitimate therapeutic use in the ethical care of race horses" are informed by the limits "developed by the European Horseracing Scientific Liaison Committee, compris[ing] scientists and veterinary specialists, using data from administration studies and applying a statistical method to determine" the amount of a substance.[25] Likewise, the *Screening Limit* "for environmental or dietary substances is determined by using extensive and diverse population surveys that take into account agricultural and animal husbandry practices."[26] In the same fashion, the Authority's *Detection Time* is derived from published studies showing the number of horses participating in a given study. The Responsible Person (*i.e.*, the trainer or, in the absence of a trainer, the owner, who is strictly liable for rule infractions) can determine a withdrawal interval greater than the Detection Time and "can consider the

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[23] Authority's Response at 30–31.

[24] *Id*. at 23.

[25] *Id.* at 23–24.

[26] *Id.* at 24.

size of the study group and adjust their withdrawal interval determination accordingly."[27]

The Commission finds that the ADMC proposed rule's definitions are consistent with the Act, either because the definition at issue is in the Act itself or because those terms not defined in the Act show no apparent inconsistency with any requirement in the Act. Generally, the fact that a definition could be sharper or clearer is unlikely to support a finding that the definition is in conflict with the Act.

If the Commission were presented with information that persuaded it that a rejected alternative was necessary to further the purposes of the Act, it could issue its own rule modification under 15 U.S.C. § 3053(e). No such showing was made to the Commission, but the Commission welcomes any proposed rule modifications that might refine or improve existing definitions as well as any other definitions that experience shows to be inadequate.

Regarding the challenges by the Oklahoma Commission to several definitions that are not statutorily provided, the Commission concludes that the Authority's definitions are fully consistent with the Authority's statutory responsibility to (1) develop a horseracing ADMC program providing that "covered horses should compete only when they are free from the influence of medications [and] other foreign substances . . . that affect their performance"[28] and (2) issue rules that implement uniform standards for "the administration of medication to covered horses by covered

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[27] *Id*. at 25–26.

[28] 15 U.S.C. § 3055(b)(1).

persons" and "laboratory testing accreditation and protocols."[29]

As for the Kentucky Commission's comment about no Kentucky breeder being able to become a *Covered Person* under the Act, that complaint is addressed by the Act itself, which provides that breeders (and other racing professionals) "licensed by a State racing commission" are considered a *Covered Person*. *See* 15 U.S.C. § 3051(6). Under the Act, Kentucky can cause Kentucky breeders to become *Covered Persons* by requiring breeders to register with the Kentucky Commission.

As for the Texas Commission's criticism that young horses may be drugged before being sold and becoming protected as a *Covered Horse* under the Act, the Authority correctly notes that its definition is based on the definition in 15 U.S.C. § 3051(4), which provides that a thoroughbred's protected status begins when the horse has its first timed and reported workout at a participating racetrack. If a young horse were found to have albuterol or clenbuterol in its system when first tested after the sale, it would likely not be able to race. The horse, however, might not be barred from racing if the substances were prescribed as allowed under two exceptions in Proposed Rule 4111. Albuterol may be prescribed by a veterinarian as a bronchodilator under Proposed Rule 4111(a). And clenbuterol may be used "when prescribed by a veterinarian . . . for a duration not to exceed 30 days in a 6-month period," although a horse that has been so medicated is placed on the Veterinarians' List and

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[29] *Id.* § 3055(c)(1)(A).

ineligible to participate in any timed workout or covered horserace until urine and blood samples have been found to be free of clenbuterol (or its metabolites or markers).[30]

b. Rule Series 3000—Equine Anti-Doping and Controlled Medication Protocol

In Rule Series 3000, the Authority proposes to establish an Equine ADMC Protocol as part of the Act's mandate that the Authority establish a uniform ADMC program to improve the integrity and safety of horseracing in the United States.

1. Rules 3010–3090—Purpose Scope, and Organization

In Proposed Rule 3010, the Authority proposes the framework for the Protocol, which implements the Act's anti-doping principles and contains or incorporates by reference rules, standards, and procedures to improve and protect the integrity and safety of horseracing in the United States by deterring and penalizing the improper administration or application of Prohibited Substances and Prohibited Methods to Covered Horses. *See* 15 U.S.C. § 3055(b). The Protocol will be implemented and enforced by the Agency and (where so agreed) by state racing commissions acting under delegated authority. Proposed Rule 3020 implements the Act's requirements that the Protocol apply to all Covered Horses, Covered Persons, and Covered Horseraces, *id*. § 3055(a)(1), and that Covered Persons must register with the Authority, *id*. § 3054. Other proposed rule provisions govern the liability of Responsible Persons (Proposed Rule 3030), the responsibilities of Covered Persons (Proposed

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[30] Notice, 88 Fed. Reg. at 5122 (Proposed Rule 4111(b)).

Rule 3040), the retirement of Covered Persons and Covered Horses (Proposed Rule 3050), the procedure for horses that test positive for an ADMC violation following a claiming race in which the horse is claimed (Proposed Rule 3060), procedures for amending and interpreting the Protocol (Proposed Rule 3070), the applicability of the Protocol during the transition to its implementation (Proposed Rule 3080), and limitations periods applicable to rule violations (Proposed Rule 3090).

The Texas Commission challenges Proposed Rule 3010(e)–(f) for permitting certain acts to be conducted by the "Agency," or "empower[ing] the Agency," when in the Texas Commission's view "the Act only empowers the 'Authority,' and allows the Authority to create the Agency, but . . . does not relieve the Authority of its intended responsibilities."[31] The Oklahoma Commission asks whether Proposed Rule 3070's statement about considering the World Anti-Doping Code and related international codes and case law in adjudications should also appear in Proposed Rule 3040(b), which imposes liability on the Responsible Person for violating those codes and standards.[32] The Kentucky Commission points out a conflict between the void-claim provisions in Proposed Rule 3060 and existing Rule 2262—a conflict that is said to arise from the fact that there are more conditions imposed in Rule 2262 than in Proposed Rule 3060 for a claimant who wants to keep a claimed horse even if the horse tests positive after a race.[33]

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[31] Tex. Comm'n Cmt. at 2.

[32] Okla. Comm'n Cmt. at 3.

[33] Ky. Comm'n Cmt. at 1.

The Oklahoma Commission complains that, under Proposed Rule 3040(b)(3), the Responsible Person would become strictly liable for the improper use of medications detrimental to the horse or for the administration of a banned substance or method, that the proposed rule would require additional personnel to ensure due diligence, and that a "significant financial, operational, and logistical burden will be added to daily training costs for the owner."[34] Dr. John Sivick (adopting the template from NAARV) complains about "[t]he regulation's inclusion of unregistered persons under the jurisdiction of the Authority, simply because they come in contact with Covered Horses" and mentions "colleagues who have been asked to examine and/or treat a horse that is not physically on the racetrack, but nonetheless requires veterinary attention."[35] K. Myrick makes the same complaint, using nearly identical language.[36] And Dr. Clara Fenger repeats the complaint about Proposed Rule 3020(b) as "plac[ing] people who are unwittingly treating and caring for Covered Horses in the position of being subject to HISA regulations and penalties."[37]

The Authority responds that it was aware that the void-claim rules differed between Rule 2262 and Proposed Rule 3060, but it states that the solution was

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[34] Okla. Comm'n. Cmt. at 2.

[35] Cmt. of Dr. John Sivick (Feb. 7, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0065.

[36] Cmt. of K. Myrick at 2.

[37] Cmt. of Dr. Clara Fenger 1 ("Second Fenger Cmt.") (Feb. 6, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0072.

already found in its rules.[38] More specifically, if the ADMC proposed rule is approved, "Rule 3060 will supersede the parallel provisions in Rule 2262"—a supersession that stems from language in Rule 3070(c) providing that "[i]n the event of any conflict between the Protocol and any other rules, . . . the Protocol shall prevail."[39] The Authority characterizes Dr. Sivick's complaint (and Dr. Fenger's similar point) as concerning "unregistered veterinarians who have no direct contact with horse racing and are unfamiliar with the Authority's rules [becoming] unfairly punished for violations pertaining to the provision of veterinary care to Covered Horses."[40] In response, the Authority notes that Proposed Rule 3040(b)(4) obligates the Responsible Person to inform all covered persons, including veterinarians, of their "respective obligations under the Protocol" and "to adequately supervise them."[41] The Authority does not respond to the Oklahoma Commission's complaint about Proposed Rule 3040(b)(3) or to the Texas Commission's complaint about Proposed Rule 3010(e)–(f).

The Commission finds that Proposed Rules 3010–3090, which lay out the purpose, scope, and organization of the Protocol, are consistent with the Act. The provisions of Proposed Rule 3010 closely track the statutory language of 15 U.S.C. § 3055(b). As for the conflict between Rule 2262 and Proposed Rule 3060 regarding void claims, the Authority provides a cogent explanation for how Proposed Rule 3060 would supersede Rule 2262 through the preemption terms in

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[38] Authority's Response at 21–22.

[39] *Id.* at 22.

[40] *Id*. at 3.

[41] *Id.* at 3–4.

Proposed Rule 3070(c). Nonetheless, although that reasoning is correct, it is also complex, and the Commission recommends that the Authority consider submitting a proposed modification to Rule 2262 to increase clarity.

The Commission also finds that Proposed Rule 3010(e)–(f) is consistent with the Act. Contrary to the Texas Commission's contentions, the Act expressly provides the Agency with multiple duties and powers, including to serve as the ADMC "enforcement agency" to "implement[ ]" the ADMC program on behalf of the Authority, to ensure that covered horses and persons are deterred from violating the ADMC rules, and to implement the anti-doping "testing, compliance, and adjudication program." 15 U.S.C. § 3054(e)(1)(E). Further, under 15 U.S.C. § 3055(c)(4), the Agency is given additional responsibilities, including participating in developing the ADMC proposed rule; overseeing ADMC results management, the sample collection process, and substance testing; and accrediting testing laboratories. It was the Act (not the Authority) that specified the roles of the Agency, and nothing in those statutory provisions relieves the Authority of its own statutory responsibilities.

The Commission concludes that Proposed Rule 3040 governing Covered Persons is consistent with the Act. The rule requires any Covered Person (including veterinarians) to register with the Authority and imposes affirmative obligations on the person to know, comply with, and be bound by the Protocol and relevant rules at all times. Further, it requires the Responsible Person to ensure that veterinarians (like any Covered Person) are made aware of their responsibilities under the Protocol. Those duties and

obligations are consistent with—indeed, mandated by—the Act under 15 U.S.C. § 3054(d).

As for the Kentucky Commission's complaints about Proposed Rule 3040(b)(3), it does appear that, because there is no knowledge requirement, the provision imposes strict liability on the Responsible Person to ensure that no improper medications or methods (including banned substances or methods) are administered. These obligations are consistent with Proposed Rule 3030(a), which imposes personal liability on the Responsible Person for his or her Covered Horse regardless of knowledge or intent. Most important, the Kentucky Commission does not point to any inconsistency between Proposed Rule 3040(b)(3) and the Act. Indeed, strict liability for certain infractions under Proposed Rule 3040(b)(3) is consistent with the strict liability sanctions imposed on trainers under 15 U.S.C. § 3057(a)(2)(A) for, among other things, the presence of a prohibited substance in a horse.

Finally, as for the Oklahoma Commission's point about adding into Proposed Rule 3040(b) that adjudicators can consider the World Anti-Doping Code Program, the Commission does not believe that there is a need to do so because Propose Rule 3070(d) already states that the Code Program may be considered when adjudicating cases.

The Commission welcomes future proposed rule modifications that the Authority decides to submit in response to the useful comment from the Kentucky Commission about the void-claims rule conflict and any other useful comments received.

2. Rules 3110–3140—Prohibited List, Rules of Proof, and Testing and Investigations

Proposed Rule 3111 describes the Prohibited List, which identifies Prohibited Substances and Prohibited Methods that include both (a) Banned Substances and Banned Methods that are always prohibited as well as (b) Controlled Substances and Controlled Medication Methods that are prohibited only during the Race Period. The Prohibited List is supplemented by the "Technical Document—Prohibited Substances," which provides further guidance on the Prohibited Substances. Proposed Rules 3121–3122 place the burden on the Agency to prove a violation of the Protocol "to the comfortable satisfaction of the hearing panel" based on facts "established by any reliable means."[42] Proposed Rules 3132–3137 give the Agency broad authority to test Covered Horses, both in and out of competition, mainly to detect the presence of Prohibited Substances. Third parties may request that the Agency conduct enhanced or additional testing, which the Agency may accept or decline in its discretion. Proposed Rule 3140 permits clearance testing (*i.e.*, a request to determine if controlled medication substances have cleared the horse's system) by a laboratory if, before such testing, (1) the Agency approves such request and (2) the Covered Person pays the costs for sample collection and analysis. Further, the Agency may pursue any violation of the Protocol based on the results of such testing.

The Kentucky Horsemen argue that "the burdens of proof and presumptions in proposed Rules 3121 and 3122(a), (b), and (c) create a significant (if not insurmountable) hurdle for an accused violator of the

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[42] Notice, 88 Fed. Reg. at 5054 (Proposed Rules 3121–3122).

[ADMC] rules who seeks to defend him or herself" and that "adequate due process" requires that the "accused *must be afforded* an *unconditional* opportunity to proffer oral and written evidence and other submissions in a full-on arbitral hearing."[43] Along similar lines, the Oklahoma Commission contends that the presumptions in Proposed Rule 3132(a) will "relieve a party from having to actually prove the truth of the fact being presumed [and] may negatively affect integrity of [the Horseracing Integrity & Welfare Unit] testing program."[44] The National Horsemen ask whether, in providing that decisions arising from Proposed Rule 3113 ("Validity of the Prohibited List and Related Technical Documents") "shall not be subject to any challenge," that proposed rule "implies that no mitigating circumstances [will] be allowed."[45] The National Horsemen further argue that "[n]ot allowing any challenges to analytical methods, screening limits, decision limits and assuming [that those] are scientifically valid is simply wrong" because "[i]f these methods and limits are scientifically valid, they will stand up to legal challenges" and "if they are scientifically flawed then a horseman should not be held responsible for meeting them and they should be allowed to be challenged and subsequently changed."[46] Dr. Fenger likewise complains that "[t]he Prohibited List includes many substances with appropriate use during the out-of-competition period," which the

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[43] Second Ky. Horsemen Cmt. at 14 (emphasis in original).

[44] Okla. Comm'n Cmt. at 3.

[45] First and Second Nat'l Horsemen Cmts. at 40.

[46] *Id*.

covered person cannot challenge under Proposed Rule 3113.[47]

As to Proposed Rule 3132(e), which states that "[a]ny sample collected following a Vets' List workout constitutes a post-race sample, and, as a result is subject to all of the same requirements that apply to [a] sample collection at covered horseraces," the Kentucky Commission asks whether this provision requires that "post-workout samples will be tested for furosemide (Lasix)."[48] It also contends that post-workout samples should not be considered post-race samples because "[r]etaining the horse on the Vets' List following a post-workout positive is sufficient incentive for trainers and vets to avoid administering inappropriate medications to horses during that period."[49]

On the other hand, the Animal Welfare Institute ("AWI") emphasizes its "strong[ ] support [for] a robust out-of-competition testing program" under Proposed Rule 3132 "in order to better identify bad actors and create an effective deterrent against committing violations." The United States, according to AWI, presently has a dismal record for "out-of-competition testing rates among countries with thoroughbred racing."[50]

Regarding Proposed Rule 3140, one commenter urges the removal of Clearance Testing from the

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[47] Second Fenger Cmt. at 1.

[48] Ky. Comm'n Cmt. at 1.

[49] *Id.*

[50] *Id*.

ADMC proposed rule, positing that this provision would allow a trainer to be punished for simply trying to comply with the rules. For example, a horse may come to a trainer from another source with whom the horse "may have accidently [sic] been exposed to a controlled medication" and the trainer is trying in good faith "to verify that [the substance] is no longer showing in the horse's system."[51] The Kentucky Commission states that it was given assurances in earlier negotiations with the Authority that, under Proposed Rule 3140, the *Agency* would pay for post-race sample testing of claimed horses, but the proposed rule instead lays the costs on the Covered Person.[52]

The Authority states that Proposed Rule 3122 "adopts the same approach" with respect to presumptions "as set out under the World Anti-Doping Code," and that "[p]resumptions are common in federal and state law and may be rebutted."[53] Regarding Proposed Rule 3140, the Authority states that the purpose of clearance testing is to afford a trainer the ability to verify in advance, through drug testing, that a horse that has been following a course of prescribed medication can be entered into a race.[54] The Authority responds to the Kentucky Commission's question regarding whether Proposed Rule 3132(e) requires post-workout samples to be tested for Lasix by noting that Proposed Rule 4212(d) allows the use of Lasix "during

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[51] Cmt. of Jim Roberts (Jan. 31, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0020.

[52] Ky. Comm'n Cmt. at 1.

[53] Authority's Response at 24.

[54] *Id.* at 19.

Timed and Reported Workouts and Vet's List Workouts."[55]

The Commission finds that Proposed Rules 3110–3140 are consistent with the Act. Although the Kentucky Horsemen complain about the burden of proof and presumptions in Proposed Rules 3121 and 3122, the Agency retains the initial burden of establishing that a violation occurred and for that must satisfy a heightened standard of proof: "comfortable satisfaction of the hearing panel," which is higher than the "preponderance of the evidence" standard.[56] By contrast, the opposing party's showing on rebuttal is subject to the lower preponderance standard.[57] The Oklahoma Commission's assertion that presumptions "relieve the party from having to actually prove the truth of the fact being presumed" ignores that the same approach is applied under the World Anti-Doping Code, which the Act (15 U.S.C. § 3055(g)(2)(A)(ii)) requires to be considered. Further, the accused person can rebut the presumption by showing "that a departure from the Laboratory Standards occurred that could reasonably have caused the Adverse Analytical Finding."[58]

The Commission also finds that Proposed Rule 3140 governing Clearance Testing is consistent with the Act. In particular, in developing the ADMC program, the Authority must consider that "[c]overed horses should compete only when they are free from the influence of medications [and] other foreign

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[55] *Id.* at 19–20.

[56] Notice, 88 Fed. Reg. at 5097 (Proposed Rule 3121(a)).

[57] *Id*. (Proposed Rule 3121(b)).

[58] *Id.* (Proposed Rule 3122(c)).

substances, . . . that affect their performance." 15 U.S.C. § 3055(b)(1). Clearance testing is one way to ensure compliance with § 3055(b)(1) and allows trainers to use a process to confirm that no banned substances are present in the horse so that it is safe for the horse to participate in races again.

Likewise, the Commission finds that Proposed Rule 3132 ("Authority to Test") is consistent with the Act. The Commission agrees with the comment from the AWI about the long-overdue need for "out-of-competition testing" that Proposed Rule 3132 would provide. With respect to the Kentucky Commission's inquiry about whether Proposed Rule 3132(e) requires testing for Lasix in a post–Vets' List workout sample, the Authority reasonably observes that Proposed Rule 4212(d) allows such use. Regarding the Kentucky Commission's suggestion that post–Vets' List workout samples not be considered post-race samples, it appears that the sampling conducted under Proposed Rule 3132(e) is done at the affirmative request of the Responsible Person to release a horse from the Vets' List so that the horse may enter races again.[59] Thus, the Commission believes that it is entirely appropriate to require a sample collection to be tested like a post-race sample to ensure that the horse enters the race period free of any banned or controlled substances. Furthermore, the Commission notes that Proposed Rule 3132(e) states only that the horse "*may* be required to submit to [a] sample collection," and thus does not require sampling in every instance. As for the Kentucky Commission's question about

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[59] Proposed Rule 3132h(e) states in relevant part that "a Covered Horse may be required to submit to Sample collection (at the Owner's cost) following a Vets' List Workout in order to be released from the Veterinarians' List." Notice, 88 Fed. Reg. at 5098.

imposing costs on the owner for Clearance Testing, it seems entirely reasonable to impose such costs on the party asking for the test's benefit—in this instance, the trainer, who is asking for Clearance Testing as a means to reenter her horse in races.

3. Rules 3210–3260—Equine Anti-Doping Rules

In Proposed Rules 3211–3231, the Authority proposes a list of civil sanctions for Anti-Doping rule violations. Proposed Rules 3212–3214 impose violations for the use, attempted use, possession, trafficking, or administration of Banned Substances or Banned Methods to a Covered Horse, and they impose strict liability on the Responsible Person when a Banned Substance is found in a Covered Horse. Proposed Rules 3215–3216 impose sanctions for refusing or failing to submit a Covered Horse to a sample collection, tampering with doping control, complicity in another person's violation, associating with a person who is banned, and witness intimidation and retaliation against whistleblowers. Proposed Rule 3221 requires the automatic disqualification of a Covered Horse's results if the violation arises from a post-race sample or occurs during the race period and may also disqualify subsequent results. Proposed Rules 3222 and 3229 mandate that, in presence or use cases, the Covered Horse will be ineligible to race for a period designated in the Prohibited List for the particular Banned Substance detected but will remain subject to testing. Proposed Rules 3223–3229 impose sanctions on Covered Persons that include periods of ineligibility and fines based on the nature of the violation but that allow for a downward adjustment of the sanction when no fault or negligence has been shown, when the Covered Person provides assistance to the investigating body, or when the Covered Person admits to the

violation early. Conversely, a sanction can be increased when aggravating circumstances are present or a repeat offense is involved. Proposed Rules 3241–3246 involve analysis and notification of test results when there is evidence of an Anti-Doping rule violation. Proposed Rule 3248 allows a Covered Person to respond to a letter charging a rule violation, and Proposed Rules 3261 and 3264 entitle the Covered Person to have the charge determined by impartial arbitrators, whose final decision is subject to review pursuant to 15 U.S.C. § 3058.

With respect to Proposed Rule 3221(b), the National Horsemen contend that results from subsequent races should not be automatically disqualified when a Covered Horse is claimed from the race in which the Anti-Doping violation occurred, ownership changes, and the horse subsequently races for the new owner.[60] The National Horsemen also ask why a Covered Person who unintentionally fails to submit a sample should be subject to an automatic 2-year period of ineligibility.[61] Finally, they take the position that the requirement in Proposed Rule 3224 that a Covered Person establish how the prohibited substance entered the Covered Horse's system is too stringent.[62] Dr. Fenger similarly criticizes Proposed Rule 3224 for requiring the "Horse person to identify the source of the Specified Substance" in order to be found free of fault because, "by the time that a positive is called"—potentially "years after the race,"

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[60] First Nat'l Horsemen Cmt. at 47 (margin notes).

[61] *Id.*

[62] *Id.*

according to Dr. Fenger—there is no hay, feed, or supplement left to test, and employees may have moved on.[63]

The Authority provided no response to these comments.

The Commission finds that Proposed Rules 3321–3324 are consistent with the Act. The severe sanction of automatic disqualification for the presence of a banned substance is mandated by the Act, which imposes strict liability on covered trainers for the presence of a prohibited substance in a covered horse. *See* 15 U.S.C. § 3057(a)(2)(A). Thus, Banned Substances are prohibited *at all times* irrespective of the reason why the Banned Substance was present and regardless of any degree of fault on the part of the Covered Person.[64] As for the National Horsemen's comment that there should not be a continuing disqualification for racing results when the horse changes ownership and races for the new owners, Proposed Rule 3221(b)(2) provides just that relief.[65] Regarding the National Horsemen's question about why a Covered Person who unintentionally failed to submit a sample should be subject to an automatic 2-year period of ineligibility, the rules permit any ineligibility period to be reduced or eliminated when the trainer can show

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[63] First Fenger Cmt. at 2.

[64] *See* Notice, 88 Fed. Reg. at 5100–01 (Proposed Rule 3221(a)).

[65] The provision states that if "the Anti-Doping Rule Violation occurs in relation to a Claiming Race in which the Covered Horse is claimed," Proposed Rule 3221(b)(1) (disqualifying further results from the covered horse) "shall not apply to any results obtained by the Covered Horse under the new ownership." Notice, 88 Fed. Reg. at 5101.

that he or she bears no fault or negligence.[66] The applicable Authority rules are modeled on those of the World Anti-Doping Code, which is one of the sources of the baseline ADMC rules identified in the Act. *See* 15 U.S.C. § 3055(g)(2)(A)(ii).

4. Rules 3310–3360—Equine Controlled Medication Rules

In Proposed Rules 3312–3316, the Authority proposes a list of sanctionable violations of the Equine Controlled Medication Rules for conduct involving medication substances and methods. Proposed Rules 3313 and 3315 prohibit the use, attempted use, possession, or administration of Controlled Medication Substances or Controlled Medication Methods to a Covered Horse during the Race Period. Proposed Rules 3315–3316 bar a Covered Person from being complicit in another person's violation or from tampering with medication control. Other violations include the presence of a Controlled Medication Substance in a sample collected from a Covered Horse (Proposed Rule 3312) or the use of a Controlled Medication Substance unjustified by the horse's medical condition or other criteria (Proposed Rule 3314). Strict liability is imposed in Proposed Rules 3312–3314 for presence and use violations. Proposed Rule 3321 automatically disqualifies racing results (but not subsequent results) when the violation is based on a post-race sample or occurs during the Race Period, and irrespective of the reason why the substance was detected or of any degree of fault. Proposed Rule 3322 states that if a violation is based on a Controlled Medication Substance, horses will be race eligible, but if

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[66] *See* Notice, 88 Fed. Reg. at 5075 (Proposed Rules 3223(b), 3224, 3225).

there is a Controlled Medication Method violation, the horse may be ineligible to race. Proposed Rules 3323–3328 and 3331 impose sanctions (*i.e.*, periods of ineligibility, disqualification of results, fines, legal costs, and public disclosure of violation information) on Covered Persons for a rule violation. Those proposed rules allow for the elimination or reduction of the ineligibility period when there is no or little fault or negligence or if the Covered Person has provided investigative assistance—and, conversely, provide for an increase in the ineligibility period where a repeat offense or aggravating circumstances are involved. Proposed Rule 3328 imposes a penalty point system for repeat offenders that may result in additional periods of ineligibility.

Proposed Rules 3341–3346 provide for the analysis of test results when there is evidence of a rule violation and require that the Covered Person be notified of a possible violation and be allowed to provide an explanation, to take an action that might reduce any sanction, or to resolve the matter without a hearing. Proposed Rule 3348 sets forth information that must be provided in a charge letter and allows the Covered Person to respond to the charges. Proposed Rules 3361–3364 entitle the Covered Person to have charges determined by a panel of impartial arbitrators, with or without a hearing, whose final decision is subject to review pursuant to 15 U.S.C. § 3058.

The Oklahoma Commission comments that, although Proposed Rule 3322(a) states "[t]here shall be no period of Ineligibility for Covered Horses implicated in violations involving only Controlled Medication Substances," the "[r]egulatory veterinarian should have discretion to place [the] horse on [the] veterinarians' list" anyway because "NSAIDs and

corticosteroids may impact [the] welfare status of the racehorse."[67] The Oklahoma Commission makes the same point about Provisional Suspensions under Proposed Rule 3347(a).[68]

The Authority responds that "[h]orses will not be suspended" automatically due to "the detection of a Controlled Medication Substance" but that the Regulatory Veterinarian may place the horse "on the Vets' List to verify its fitness to race if warranted" in the Regulatory Veterinarian's opinion.[69]

The Commission finds that Proposed Rules 3310–3360 are consistent with the Act, which requires the Authority, in developing the ADMC program, to consider that horses that are injured or unsound should not train or participate in races.[70] Section 3054(a) requires the Commission, the Authority, and the Agency to exercise authority over "the safety, welfare and integrity of covered horses."[71] Regarding Proposed Rules 3332 and 3347, the Act requires the ADMC rules to provide "adequate due process . . . commensurate with the seriousness of the alleged . . . [ADMC] rule violation and the possible civil sanctions for such violation." 15 U.S.C. § 3057(c)(3). The Act therefore allows for more lenient sanctions for controlled-medication rule violations than for banned-substance violations, thereby excusing the horse found in violation of only a controlled-medication rule from an imposed period of ineligibility. But, at the same time, a Regulatory

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[67] Okla. Comm'n Cmt. at 3.

[68] *Id.* at 4.

[69] Authority's Response at 26.

[70] *See* 15 U.S.C. § 3055(b)(1).

[71] *See id*. § 3054(a)(2)(A).

Veterinarian may place the horse on the Vets' List if, in her medical judgment, doing so would be beneficial to the horse's health and wellbeing.

5. Rules 3500–3800—Other Violations and General Procedure/Administration

Proposed Rule 3510 sets forth additional disciplinary offenses that fall outside the ADMC Rules, such as engaging in disruptive or offensive conduct toward anti-doping or medication-control personnel, refusing or failing to cooperate with the Authority or the Agency, or failing to provide information necessary to locate a Covered Horse for testing (a "Whereabouts Failure"). In Proposed Rule 3520, the Authority proposes sanctions (periods of ineligibility and fines) for those violations. Proposed Rules 3610–3630 provide guidelines for confidentiality and public reporting of decisions. In Proposed Rule 3710, the Authority proposes to provide for the recognition of final decisions issued pursuant to the Equine ADMC Protocol and for the decisions issued by recognized, official third parties (for example, national horseracing authorities in other countries applying substantially similar rules). Proposed Rule 3810 requires the Agency to institute educational programs regarding responsible medication use and doping-free horseracing.

No comments address these provisions. The Authority accordingly provides no response.

The Commission finds that it is consistent with the Act and will further the Act's purposes to impose additional disciplinary measures for offenses that adversely affect the activities of the Agency or the Authority. The same is true of the proposed rule provisions concerning confidentiality, recognition of final decisions, and the initiation of educational programs

that teach responsible medication treatment of horses: All of those proposed rules are consistent with the Act.

c. Rule Series 4000—Prohibited List

As described in Proposed Rule 4010, Rule Series 4000 contains provisions governing the Prohibited List, through which the Authority proposes to identify prohibited substances and methods, including substances and methods that are prohibited at all times ("Banned Substances and Banned Methods") and those that are generally prohibited for a more limited time during the race period and in a post-race or post-work sample ("Controlled Medication Substances and Controlled Medication Methods"). The Prohibited List is supplemented by the "Technical Document—Prohibited Substances," which provides guidance on substances falling into general categories on the list. The Technical Document also designates "as Specified Substances," certain "Prohibited Substances . . . that pose a higher risk of being the result of contamination and, therefore, are subject to more flexible sanctions."[72] Proposed Rule 4010 further explains how "certain Prohibited Substances might also first be reported as Atypical Findings requiring further investigation before being declared as Adverse Analytical Findings, in accordance with the Atypical Findings Policy."[73]

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[72] Notice, 88 Fed. Reg. at 5121.

[73] *See id.* at 5121–22 (Protocol, Appendix 1).

Notwithstanding the definition of Specified Substances described above (and elsewhere in the rules),[74] the National Horsemen maintain that there is no definition for the term and "strongly recommend" that the Authority adopt the definition used by the Fédération Équestre Internationale: "substances which are more likely to have been ingested by Horses for a purpose other than the enhancement of sport performance, for example, through a contaminated food substance." The National Horsemen express concerns that the source of a positive result—*e.g.*, hay or feed—might not become known until weeks after the substance is consumed, thereby diminishing the mitigating impact that might otherwise arise from identification of such a source.[75] They also recommend that the Authority remove all endogenous substances from the S0 Non-Approved Substances" substances category, "since these would be expected to be present at some level in all animals," and that the Authority "adopt science-based screening limits for endogenous substances in order to prevent inappropriate penalties."[76]

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[74] Proposed Rule 1020 (definitions) states that *Specified Substance* has the meaning given to it in Proposed Rule 3111(c), which states that "Specified Substances . . . are those that pose a higher risk of being the result of contamination and, therefore, are subject to more flexible sanctions." *Id.* at 5074. *See also id.* at 5077 (Proposed Rule 4010) (providing same definition).

[75] First Nat'l Horsemen Cmt. at 14 (first page of "Review of Endogenous and Dietary Substances" section).

[76] *Id.* S0 is defined in Proposed Rule 4111 as "[a]ny pharmacological substance that (i) is not addressed by Rules 4112 through 4117, (ii) has no current approval by any governmental regulatory health authority for veterinary or human use, and (iii) is not

With regard to dietary substances, which are those that can be detected in the animal's blood or urine from their natural presence in hay or feed, the National Horsemen observe that not all such substances are associated with screening limits. The National Horsemen urge the Authority "to adopt screening limits for all dietary substances" and note that "[s]ome provisional screening limits can be readily adopted from existing sources."[77]

The National Horsemen also assert that, in view of increased drug-testing sensitivity, a group of substances with similar characteristics (*i.e.*, mostly eliminated in urine, stable in the environment, and readily absorbed by the horse), which it names "Environmental Substances," should be considered Specified Substances and, like others in that category, should be recognized by the ADMC Committee as involving inadvertent environmental transfers that can result in positive tests. They therefore contend that "if such inadvertent environmental transfer—rather than intentional administration—to a horse results in an adverse analytical finding, the trainer and the horse should be eligible only for 'a minimal penalty.'"[78] Because "the source of inadvertent environmental exposure often cannot be identified," the National Horsemen contend that Authority investigations of adverse analytical findings involving such substances should involve standard investigative procedures, including providing potentially exculpatory evidence, and must

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universally recognized by veterinary regulatory authorities as a valid veterinary use, is prohibited at all times."

[77] *Id.*

[78] *Id.*; Second Nat'l Horsemen Cmt. at 20.

be directed to fact finding.[79] The National Horsemen also recommend screening limits consistent with environmental contamination, similar to the limits they recommend for dietary substances.[80]

Dr. John Sivick (following NAARV's template) likewise contends that "the majority of violations will result from [innocent] transfer of random substances from the environment."[81] Dr. Fenger's comment agrees.[82]

Regarding the limits of detection for substances on the Prohibited List, one commenter complains about "appropriate classifications for substances [and] establishing reasonable thresholds which correlate with the ability to affect performance or endanger the welfare of the horse." Of particular concern to this commenter are findings based on limits of detection that (with evolving technology) become an arbitrary "moving target" so that "withdrawal times can change without warning," leading to arbitrary enforcement.[83]

Zach Badura argues that the ADMC proposed rule "would situationally negatively impact the welfare of the racehorse" and recommends continuing the application of state rules, most of which utilize policies

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[79] *Id*. at 20–26.

[80] *Id.*

[81] Sivick Cmt. at 1.

[82] Second Fenger Cmt. at 2.

[83] Cmt. of MaryAnn O'Connell, Exec. Director, Wash. Horsemen Benevolent & Protective Ass'n, at 1 (Feb. 14, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0090.

from the Association of Racing Commissioners International ("ARCI").[84]

The Authority observes that the Act requires the adoption of International Federation of Horseracing Authorities ("IFHA") medication controls,[85] and IFHA publishes thresholds only for endogenous substances and does not provide withdrawal guidelines.[86] The Authority addresses limits of detection in responding to Dr. Andy Roberts[87] and other commenters, noting that requiring laboratories to detect banned substances at the limit of detection is consistent with the approach endorsed by ARCI's Model Rules, which published a limited number of thresholds and provided for other substances to be regulated by the laboratory's limits of detection. Further, as the Authority notes, laboratories do not publish their limits of detection, which helps to prevent manipulation of the system.[88]

With respect to cases involving possible environmental contamination, the Authority refers to its "Atypical Findings Policy,"[89] in which Specified Substances, endogenous substances, and two specific medications can be "investigated first as Atypical Findings before being pursued as Adverse Analytical Findings." The Authority explains that "[i]f it is

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[84] Cmt. of Zach Badura (Feb. 14, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0109.

[85] *See* 15 U.S.C. § 3055(g)(2)(A)(i).

[86] Authority's Response at 8.

[87] *See* Cmt. of Dr. Andy Roberts at 1.

[88] Authority's Response at 21, 23.

[89] *See* Notice, 88 Fed. Reg. at 5120 (Appendix 1 to the Rule 3000 Series).

determined that the presence of the substance in the Covered Horse's system was the result of environmental contamination, the matter will not be pursued as an Adverse Analytical Finding, and the Atypical Finding will not be publicly disclosed."[90]

The Commission commends the Authority for developing and implementing its Atypical Findings Policy; among other things, the policy takes into account the possibility that a preliminary adverse analytical result may have been caused by innocent environmental contamination, in which case sanctions will not result.[91] The Commission finds that provisions that implement the Atypical Findings Policy are consistent with the Act, particularly the Act's sections governing investigations, testing, and results management.[92]

Regarding the National Horsemen's point about screening limits for endogenous and dietary substances, the Authority states that "[t]hresholds are established in the Technical Document . . . for endogenous substances" and "screening limits are established for dietary substances."[93] As for "Environmental Substances," the Authority notes that the Technical Document characterizes Specified Substances

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[90] Authority's Response at 11–12.

[91] *See* Notice, 88 Fed. Reg. at 5096, 5106, 5115, 5120 (Proposed Rules 3111(d), 3243(c), 3343(c), 3620(b)(5)); *see generally id.* at 5120–21.

[92] *See, e.g.*, 15 U.S.C. §§ 3055(c)(4) (results management and investigations), 3055(c)(1)(A)(ii) (uniform standards for laboratory testing protocols).

[93] Authority's Response at 12.

and lists screening limits for environmental substances that are consistent with IFHA Article 6.[94]

The Commission finds that Proposed Rule 4010 is consistent with the Act. The statute requires the Authority to issue "a list of permitted and prohibited medications, substances, and methods."[95] Refinements to the rule suggested by the National Horsemen and other commenters might be considered for future proposed rule modifications, but for purposes of the Commission's current review these constitute mere policy disagreements with the Authority and not any inconsistency with the Act. The Commission also finds that adopting limits of detection and omitting withdrawal times are proper methods to ensure the integrity of testing and are consistent with the Act.[96] Finally, the Commission concurs with the Authority that, with respect to drawing medication policies from the states that use policies of ARCI and the Racing Medication and Testing Consortium ("RMTC"), the Act requires instead the adoption of IFHA medication controls.[97]

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[94] *Id.*

[95] 15 U.S.C. § 3055(c)(1)(B).

[96] *See id.* §§ 3053(a)(3) (laboratory standards for accreditation and protocol), 3055(c)(1)(A)(ii) (Authority obligated to issue rules concerning "uniform standards for . . . laboratory testing accreditation and protocols"), 3057(b)(1)(C) (Authority responsible for issuing by rule "the standards and protocols for testing such samples").

[97] *See id.* § 3055(b)(4), (g)(2)(A).

1. Rule Series 4100—Banned Substances and Banned Methods

In Proposed Rule Series 4100, the Authority identifies from the Prohibited List those substances and methods that are prohibited at all times ("Banned Substances" and "Banned Methods"). Proposed Rules 4111–4117 list six categories of Banned Substances, and Proposed Rules 4121–4123 list three categories of Banned Methods.

The National Horsemen lodge a series of complaints about Rule 4111.[98] They claim that the rule ignores the statutory standards in 15 U.S.C. § 3055(b)(1) in favor of the Authority's own requirement that medications must be FDA-approved before they are taken off the S0 banned-substances list. Put simply, they contend that "no substances with a valid therapeutic use should ever be in the S0 category"[99] and that there is no justification to bar therapeutic medications that are legal but lack FDA approval.[100]

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[98] Proposed Rule 4111 ("S0 Non-approved Substances") states: "Any pharmacological substance that (i) is not addressed by Rules 4112 through 4117 [other categories of banned substances], (ii) has no current approval by any governmental regulatory health authority for veterinary or human use, and (iii) is not universally recognized by veterinary regulatory authorities as a valid veterinary use, is prohibited at all times. For the avoidance of doubt, compounded products compliant with the Animal Medicinal Drug Use Clarification Act (AMDUCA) and the FDA Guidance for Industry (GFI) #256 (also known as Compounding Animal Drugs from Bulk Drug Substances) are not prohibited under this section S0." Notice, 88 Fed. Reg. at 5122.

[99] Nat'l Horsemen Cmt. at 6.

[100] The National Horsemen list these substances in Tables 1a and 1b of their comment.

Dr. Fenger makes the similar point that "[t]he Prohibited List includes many substances with appropriate use during the out-of-competition period" and asserts that "[t]he regulations far exceed their mandate, by regulating therapeutic medications beyond the in-competition period, interfering with the ability of veterinarians to appropriately treat their patients."[101]

The National Horsemen observe that there were several primary metabolites of S7 substances that are included in the S0 list and contend that, if "the S7 substance does not warrant an S0 penalty, then there is no place for its primary metabolites on the S0 list."[102] The National Horsemen also raise concerns about the banning of standard medications required for breeding fillies, as well as anesthesia induction, reversal agents, and long-term tranquilizers used in the post-operation period for horses requiring stall rest.[103] Finally, the National Horsemen complain about imposing a 14-month ineligibility period for using any ADMC medication without a sufficient scientific basis and that doing so could "adversely impact the health and welfare of the horse" by preventing appropriate therapy or by preventing the horse from training because it was "inadvertently administered such a substance."[104] The National Horsemen urge the ADMC committee (1) to consider moving FDA-approved medications or their metabolites from the S0 to the S7 category and (2) to "further reconsider the 14-month

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[101] Second Fenger Cmt. at 1, 2.

[102] Nat'l Horsemen Cmt. at 6.

[103] *Id.* at 2, 6.

[104] *Id*. at 7.

ineligibility period" because "it is inappropriate to include in this S0 category, therapeutic substances whose use is Standard of Veterinary Practice."[105] The National Horsemen provide no scientific support for their assertions.

The Oklahoma Commission recommends adding ammonium sulfate as an S6 miscellaneous substance (from its current S0 classification), because when "[w]hen fed orally" it acts as a "urinary acidifier in horses" and, in compounded injectable form, "may be used as a regional or local anesthetic on horses for race day purposes."[106]

The Authority responds to criticisms regarding its FDA-approval requirement by stating that, if a substance is not legally required to have FDA approval, "then lack of FDA approval does not disqualify it from use."[107] On the other hand, "if a substance meets the FDA criteria for a 'Drug' and it does not have FDA approval, it is a Banned Substance."[108] The Authority further notes that "there are FDA approved medications that have no legitimate use in the horse; therefore, they are designated as Banned Substances," a conclusion it supports.[109] The Authority further notes that the S0 designation can be revised based on a substance's evolving use as recognized by international regulators and veterinary colleges.[110] As for the

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[105] *Id.*

[106] Okla. Comm'n Cmt. at 4.

[107] Authority's Response at 10.

[108] *Id.*

[109] *Id.*

[110] *Id.*

primary metabolites of S7 substances being on the S0 list, the Authority replies that "the Technical Document provides for penalty mitigation when an S0 substance is determined to be present in a sample as a consequence of a documented administration of an S7 substance.[111] Regarding the National Horsemen's complaint about prohibiting the use of standard medications necessary for breeding fillies, the Authority notes the National Horsemen's failure to identify any such medications and states further that medications conventionally used for pregnancy purposes are all classified as S7 substances and therefore permitted for use in fillies and mares under specified conditions. As for the use of anesthesia induction agents, the Authority says that conventional agents have been classified as S7 substances based on advice from veterinary specialists.[112] Regarding the asserted bar on long-term tranquilizers, the Authority replies that several long-term tranquilizers are S7 substances, so veterinarians are able to use those to control horse activity in the peri-operative period.[113] Finally, the Authority disagrees with the National Horsemen's comment about the 14-month ineligibility period, asserting that there simply "is no period of ineligibility" for a horse that was given an S7 controlled substance.[114] As for S0 violations, the Authority agrees that there is an ineligibility period for "up to 14 months" but notes that the prohibited list will be reviewed annually based on science and evolving use.

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[111] *Id.*

[112] *Id.* at 11.

[113] *Id.*

[114] *Id*.

The Commission finds that Proposed Rule 4111 is consistent with the Act. Proposed Rule 4111's ban on S0 substances that have "no current approval by any governmental regulatory health authority for veterinary or human use" or are "not universally recognized by veterinary regulatory authorities as a valid veterinary use" is certainly consistent with the Act's requirement that the medication must "represent[ ] an appropriate component of treatment." 15 U.S.C. § 3055(b)(5). As the Authority states, the designation of a banned substance on the S0 category was based on a robust scientific record that included research findings and input from veterinary specialists and research findings, and these sources informed the Authority's decision to designate a substance in the S0 category due to the health risk it poses to horses.

By contrast, as the Authority points out, the National Horsemen fail to back up many of their claims with scientific evidence. The National Horsemen rely heavily on a provision in the Act that bars medication that "affect[s] [the horse's] performance." 15 U.S.C. § 3055(b)(1). But that phrase is susceptible to different interpretations, and the Authority's determination of banned substances falls comfortably within the scope of § 3055(b)(1). As the Authority points out, the designation of a substance as Banned or Controlled cannot be based solely on individual practitioners' preferences or beliefs that particular therapeutic substances should not be banned or restricted—particularly in the absence of supporting scientific literature.[115] Commenters are incorrect when they assert that the Authority requires FDA approval for a

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[115] *Id.*

substance to be used. As the Authority replies, if a substance is not legally required to have FDA approval, "then lack of FDA approval does not disqualify it from use."[116] Conversely, "there are FDA approved medications that have no legitimate use in the horse; therefore, they are designated as Banned Substances."[117] Such a reading is entirely consistent with the Act.

As for the Oklahoma Commission's suggestion to add ammonium sulfate as an S6 miscellaneous substance, the Authority states that, like other ammonium salts, "[a]mmonium sulfate would fall under category S0 of the Prohibited List" as not approved for any veterinary use and thus banned at all times.[118] The substance "can be added to the Technical Document when it undergoes annual review," says the Authority, but until then remains banned.[119] The Oklahoma Commission's suggestion to reclassify ammonium sulfate as a S6 miscellaneous substance under Proposed Rule 4117 and the Authority's reasoned response that it remains for now an S0 "non-approved substance" under Proposed Rule 4111 might reflect different approaches, but they do not reveal any inconsistency with the Act. The Authority has the power to determine, with the approval of the Commission, what are permitted and prohibited substances

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[116] *Id*. at 10.

[117] *Id*.

[118] *See* Notice, 88 Fed. Reg. at 5127 (Proposed Rule 4111 ("S0 Non-Approved Substances")).

[119] Authority's Response at 26.

and medications.[120] The Authority's current determination to keep ammonium sulfate as an S0 substance falls clearly within its power under the Act.

Finally, the Commission notes the Authority's statement that the Prohibited List is reviewed annually and can be revised based on "new science, evolving trends in medication use, changes to FDA approvals, and input provided by stakeholders and veterinary experts."[121] The Commission encourages the Authority to submit a proposed rule modification as necessary if any of the above developments support changing the classification of a listed drug.

2. Rule Series 4200—Controlled Medication Substances and Controlled Medication Methods and Exceptions

In Proposed Rule Series 4200, the Authority identifies a less restricted group of "controlled medication substances and methods" that are prohibited only for use or administration during the "race period" and prohibited to be present in a post-race or post-work sample. Proposed Rule 4211 governs S7 controlled medication substances and prohibits their use during the race period (essentially 48 hours before a race to one hour after the race). Proposed Rule 4212 provides exceptions to those prohibitions for medical necessity. S7 substances are not otherwise banned outside the race period. As specified in Proposed Rule 4211(a), only feed, hay, and water are permitted during the Race Period. Under Proposed Rule 4212(d), Lasix (also known as furosemide or Salix), a diuretic, (1) is permitted during Timed and Reported Workouts and

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[120] *See* 15 U.S.C. §§ 3055(c)(1)(B), 3055(c)(5).

[121] Authority's Response at 10–11.

Vets' List Workouts and (2) may be administered during the Race Period (in accordance with specific Act provisions and any guidance or exceptions approved by the Authority), but (3) cannot be administered within four hours of a race.[122] This exception thus justifies the Prohibited List's exclusion for the use of furosemide in training exercises.[123]

The AWI comments on Proposed Rule 4212's exceptions to Proposed Rule 4211, particularly with respect to the use of Lasix, noting that the "the negative effects associated with this potent diuretic are well understood . . . as is its use as a performance-enhancing substance."[124] The AWI notes that the United States was the only major racing jurisdiction in the world to permit the race-day use of Lasix and, while appreciating the Authority's work, hopes for an eventual prohibition on the race-day use of Lasix in the United States.[125] Although recognizing the therapeutic role Lasix can play to treat exercise-induced pulmonary hemorrhage, the AWI notes that such treatment "affects only a small percentage of horses," whereas the overreliance on Lasix in the lead-up to a race has long been a serious concern; indeed, it cites research that approximately 95% of starters in the United States receive Lasix. As a powerful diuretic, Lasix can cause horses to lose 20 to 30 pounds of fluid, enabling them to run faster but also causing severe dehydration, which in turn can be linked to electrolyte imbalance, muscle fatigue, and overall exhaustion.

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[122] The exemption does not apply to 2-year-olds and stakes races. *See* 15 U.S.C. § 3055(f)(2).

[123] *See* Notice, 88 Fed. Reg. at 5140.

[124] Second AWI Cmt. at 3.

[125] *Id*.; *see also* First AWI Cmt. at 2–3.

AWI recognizes that resistance to barring or even limiting the use of Lasix exists in the United States. AWI characterizes as important first steps the Agency's position that Lasix should be categorized as a controlled medication category and its four-hour race day prohibition, but nevertheless notes that "workouts pose just as much risk for horses as racing." Other commenters express opposition to any restrictions on the use of furosemide.[126]

The Texas Commission states that "[s]ince feed is undefined in the HISA regulations, the provision [Proposed Rule 4211] may or may not make complete feed illegal in the last 24 to 48 hours."[127] It also suggests changing Proposed Rule 4211(b) to the language used in Texas rules that prohibit the use of substances for 24 hours before post time, which allows "treatments that are necessary for horse welfare" without any ill effects "on the safety or integrity of the sport."[128]

The Authority takes issue with the Texas Commission's comment to change Proposed Rule 4211(a), suggesting that such a change would allow the use of banned substances and would allow more than only feed, hay, and water to be given to the horse during the last 48 hours before race time. In response to AWI's Rule 4212 proposal, the Authority notes that

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[126] Cmt. of Joseph Bahadoor (Jan. 29, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0008; Cmt. of Gerald Bergsma Cmt. (Jan. 30, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0015; Cmt. of Cindy Murphy Cmt. (Feb. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0092.

[127] First Tex. Comm'n Cmt. at 4.

[128] Second Tex. Comm'n Cmt. at 2–3.

the 4-hour window is solidly grounded in science and based on the period of time required for furosemide's dilution effect on the urine to resolve.[129] The Authority explains that the risk of a masking effect from the use of diuretics is based on the production of dilute urine below the laboratory's sensitivity to detect that substance.

The Authority also discusses its obligations under 15 U.S.C. § 3055(e)–(f) to convene an advisory committee to study the use of furosemide on horses during the 48-hour period before post time, and that the committee's findings must be submitted within three years of the program's effective date. During the three-year period, state racing commissions are permitted to request an exemption for furosemide from the prohibition in 15 U.S.C. § 3055(d) (an exemption that may not be requested for two-year-old Covered Horses or Covered Horses competing in stakes races). In the meantime, as the Authority observes, there is a sound scientific basis for the provisions proposed by the Authority concerning furosemide; moreover, "much of the international racing community conducts racing without the use of race-day furosemide and has done so for decades," which shows that "horses can race safely and successfully without furosemide administration."[130]

The Authority disagrees with the Texas Commission's assertion that Proposed Rule 4211 might make feed illegal up to 48 hours before race time. It states that "[f]eed is clearly permitted in Rule 4211."[131] The

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[129] Authority's Response at 4.

[130] *Id*. at 4–5.

[131] *Id.* at 15–16.

Authority also takes issue with the Texas Commission's comment to change Proposed Rule 4211(a) because it believes that Texas's suggested changes would allow the use of banned substances and would allow many more substances to be given to the horse in the 48 hours prior to post time beyond only feed, hay, and water during the 48-hour race period.

The Commission finds that Rule Series 4200 is consistent with the Act. As for furosemide (Lasix), the Commission finds that the limited (and temporarily three-year-excepted) use of Lasix under Proposed Rule 4212(d) is consistent with the Act.[132] Regarding whether feed is barred during the race period, Proposed Rule 4211(a) expressly states that "feed, hay, and water are permitted during the Race Period."[133] Although the Texas Commission is not exactly clear on what changes it seeks to Proposed Rule 4211(a), the Commission believes that the proposed provision (along with the exceptions in Proposed Rule 4212) strikes an appropriate balance by prohibiting all banned substances at any time and restricting the abuse of any controlled medical substances in the two days before race time, after which only feed, hay, and water can be given to the horse; Proposed Rule 4211(a) is consistent with the Act's requirements to protect the health and wellbeing of racehorses.

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[132] *See* 15 U.S.C. § 3055(d) (generally prohibiting the use of controlled medication substances during the "Race Period"), (e) (three-year advisory committee study and report on Lasix), (f) (allowing states to seek exemptions for Lasix during the three-year period). *See generally* Notice, 88 Fed. Reg. at 5077.

[133] Notice, 88 Fed. Reg. at 5078.

3. Rule Series 4300—Ineligibility Periods for Covered Horses

In Rule Series 4300, the Authority proposes ineligibility periods for anti-doping and controlled medication methods rule violations. Proposed Rules 4310–4330 impose ineligibility periods for violations involving prohibited substances and methods as well as for violations of Proposed Rule 3215. Proposed Rule 4310 contains a table detailing the period of ineligibility resulting from a violation involving a prohibited substance; it states that there is no period of ineligibility resulting from a violation involving an S7 controlled medication substance, but that the covered horse "may be placed on the Veterinarian's List, and, if so, then a subsequent Vets' List Workout must be scheduled [and] [a] post-Vets' List Workout Sample may be required."[134]

The Oklahoma Commission suggests that the rule specify that the Regulatory Veterinarian possesses discretion to place a horse on the Vets' List after an S7 substance violation even if the horse were eligible to compete, out of concern for "NSAIDs & corticosteroids (among other substances) possibly masking lameness & welfare issues."[135] The Authority agrees, with the desirability of such discretion, stating that "[t]he horse may be placed on the Vets' List to verify its fitness to race if warranted in the opinion of the Regulatory Veterinarian."[136]

The Commission agrees with both the comment and the Authority that, even when a horse could

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[134] *See id*. at 5124.

[135] Okla. Comm'n Cmt. at 4.

[136] Authority's Response at 26–27.

return to racing after a finding of an S7 controlled-medication violation, the Regulatory Veterinarian has the discretion to postpone such return and place the horse on the Vets' List until the horse's condition improves. Proposed Rule 4310 as applied is consistent with—indeed, mandated by—the Act.[137]

4. Rule Series 4000 Appendix: Technical Document—Prohibited Substances

The Proposed Rule Series 4000 Appendix lists those prohibited substances falling within the general categories in the Prohibited List and sets forth their detection times, screening limits, and thresholds.

The Authority's Prohibited Substances—Technical Document elicited many comments. The National Horsemen and Kentucky Horsemen (using identical language) argue that the Technical Document "completely reorganizes the existing [ARCI] Uniform Classification Guidelines" for "no good reason"; they describe the Guidelines as having "been developed and refined over many years," and as based on peer-reviewed, veterinary science–based research concerning "the potential for a substance to affect racing performance or endanger the welfare of the horse."[138] The National Horsemen and Kentucky Horsemen also raise concerns about blank spots in the

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[137] *See* 15 U.S.C. § 3055(b)(2) (requiring the Authority to consider, in developing its ADMC program, that "covered horses that are . . . unsound should not . . . participate in covered races, and that "the use of medications [and] other foreign substances . . . that mask or deaden pain in order to allow . . . unsound horses to . . . race should be prohibited").

[138] Second Nat'l Horsemen Cmt. at 3; First Nat'l Horsemen Cmt. at 1, 3; Second Ky. Horsemen Cmt. at 1 & Att. (Hiles Cmt.).

Prohibited Substance list that would default to the limit of detection without regard for a substance's ability to be transferred from the environment or to have a very long terminal half-life.[139] They claim that 12% of substances on the list are at risk of environmental transfer either from common, legal use as an oral medication or from stability in the environment. Further, they express the concern that veterinarians will need to be careful about using therapeutics with extremely long terminal half-lives.[140]

The National Horsemen also complain about the Authority's handling in the Prohibited Substances—Technical Document of S7 therapeutic medications,[141] which they deem a clear departure from the original ARCI goal of establishing scientifically based withdrawal times and thresholds for therapeutic medications. The National Horsemen claim (as does a nearly identical comment from K. Myrick) that the Authority has determined the regulation of most therapeutic medications to be at limit of detection, which they claim restricts the use of many therapeutic medications to the detriment of the horses' health and welfare.[142] Further, they contend, limit-of-detection regulations for therapeutic medications are subject to change whenever technology advances, resulting in a

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[139] Second Nat'l Horsemen Cmt. at 3; First Nat'l Horsemen Cmt. at 1, 3; Second Ky. Horsemen Cmt. at 1 & Att. (Hiles Cmt.).

[140] Second Nat'l Horsemen Cmt. at 1, 3; Second Ky. Horsemen Cmt. Attach. (Hiles Cmt.) at 2; First Nat'l Horsemen Cmt. at 1, 3.

[141] Second Nat'l Horsemen Cmt. at 2–4, 28.

[142] *Id.*; Myrick Cmt. at 1 (same).

lack of consistency.[143] The National Horsemen lament that "the ARCI thresholds for substances for which no IFHA Screening Limit exists are ignored in the . . . Technical Document" and that "there was no reason for the Authority to abandon the in-place ARCI thresholds for substances not included in the IFHA screening limits."[144] While acknowledging drawbacks to ARCI's methodology, the National Horsemen claim that the methodology is "significantly more scientifically rigorous than virtually all of the HISA/IFHA therapeutic medication guidelines."[145] The National Horsemen recommend that the Authority "establish a transition period between the existing therapeutic medication regulations and the new IFHA based regulations" to avoid an "upheaval in horse racing."[146]

Dr. Richard Braithwait calls for the removal of Methyl Sulphonyl Methane ("MSM") from the S7 controlled substance list and notes its omission from an ARCI classification list. He also cites research showing that supplementation with MSM reduced horses' oxidative and proinflammatory "marker levels significantly."[147] Zach Badura recommends the declassification of dimethyl sulfoxide ("DMSO") as an NSAID

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[143] Myrick Cmt. at 1.

[144] Second Nat'l Horsemen Cmt. at 28.

[145] According to the National Horsemen, ARCI has regulated controlled therapeutic medications "by establishing a withdrawal period that represents a balance between appropriate care of the equine athlete" and "preventing an effect of the medication on the outcome of the race." *Id.* at 28.

[146] *Id.* at 29.

[147] Cmt. of Dr. Richard Braithwait (Jan. 30, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0010.

(nonsteroidal anti-inflammatory drug), citing "evidence that DMSO is a naturally occurring substance in the environment" and that it "is a safe and effective medication utilized . . . in treating various conditions."[148]

Regarding the National Horsemen's critique of the Authority's use of limits of detection, the Authority responds that "the Act requires adoption of IFHA medication controls."[149] The Authority points out that "[t]he IFHA does not provide withdrawal guidance," which the Authority in any event contends "would not be more reliable because it would be based on generalized data" and not take "account of inter-individual variability."[150] The Authority also responds to the National Horsemen's identification of items in the Technical Document that the National Horsemen claim are errors requiring clarification and correction. The Authority acknowledges and seeks to correct some errors while indicating that other of the challenged items are correct.[151] Finally, regarding the National Horsemen's request for a transition period, the Authority responds that, although "[t]he Act does not provide for a grace period," the Agency "is undertaking an extensive educational program to minimize errors in medication control."[152]

As for Dr. Braithwait's request that the Authority remove MSM from the S7 list, the Authority declines

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[148] Cmt. of Zach Badura.

[149] Authority's Response at 8.

[150] *Id.* at 12.

[151] *Id*. at 12–13.

[152] *Id.* at 14.

to do so, stating that, as reflected in the Prohibited List, IFHA recognizes MSM as a dietary substance and has established a screening limit for it; the Authority further explains the use and prohibitions on using MSM as a S7 substance.[153] The Authority also denies Mr. Badura's request to declassify DMSO as an NSAID but adds that IFHA's screening limit considers that DMSO is a dietary or environmental substance.[154]

The Commission finds that the Authority's inclusion of MSM as an S7 controlled substance and DMSO as a dietary or environmental substance classified as an NSAID in the Technical Document is consistent with the Act. Specifically, the Act provides for the baseline ADMC rules to include the lists of prohibited substances in effect for the IFHA, which is exactly what the Authority did in these provisions.[155]

Several scrivener's errors, typos, and other minor mistakes found in the Technical Document have been brought to the Commission's attention by commenters or by the Authority. Those that the Commission has found to be very minor errors are noted in the footnote will be deemed corrected in the final rule.[156]

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[153] *Id*. at 21.

[154] *Id.* at 22.

[155] *See* 15 U.S.C. § 3055(g)(2)(A)(i); Notice, 88 Fed. Reg. at 5073 (stating that the baseline standards include the lists of prohibited substances in effect for the IFHA).

[156] The corrections in the final rule will be: (1) capitalizing terms in the heading so the proposed term "Specific substances" will be "Specific Substances," the term "Detection time" will be "Detection Time," the word "Screening limit" will be Screening Limit";

d. Rule Series 5000—Equine Standards for Testing and Investigation

1. Rules 5100–5500 and 5800—Testing

Proposed Rules 5110–5150 require the Agency to plan and implement effective testing by using risk assessments, prioritizing among categories of horses and types of testing, and directing sample analysis and retention. Proposed Rules 5210 and 5200 require that samples be collected for testing without advance notice if possible, pursuant to procedures and notification requirements based on when the sample is collected. Sample collections will be conducted by suitably qualified personnel (Proposed Rule 5450), using suitable equipment (Proposed Rule 5320), in a suitable "test barn" environment (Proposed Rule 5310). Proposed Rule 5410 dictates general collection procedures necessary to ensure the integrity of samples,

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(2) for Desoximethasone, the word "Topicor" will be "Topicort"; (3) for Donepezil, the name "Aricep" will be "Aricept"; (4) for Dorzolamide, the name "Casp" will be "Cocopt"; (5) for Estranediol, the name "Estroge" will be "Estrogen"; (6) for Gonadorelin, the name "Gonabree" should be "Gonabreed"; (7) for Hydralazine, the name "Bidi" will be "Bidil"; (8) for Hydrochlorth (Lopessor), the word "other" will be "others"; (9) for Isomethadone, the words "DEA Schedule I" will be "DEA Schedule II"; (10) for Levorphanol, the words "DEA Schedule I" will be "DEA Schedule II"; (11) for Mehtyltrienolone, the stray word "F89" will be deleted; (12) for Methysergide, the word "availabl" will be "available"; (13) for Nalorphine, the stray word "F94" will be deleted; (14) for Oripavine, the words "DEA Schedule I" will be "DEA Schedule II"; (15) for Phendimetrazide, the words "DEA Schedule II" will be "DEA Schedule III": (16) for Psilocin, the words "DEA Schedule" will be "DEA Schedule I"; (17) for Tetrahydrogestrinone, the word "approva" will be "approval"; and (18) for Thioridazine, the word "Generc" will be "Generic."

and Proposed Rules 5320(c)–(e) and 5420–5440 set forth additional requirements concerning the collection of urine, blood, and hair samples. Proposed Rules 5510 and 5520 specify procedures governing the storage and transportation of samples to laboratories to protect the samples' integrity.

According to the Kentucky Commission's comment on the sample collection equipment requirements in Proposed Rule 5320, while "[n]othing states that each item must be packaged individually . . . , it is the KHRC's understanding that HIWU interprets this regulation to require individual packaging."[157] Doing so, the Kentucky Commission claims, is "not only inefficient and unnecessary, but also bad for the environment and expensive"; the Kentucky Commission therefore recommends that the rule "clarify that sample collection equipment must be clean and sealed prior to use, but need not require individual packaging of each blood or urine container."[158] The Kentucky Horsemen challenge the sample collection process in Proposed Rule 5410 as failing to provide "adequate due process" to the accused in several respects.[159] First, they argue that, at an adjudication of any alleged errors occurring during sample collection process, they would be limited to presenting their concerns and a supporting an affirmation, and they would

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[157] Ky. Comm'n Cmt. 2.

[158] *Id.*

[159] Cmt. of Ky. Horsemen's Benevolent & Protective Ass'n 5 (Nov. 11, 2022) ("First Ky. Horsemen Cmt."), https://www.regulations.gov/comment/FTC-2022-0062-0005.

not be able to present photographs, videos, or any other evidence.

The Kentucky Horsemen also question whether the Covered Person at the collection site would know what the proper collection procedures are, whether they were followed properly, or how to reflect accurately the sample collection session on the documentation forms.[160] The Kentucky Horsemen complain about Proposed Rule 5410(m)'s prohibition on photographing or video/audio recording the sample collection session, claiming that such documentation would provide "the most conclusive evidence there is" of what happened there.[161] They assert that these provisions hamstring their ability to contest "the Agency's ECM rule violation charge [as] incorrect due to noncompliance with a key sample collection, handling, or testing protocol."[162] The Oklahoma Commission expresses the same concern regarding the prohibition on photography/videography of the sample collection session, stating that the provision "decreases testing integrity and transparency" and that—especially given the Responsible Person's potential liability—"recording of [a] sampling session should be a reserved right."[163]

The Oklahoma Commission further complains that under Proposed Rule 5520(d),[164] the transported

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[160] *Id*. at 15.

[161] *Id.*

[162] *Id*. at 14–15.

[163] Okla. Comm'n Cmt. at 4–5.

[164] Proposed Rule 5520(d) requires that the "A and B Samples (and official and duplicate TCO2 Samples) will be shipped

samples and documentation "will more than double [the storage space required] for testing Laboratories," and that "[t]he extra space needed will prevent additional testing equipment from being added efficiently and possibly negatively impacting HIWU testing program."[165] The Kentucky Horsemen also claim that the accused is "denied the ability to call witnesses [at the adjudication] who can offer oral testimony as to what transpired in the sample collection and handling process."[166] Due to that bar, the Kentucky Horsemen contend, the accused will be unable to show that everything was regular and in accordance with applicable standards; according to the Kentucky Horsemen, "whatever gets documented by the Sample Collection Personnel during the Sample Collection Session" under Proposed Rule 5410 becomes conclusive.[167] The Kentucky Horsemen thus contend that, "[i]n an ECM rule case, the accused *must be permitted* to call potentially adverse witnesses to testify" about whether the applicable standards "governing investigations or sample collection[s]" were followed properly.[168] The Kentucky Horsemen assert that the accused must be able to supplement the record created in the adjudicatory stage if review of the final decision and sanction is sought from the Commission under § 3058.[169]

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together to the Laboratory conducting the A Sample analysis." Notice, 88 Fed. Reg. at 5168.

[165] Okla. Comm'n Cmt. at 5.

[166] *Id.* at 15 (citing Proposed Rules 7180 and 7110(b)).

[168] Ky. Horsemen Cmt. at 16.

[169] *Id.* at 16, 19.

Dr. Sivick complains that the proposed rule provisions "permit laboratories to call positive tests at their limits of detection, which may vary widely from lab to lab."[170] "The end result of this regulation," Dr. Sivick asserts, "is to have completely different rules depending upon which laboratory is testing the samples," such that "[t]he approval of these regulations will result in differing violations from jurisdiction to jurisdiction depending on the laboratory limits of detection."[171] Finally, the Texas Commission criticizes Proposed Rule 5450(b)(2)(i) as "prohibiting individuals from performing the duties of Sample Collection Personnel if they are involved in the administration of horseracing." The Texas Commission claims this restriction will essentially "exclude any Association Veterinarian from collecting samples . . . [and] will put the Association in the untenable position of being required to obtain a sample for injured or euthanized horses but unable to do so because of the lack of authorized personnel on site."[172]

As for Kentucky Commission's comment about sample collection packaging under Proposed Rule 5320, the Authority notes that "[b]ulk packaging only ensures the first container retrieved from the sealed package is 'clean and sealed prior to use,'" but that, "once opened, bulk packaging allows the remaining collection supplies to be exposed to dust, dirt, and moisture" and therefore fails to ensure that the sample is "clean and sealed prior to use."[173] Regarding the

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[170] Sivick Cmt. at 1.

[171] *Id.*; *see also* Myrick Cmt. at 2 (quoting precisely the same language).

[172] Second Texas Comm'n Cmt. at 3.

[173] Authority's Response at 31.

Oklahoma Commission's complaint about lack of storage space for samples and related materials, the Authority responds that "[m]any jurisdictions already send A and B samples to their laboratories[,] and that "[t]he Agency has been communicating with all RMTC-accredited laboratories on sample storage requirements . . . and [n]one have expressed concerns about storage requirements constraining laboratory activities."[174] With respect to the complaints about the bar on photographing or videorecording the collection session, the Authority responds that the approach set out in Proposed Rule 5410 "is consistent with that taken by the international anti-doping community."[175] Finally, regarding the Texas Commission's complaint about Association Veterinarians not being able to collect samples simply because they are involved in the administration of horseracing, the Authority notes that Proposed Rule 5450(b)(2)(i) excludes Association Veterinarians unless they meet other criteria that the Agency has designated as constituting a conflict.[176]

The Commission finds that Proposed Rules 5100–5500 and 5800 are consistent with the Act. Regarding the Kentucky Commission's comment about whether individual sample collection packaging is required under Proposed Rule 5320, the Commission agrees with the Authority that this does not reflect an inconsistency with the Act but essentially a policy disagreement with the Authority. The Authority states that bulk packaging will not satisfy Rule 5320(b)(4)'s requirement that the packaging be "clean and sealed prior to use," which is a fair reading of that rule. But

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[174] *Id.* at 27.

[175] *Id.* at 24.

[176] *Id.* at 29–30.

the Commission is also concerned that the requirement of individual packaging is not more explicit in the rule and therefore suggests that the Authority consider providing Guidance or submitting a rule modification proposal to clarify that individual and not bulk packaging meets the requirements of Proposed Rule 5320(b). With respect to the Oklahoma Commission's complaint about testing laboratories' purported lack of storage space due to housing samples and related documents, the Authority's response shows that in fact laboratories have not expressed concerns about limited storage capacity or less space to conduct testing.

Proposed Rule 5410 provides a very comprehensive—and secure—procedure to collect horse urine, blood and hair samples. It ensures equal representation during the sample collection session to both the Agency and the Responsible Person (either the trainer or the owner). And it provides *two* opportunities to the accused (during and after the sample collection session) to record any "concerns" about the sample collection session.[177] The rule also requires a person who is suspected of a violation to acknowledge and describe the processing of sample collection data during the session,[178] as well to record (after the session) "their satisfaction (or otherwise) that the documentation accurately reflects the details of the . . . sample collection session."[179]

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[177] Notice, 88 Fed. Reg. at 5165 (Proposed Rule 5410(i)(21) (concerns regarding conduct during the session)); *id.* (Proposed Rule 5410(j) (concerns about the manner the session was conducted to be recorded after the session ends)).

[178] *See id.* (Proposed Rule 5410(i)(22)).

[179] *Id.* (Proposed Rule 5410(j)).

As for the Kentucky Horsemen's concern that the Covered Person may not understand the procedures and standards required at the sampling session or be able to fully record their concerns in the collection documentation, the rules require that the Responsible Person (the trainer or in his absence, the owner, both of whom face strict liability for doping violations) must be present at the sample collection session.[180] Consistent with the Act, Responsible Persons must register with the Authority and are expected to acquire the requisite knowledge, including by availing themselves of the education materials and guidance the Authority makes available on its website.

Scrivener's errors were found in Proposed Rules 5430(e) and 5510(b)(1). The Commission deems the errors to be corrected in the final rule.[181]

2. Rules 5600–5700—Investigations

Proposed Rules 5610–5640 require the Agency to obtain, assess, and process anti-doping and medication control intelligence from all available sources so as to detect and deter doping and medication abuse, develop effective test planning, and conduct investigations. Proposed Rules 5710–5740 require the Agency to conduct efficient and effective investigations into (among other things) atypical findings and other sample abnormalities, and to scrutinize other information or intelligence, in order to determine whether there

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[180] *See id.* (Proposed Rule 5410(b)(2)).

[181] In the final rule, the words "within the kit" will be deemed as stricken from Rule 5430(e). The Notice explained this change, stating that "it was not consistent with collection kits available in the industry." *See* 88 Fed. Reg. at 5083. In Rule 5510(b)(1), the word "refigerator" will be deemed to be corrected as "refrigerator" in the final rule.

has been an anti-doping or controlled medication rule violation or other rule violation. The Agency must use all available investigative resources, including obtaining information from law enforcement authorities and other regulators. The investigative powers provided to the Agency by Proposed Rule 5730 include inspection, examination, seizure, production of documents, subpoenas, and interviews. Proposed Rule 5720(f) requires all covered person to cooperate with the Agency's investigations and provides that failure to do so may result in the imposition of sanctions.

No comments were received about these proposed rules and thus the Authority provided no response.

The Commission finds that these rules are consistent with the Act. Investigations of potential ADMC rule violations play a central part in the program and are required to be conducted pursuant to several statutory provisions.[182]

e. Rule Series 6000—Equine Standards for Laboratories and Accreditation

Proposed Rule Series 6000 establishes "Laboratory Standards" to govern the accreditation of laboratories used to test samples obtained from Covered Horses, the process for achieving and maintaining such accreditation, and the standards and protocols for testing the recovered samples. Its "main purpose . . . is to ensure that Laboratories report valid test results based on reliable evidentiary data and to facilitate harmonization in Analytical Testing of Samples by Laboratories."[183] Proposed Rule Series 6100 prescribes the standards and procedures under which a

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[182] *See, e.g.*, 15 U.S.C. §§ 3054(c)(1)(A), 3054(e)(1)(E), 3055(c)(4).

[183] Notice, 88 Fed. Reg. at 5171 (Proposed Rule 6010(a)).

laboratory can obtain and maintain HISA Equine Analytical Laboratory ("HEAL") accreditation. Proposed Rule 6130 deals specifically with a laboratory's efforts to maintain HEAL accreditation, while Proposed Rule 6140 addresses the Agency's monitoring of laboratories' accreditation status. Proposed Rule 6500 sets forth the circumstances that may lead to suspension, revocation, or restriction of a laboratory's HEAL accreditation. Proposed Rule Series 6200, 6400, and 6600 establish procedures for monitoring the quality of laboratories' performance. Under Proposed Rule 6210, the Agency will distribute samples used to monitor laboratories' capabilities and performance. Proposed Rule Series 6400 sets forth the procedures that will be used by the Agency to inform laboratories of deficiencies in their testing operations and results and to monitor the laboratories' corrective efforts. Proposed Rule Series 6300 includes standards for the analysis of samples as well as criteria to govern the withdrawal of HEAL accreditation if a laboratory falls short of those standards.

The American Association for Laboratory Accreditation ("A2LA") "commend[s]" the Authority "for developing a robust program concerning Anti-Doping and Medication Control" and "support[s] . . . the laboratory testing requirement": "specifically[,] the inclusion of the requirement to be ISO 17025 accredited by an accreditation body who is an [International Laboratory Accreditation Cooperation ("ILAC")] full member and a signatory to the ILAC."[184] With respect to biobanking, however, A2LA recommends a revision to

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[184] Cmt. of Am. Ass'n for Lab. Accreditation's 1 (Nov. 14, 2022) ("A2LA Cmt.").

Proposed Rule 6319(e)(3)(ii) to "strengthen[ ] the requirements when using a specialized secure sample storage facility" to include only ISA 20387.[185] Proposed Rule 6319(e)(3)(ii) now provides that "[i]f [an] external Sample storage facility is not covered by the Laboratory's ISO/IEC 17025 accreditation, then the subcontracted external storage facility shall be Fit-for-Purpose and have its own ISO accreditation or certification (*e.g.*, 17025, 20387, 9001)." A2LA recommends that the ISO 20387 standard "should be given preference when implementing requirements for external sample storage facilities as it is the ISO standard written specifically for biobanks" and "includes requirements for activities that are distinct to biobanking." Further, A2LA recommends that "[i]n order to achieve accreditation, a biobank [must] demonstrate[ ] their technical competency in performing the biobanking tasks to ISO 20387 and the HISA requirements"; as A2LA notes, ISO 20387 was recently included in the ILAC Mutual Recognition Arrangement. By contrast, because ISOs 17025 and 9001 "do not include these specific biobanking activities" and "ISO 9001 is not an accreditation standard" so that "an attestation of technical competency could not be formally declared," those two standards should be omitted from the rule, according to A2LA.[186]

As noted above, Dr. Sivick complains that the proposed rules "permit laboratories to call positive tests at their limits of detection, which may vary widely

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[185] *Id.*

[186] *Id.*

from lab to lab."[187] Dr. Fenger likewise complains about "the lack of uniformity that is included in [the Authority's] laboratory requirements," asserting that "[t]he actual level at which any substance may be detected and reported may vary widely between laboratories" as long as all of the levels meet the Minimum Required Performance Level for a substance.[188]

In response to these concerns regarding testing variability, the Authority notes that "[t]he fact that some laboratories may be better at detecting certain substances than others is not unfair, as these substances must never be used on a horse."[189]

The Commission concludes that Rule Series 6000 is consistent with the Act. The Act requires the Authority to issue rules governing "the standards and protocols for testing" samples from covered horses"[190] and "uniform standards for . . . laboratory testing accreditation and protocols,"[191] but it does not specify a preference for one standard over any other to govern the preservation of samples in an external storage facility, instead leaving that task to the Authority. Proposed Rule 6319(e)(3)(ii) therefore complies with the Act. A2LA's concerns regarding the inclusion of ISOs 17025 and 9001, however, appear to have merit, and the Authority's failure to explain that decision hinders the Commission's evaluation of Proposed Rule 6319(e)(3)(ii). The Commission therefore recommends

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[187] Sivick Cmt. at 1.

[188] Second Fenger Cmt. at 3.

[189] Authority's Response at 21.

[190] 15 U.S.C. § 3057(b)(1)(c).

[191] *Id.* § 3055(c)(1)(A)(ii).

that the Authority study this comment and, if appropriate, consider filing a proposed rule modification for Proposed Rule 6319(e)(3)(ii).

As the Commission appreciates, "[t]he Act recognizes that the establishment of a national set of *uniform* standards for racetrack safety and medication control will enhance the safety and integrity of horseracing."[192] In that vein, the Authority has proposed various rules designed to ensure uniformity in testing among laboratories. For example, Proposed Rule 6210 requires the Agency to regularly distribute External Quality Assessment Scheme samples to Laboratories"; these samples are "designed to continually monitor the capabilities of the Laboratories . . . to evaluate their proficiency, and to improve test result uniformity between Laboratories." Rule 6610(h)(2) requires a "laboratory director or staff to participate in developing standards for best practices and enhancing uniformity of Analytical Testing in the HEAL-accredited laboratory system."

These rules are consistent with the Act. In particular, 15 U.S.C. § 3053(a)(3) directs the Authority to develop proposed rules relating to "laboratory standards for accreditation and protocols," and requires the Authority to issue rules governing "the standards and protocols for testing" samples from covered horses."[193]

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[192] 88 Fed. Reg. at 5070 (emphasis added); *see also id*. at 5071 (Protocol and related rules are intended, among other things, to address the need for uniformity in horseracing).

[193] 15 U.S.C. § 3057(b)(1)(c) (standards, procedures, and protocols regulating medication).

And those testing requirements are designed to ensure uniformity of test results among laboratories.[194]

f. Rule Series 7000—Arbitration Procedures

Proposed Rule Series 7000 establishes a disciplinary process for hearing and adjudicating violations of the rules and related offenses. Proposed Rules 7020–7040 govern the duties and appointment of members of the bodies adjudicating violations of the Anti-Doping rule (the Arbitral Body) and the Controlled Medication rule (the Internal Adjudication Panel, or IAP). Proposed Rules 7060–7161 set forth procedures for the initiation of proceedings by the Agency. Proposed Rules 7170–7180 govern procedures for hearings before both adjudicative bodies. Proposed Rule 7250 provides the general framework for conducting the hearings, while Proposed Rule 7260 prescribes the submission of evidence. Other rules concern the maintenance of confidentiality (Proposed Rule 7210), the right to be represented by counsel (Proposed Rule 7220), the closing of the hearing (Proposed Rule 7300), and the reopening of a hearing in order "to avoid manifest injustice" (Proposed Rule 7310). Proposed Rule 7340 sets forth the timing for issuing a final decision, and Proposed Rule 7350 authorizes arbitrators and IAP members to "grant any remedy or relief authorized by the Act" or its rules. Under Proposed Rule 7400, final decisions of the

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[194] *See, e.g.*, *id*. §§ 3055(c)(1)(A) (rules must ensure "*uniform* standards for . . . laboratory testing accreditation and protocols), 3055(b)(3) (requiring the Authority, in developing the ADMC program, to consider "[r]ules, standards, procedures, and protocols regulating medication and treatment methods for Covered Horses and Covered Horseraces should be *uniform* and *uniformly* administered nationally") (all emphases added).

Arbitral Body or the IAP are subject to review pursuant to 15 U.S.C. § 3058.

The Kentucky Horsemen challenge multiple rule provisions in Rule Series 7000. They first contend that the Act created a "separation of powers" framework in which the Authority has been given "legislative-like functions" while the Agency has been provided both law enforcement and adjudicative authority.[195] For enforcement duties, they cite to the Act's directive that the Agency "shall . . . serve as the independent [ADMC] enforcement organization."[196] They assert that the Agency's adjudicative functions derive from its statutory mandate to "conduct and oversee [ADMC] results management, including independent investigations, charging, and adjudication of potential [ADMC] rule violations."[197] This mandate, the Kentucky Horsemen contend, gives the Agency the exclusive right to choose members of the Arbitral Panel and the IAP.[198] According to the Kentucky Horsemen, such an arrangement—embodied in Proposed Rules 7020, 7030, and 7040, which allow the Authority to enter "mutual agreements" with the Agency in the selection and appointment of arbitrators and adjudicators who serve on those panels—violates the Act by improperly

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[195] First Ky. Horsemen Cmt. at 2–3.

[196] *Id*. at 1; *see* 15 U.S.C § 3054(c)(1)(E)(i).

[197] First Ky. Horsemen Cmt. at 2–3 (citing 15 U.S.C.§ 3055(c)(4)(B); *see also* 15 U.S.C. § 3054(e)(1)(E) (providing duties of the Agency).

[198] First Ky. Horsemen Cmt. at 3.

(*i.e.*, without statutory authorization) giving "the Authority a role in 'adjudication.'"[199]

The Kentucky Horsemen further contend that "Sections 3054(a), (e)(1) and 3055(c)(4)(B) of the Act *do not permit the Authority* to have any say or input—by 'mutual agreement' or otherwise—in selecting or appointing *independent* arbitrators or adjudicators, or pools of same, to adjudicate ADMC rule violations or sanctions."[200] The Kentucky Horsemen contend that the Act structurally walls off the Authority from exercising any role in the Agency's "conduct and over[sight of] . . . results management," including the Agency's oversight of "independent . . . adjudication." 15 U.S.C. § 3055(c)(4)(B). The Kentucky Horsemen assert that this structural wall assures "Covered Persons" that the Agency alone exercises the power to select and appoint arbitrators or adjudicators, who are independent of influence or manipulation by the Authority, to hear charges and consider sanctions.[201] The Kentucky Horsemen argue that each of the contested rules breaches the Act's exclusive assignment of "results management" functions to the Agency to "conduct and oversee . . . independent . . . adjudication."[202]

The Authority rejects these arguments on the grounds that "[t]he Act does not establish a system of separation of powers within the Authority."[203]

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[199] *Id.*

[200] *Id.* at 4.

[201] *Id*. at 3–8.

[202] *Id*. at 7.

[203] Authority's Response at 2.

The Commission finds that Proposed Rules 7020, 7030, and 7040 are consistent with the Act. The Kentucky Horsemen fail to show that allowing the members of the Arbitral Body and the IAP to be selected by "mutual agreement of the Authority and the Agency" violates the Act's provision for the Agency to "conduct and oversee antidoping and medication control results management, including . . . adjudication."[204] Adjudications are the central element in disciplinary proceedings brought under the Act, and the Act empowers both the Agency and the Authority to play a role in that process. Indeed, the Authority is given broad powers to establish the overall ADMC program itself, including specifying the persons and horses to be covered by the ADMC rules,[205] the ADMC program's "disciplinary process," the "[h]earing procedures" for [ADMC] rule violations,[206] and the rules and procedures for access to relevant facilities and the issuance of subpoenas.[207] The Authority also may submit for Commission approval numerous rules pertaining to nearly all aspects of the ADMC program, including provisions pertaining to the "process or procedures for disciplinary hearings,"[208] provisions describing ADMC rule violations and imposing sanctions for

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[204] 15 U.S.C. § 3055(c)(4)(B); *see also id.* § 3054(e)(1)(E)(iii) (power to "implement anti-doping . . . adjudication programs").

[205] *Id.* § 3055(a)(1).

[206] *Id.* § 3057(c).

[207] *Id.* § 3054(c)(1)(A).

[208] *Id.* § 3053(a)(10).

violations,[209] and provisions governing ADMC "results management."[210]

The Agency does not have "exclusive" authority over the adjudicatory process under the Act. Further, contrary to the Kentucky Horsemen's suggestion, the Agency and the Authority are not cabined in strictly defined roles but are obligated to consult with each other in several important respects. For example, the Agency must "consult" with the Authority's ADMC standing committee to develop "[ADMC] rules, protocols, policies, and guidelines," as well as lists of "prohibited medications, methods, and substances" for the Authority's approval.[211] Along similar lines, the Agency is obligated "to consult" with the Authority's standing committee and Board "on *all* [ADMC] rules"—including those involving adjudications "of the Authority"[212] Indeed, the Agency is obligated to "implement[ ] the [ADMC] program on behalf of the Authority."[213] Clearly, the Act's framework does not impose the rigid separation claimed by the Kentucky Horsemen but rather reflects a collaborative process between the Agency and the Authority.

Second, the Kentucky Horsemen complain that Proposed Rules 3361, 7060(b), 7110(b), and 7180, which concern the adjudication of alleged controlled medication rule violations, fail to provide the "adequate due process" required under 15 U.S.C.

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[209] *Id.* § 3053(a)(8), (a)(9).

[210] *Id.* § 3057(c)(1)(A).

[211] *Id*. § 3055(c)(4)(A), (c)(5).

[212] *Id.* § 3054(f) (emphasis added).

[213] *Id.* § 3054(e)(1)(E)(i).

§ 3057(c)(3) because they allow the IAP to rely solely on the parties' written submissions instead of holding an evidentiary hearing where adverse witnesses can be cross-examined. Cross-examination, the Kentucky Horsemen claim, is required under § 3057(c)(2)(B).[214] The Kentucky Horsemen further assert that an in-person hearing is required at the adjudicative stage because there is no assurance that there will be an evidentiary hearing before an Administrative Law Judge when the final sanction is reviewed by the Commission under 15 U.S.C. § 3058.[215] The Kentucky Horsemen also contend that proposed Rules 7180(c) and 7180(d) fail to provide due process by presumptively disallowing reply briefs.[216] Lastly, say the Kentucky Horsemen, the rules impose "disparate subpoena power" by allowing the Agency to seek relevant information during the investigation and again during the adjudicatory proceeding, whereas the accused may seek relevant information only during the adjudicatory proceeding.

The Authority responds that its proposed ADMC rules were "fully compliant" with its due-process obligations under 15 U.S.C. § 3057(c)(3) and that a

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[214] First Ky. Horsemen Cmt. at 8–17. Section 3057(c)(2) lists the elements that "shall" be included in the disciplinary process. Section 3057(c)(3) states that the ADMC rule "shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged . . . [ADMC] rule violation and the possible civil sanctions for such violation."

[215] First Ky. Horsemen Cmt. at 8–14.

[216] *Id.* at 10.

hearing was also available before the Commission under 15 U.S.C. § 3058.[217]

The Commission finds that Proposed Rules 3361, 7060(b), 7110(b), and 7180 confer sufficient due process protections to satisfy the criteria in § 3057(c)(3). The Rules allow the parties to submit "all supporting documentation" on which they seek to rely[218] and permit adjudication on written briefs alone *only* if the IAP determines that it will be "sufficiently well-informed to render a decision" without a hearing.[219] Written submissions could include, for example, documentation from the sample collection session reflecting the results of the collection and the integrity of the procedures employed, relevant materials received from third parties by IAP order,[220] and information or documents obtained from the other party.[221]

The procedures employed in IAP proceedings to resolve medication control rule charges were deliberately made simpler and less costly "partly in response to requests by commenters to provide for a simplified

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[217] Authority's Response at 2.

[218] Notice, 88 Fed. Reg. at 5199 (Proposed Rule 7180(e)).

[219] *See id.* at 5118, 5197 (Proposed Rules 3361, 7060(b)).

[220] *See id.* at 5199 (Proposed Rule 7260(b)).

[221] *See, e.g.*, *id.* at 5165 (Proposed Rule 5410) (providing detailed procedures for sample collection, including presence of horse trainer or owner to ensure the integrity of the sample); *id.* at 5199 (Proposed Rule 7190) (allowing for "the exchange of information between the parties" and authorizing the adjudicator to "resolve any disputes" that might arise from that exchange); *id.* (Proposed Rule 7260(b)) (permitting party to request IAP member(s) to order production of any document which the party believes to be "relevant and material to the dispute").

hearing process for Covered Persons charged with a violation."[222] "The procedure allows the adjudication process to dispense where appropriate with certain of the more formal and costly aspects of legal proceedings." *Id*. The submissions also fit comfortably within the Act's command that "adequate due process" be "commensurate with . . . the possible civil sanctions for such violation." 15 U.S.C. § 3057(c)(3). Infractions of the Authority's medication control rules result in fines and do not lead to periods of ineligibility. If the only available sanction in the Authority's proposed rules were a lifetime ban from the industry, "adequate due process" would likely require more. But with the sliding-scale approach to discipline evidenced in its proposals, the Authority's medication control rule violation procedures provide "adequate due process" that is "commensurate" with the available sanctions. This process is therefore fully consistent with long-standing Supreme Court precedent recognizing that due process does not require administrative evidentiary hearings where adequate procedural safeguards are in place and probative information can be provided through written documentation.[223]

The pertinent procedural safeguards here include a provision for timely notice of an alleged infraction, the right to have charges resolved by an impartial

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[222] *Id.* at 5083.

[223] *See Mathews v. Eldridge*, 424 U.S. 319, 343, 345 (1976); *see also* 88 Fed. Reg. at 5081, 5118 (the comparatively less serious sanctions imposed for controlled medication rule violations—as compared to anti-doping rule violations—allow for a more flexible and informal adjudicatory process for which written submissions alone may be adequate).

adjudicator,[224] the right for responsible parties to directly observe the same collection process, and the ability of responsible parties to record any concerns on a form that would be provided to the IAP if charges are brought.[225] Moreover, no commenter has credibly alleged that the IAP would be anything but "impartial." 15 U.S.C. § 3057(c)(3). The Kentucky Horsemen, for example, provide no evidence to support the suggestion that an adjudicator jointly chosen by the Authority might show bias. Nonetheless, part of the Authority's response is off base. Although the Authority rests on the observation that the accused may always seek an evidentiary hearing in Commission review proceedings under § 3058,[226] § 3057(c)'s due process requirements relate solely to the Authority's own processes. But as discussed above, the Commission finds that the Authority's hearing procedure satisfies the requirements for due process stated in § 3057.

As for "international best practices," § 3055(b)(4) of the Act requires the Authority to "consider[ ] international anti-doping and medication control standards to the extent consistent with" the Act, which the Authority did by "rely[ing] heavily on international anti-doping standards" in preparing its ADMC rules.[227] Regarding reply briefs, the IAP has the discretion to permit those if it determines that doing so will better inform its decision-making.[228] Finally,

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[224] *See* Notice, 88 Fed. Reg. at 5196 (Proposed Rule 7040(a)).

[225] *See id.* at 5165 (Proposed Rule 5410).

[226] Authority's Response at 2.

[227] Notice, 88 Fed. Reg. at 5072.

[228] *See id.* at 5199 (Proposed Rule 7180(c), (d)).

differences in the subpoena power of the Agency relative to the accused simply reflect the ordinary manner of public investigations, in which the enforcement body obtains a subpoena to gather enough evidence to determine whether to bring charges.[229] If charged, the accused may seek from the IAP a subpoena (or several) for witnesses, documents, and other evidence to defend herself.[230]

Third, the Kentucky Horsemen challenge Proposed Rules 3264, 3364, and 7400, which govern review of final adjudicative decisions, as failing to provide a separate intra-Authority appeals process that they claim is required by 15 U.S.C. § 3057(c)(2)(F).[231] The Kentucky Horsemen assert that each of these rule provisions, which provide that a final decision of the IAP will be considered the final decision of the Authority and will be reviewable by the Commission, "completely fail to provide an appeals process before" review to the Commission. According to the Kentucky Horsemen, "the only way to properly reconcile . . . Section 3057(c)(2)(F) and Section 3055(c)(4)(B)" is to conclude that an appellate review process is required before the stage of Commission review.[232] They assert that each of those provisions, which provide that the final decisions of the adjudicator are "subject to [Commission] review in accordance with Section 3058 of the Act," must be interpreted to require a separate

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[229] *See* Notice, 88 Fed. Reg. at 5072.

[230] *See id.* at 5200 (Proposed Rule 7260(f)).

[231] First Ky. Horsemen Cmt. (Additional Comment).

[232] *Id.*

appellate review by the Commission after an internal appeals process within the Authority.[233]

The Authority disagrees but provided little guidance other than the tautology that "the Act does not require an additional level of appeal within the Agency beyond the appeal procedures established by the Act and the ADMC Rule proposal."[234] As relevant here, 15 U.S.C. § 3507(c)(2)(F) requires that the Authority establish procedures for appeals of any sanctions imposed through the "disciplinary process" before the IAP, and § 3055(c)(4)(b) provides that "review" of a "final decision" resulting from an ADMC rule violation proceeding constitutes the "final decision" of the Authority," which may be "reviewe[d] [by the Commission] in accordance with Section 3058." Giving effect to both provisions and reading them together leads to a conclusion that the Commission's "review" under § 3058 of the final decision of the IAP *is* the "appeal" from the disciplinary proceeding before the IAP contemplated by § 3057(c)(2)(F). If Congress had intended a different result, it would have made clearer its intent for two separate review proceedings at each level. Accordingly, no additional review is required at the Commission.

In addition, 15 U.S.C. § 3507(c)(3) requires the rules to provide for adequate due process commensurate with the seriousness of the alleged violation and the possible sanctions for such violation. Because infractions involving medication controls do not lead to a period of ineligibility, the process specified in

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[233] *See* Notice, 88 Fed. Reg. at 5109, 5118, 5200 (Proposed Rules 3264 (Agency or the Arbitral Body), 3364 (Agency or the IAP), 7400 (Arbitral Body or IAP)).

[234] Authority's Response at 1–2.

Proposed Rules 3264, 3364, and 7400 satisfies the statutory standard in 15 U.S.C. § 3047(2).

The Texas Commission criticizes the "creation" of a National Stewards Panel in Proposed Rule 7130(b), asserting that racetrack stewards cannot be expected to assume additional duties given the "enormous responsibilities" already placed on them for their respective racing jurisdictions.[235] In addition, the Texas Commission sought clarification on the applicable methods for exchanging information between parties under Proposed Rule 7190.[236]

As to Proposed Rule 7130(b), the Authority responds that the panel will consist of "qualified individuals" who volunteer for a position and that "no steward will be required to serve on the Panel."[237] The Authority does not respond to the inquiry about Proposed Rule 7190.

The Commission finds that Proposed Rule 7130 is consistent with the Act. Proposed Rule 7130 governs the appointment of administrative hearing panels to adjudicate cases arising from alleged violations of the anti-doping and controlled medication rules. Under Proposed Rule 7020(b), a charge resulting from an alleged controlled medication rule violation is adjudicated by members of an IAP, the new name for the pre-existing National Stewards Panel.[238] Proposed Rule 7040(f) specifically allows stewards to serve "concomitantly" as IAP members (as long as they have no conflict of interest), but the proposed rule provisions

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[235] Second Tex. Comm'n Cmt. at 3.

[236] *Id.*

[237] Authority's Response at 27.

[238] *See* Notice, 88 Fed. Reg. at 5083.

do not oblige stewards to perform such service. Indeed, Proposed Rule 7130(b) provides that even a steward who has volunteered to serve as an IAP member may decline to participate in any particular case if doing so would impose a "personal hardship."

Proposed Rule 7190 addresses "the exchange of information between the parties consistent with the expedited nature of the proceedings."[239] It also empowers the arbitrator or IAP member to resolve information disputes between the parties.

The Commission finds that Proposed Rule 7190 is consistent with the Act's goal of an expedited and fair resolution of charges filed for ADMC rule violations. If experience shows that information requests are not being complied with, or that resolution between the parties has been minimal, the Commission recommends that the Authority submit a proposed rule modification to impose deadlines in these rules to resolve discovery matters.

Scrivener's errors were found in Proposed Rule 7180(c) and (d) and will be fixed in the final rule.[240]

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[239] Second Tex. Comm'n Cmt. at 3. Proposed Rule 7190 (Exchange of Information) provides that "information shall be exchanged electronically, unless otherwise agreed by the parties. The arbitrator(s) and IAP member(s) are authorized to resolve any disputes concerning the exchange of information between the parties consistent with the expedited nature of the proceedings."

[240] In Rule 7180(c) and (d), the words "Arbitral Body" will be deemed as corrected to "Internal Adjudication Panel" in the final rule.

g. Comments Unrelated to the Commission Determination

The Commission received many comments that were unrelated to whether the proposed rules are consistent with the Act and the Commission's procedural rule. Such comments will not be discussed here. For example, at least one commenter takes issue with a rule in a different rule series that the Commission already approved in previous order.[241] The United States Trotting Association comments about the different medical treatment and training needs for Standardbred horses, but such horses are not now subject to the Act.[242] Other comments are unrelated to any particular rule provision; some discuss concerns about other aspects of equine welfare (and its impact on human health),[243] while others criticize the Act more generally. By far the most common example of the latter category consisted of comments that assert that the Act is an unconstitutional violation of the private-nondelegation doctrine; these comments cite to the same Fifth Circuit decision from November

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[241] *See* Cmt. of Jim Roberts (Feb. 1, 2023) (discussing Proposed Rule 2143(a)), https://www.regulations.gov/comment/FTC-2023-0009-0020.

[242] Cmt. of U.S. Trotting Ass'n 1–3 (Feb. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0079.

[243] *See* Second AWI Cmt. at 4–5 (discussing NTRA's estimate that 7,500 thoroughbreds are "transported across the border to be killed for human consumption" and the "distinct public health and food safety risks as these horses are routinely treated with a range of drugs that are expressly prohibited for use in meat products due to their toxicity to humans"); First AWI Cmt. at 4–5 (same).

2022[244] that commenters claim has resulted in "legal uncertainty" and the lack of national uniformity over horseracing regulation.[245] Congress addressed the private nondelegation concern by amending 15 U.S.C.§ 3053(e) to give the Commission the power to "abrogate, add to, and modify the rules of the Authority."[246] Indeed, the Sixth Circuit has addressed and upheld the amended statute as constitutional.[247] The many (mostly duplicative) comments maintaining that legal uncertainty remains either fail to provide an explanation or erroneously base it on a second ruling by the Fifth Circuit that remanded the case for further proceedings in light of the statutory amendment.[248] Commenters have also claimed, with little

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[244] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022).

[245] *See, e.g.*, Cmt. of Pacific Legal Foundation ("PLF Cmt.") 5–7 (Nov. 14, 2022), https://www.regulations.gov/comment/FTC-2022-0062-0020; Second Ky. Horsemen Cmt. at 1; Second Nat'l Horsemen Cmt. at 1; Cmt. of Zach Badura (Feb. 14, 2023); Cmt. of Terry J. Westemeir 1 (Feb. 6, 2023); Cmt. of MaryAnn O'Connell at 1.

[246] Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459, 5231–32 (2022).

[247] *Oklahoma v. United States*, No. 22-5487, 2023 WL 2336726 (6th Cir. Mar. 3, 2023) (upholding the law against non-delegation and anti-commandeering challenges).

[248] *See, e.g.*, Cmt. of U.S. Reps. Lance Gooden and Jake Ellzey (Feb. 9, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0102 (maintaining that the amendment to 15 U.S.C. § 3053(e) did not cure the statute's constitutional infirmity and recommending that the Commission disapprove the proposed ADMC rules); Cmt. of U.S. Trotting Ass'n (Feb. 8, 2023) (same); Cmt. of K. Myrick (same); Ky. Horsemen Cmt. at 1 (Att. 1) (same); Cmt. of Kim Williams (Feb. 8, 2023),

support, that the Act violates other constitutional[249] and statutory[250] provisions.

The Commission discerns no persistence of "legal uncertainty" following the statutory amendment. In any event, these comments do not relate to the statutory decisional criteria and thus are irrelevant to the Commission's decision whether to approve or disapprove the ADMC proposed rule.

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https://www.regulations.gov/comment/FTC-2023-0009-0086 (noting that ARCI has asked the Commission to refrain from approving the ADMC proposed rules until resolution of the Act's constitutionality was resolved); Cmt. of Jared Easterling, General Counsel, Global Gaming Solutions, LLC (Feb. 9, 2023) ("Global Gaming Cmt."), https://www.regulations.gov/comment/FTC-2023-0009-0101 (discussing Fifth Circuit's decision in January 2023 not to withdraw its original holding); Tex. Comm'n Cmt. at 1 (claiming that "the Authority as private actors remains the initial rule drafters regardless of attempts to fix the facially unconstitutional Act"); Cmt. of Liberty Justice Center (Feb. 8, 2023), https://www.regulations.gov/comment/FTC-2023-0009-0084 (legal uncertainty of the Act remains and emphasizing the need for national uniformity). The Authority disagrees with those comments. *See* Authority's Response at 3 (Fifth Circuit's decision concerned the prior version of the Act before the Congressional amendment addressed that court's concern).

[249] *See* PLF Cmt. at 7–10 (claiming the Act violated Articles II and III of the Constitution and the Seventh Amendment).

[250] *See* Global Gaming Cmt. at 1–2 (claiming proposed ADMC rules and any Commission approval of those rules would violate the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act).

For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority's ADMC proposed rule is consistent with the Horseracing Integrity and Safety Act of 2020 (as amended) and the Commission's procedural rule governing submissions by the Authority. Accordingly, the Anti-Doping and Medication Control rule is APPROVED.

APPENDIX H

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF INCORPORATION OF "HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.", FILED IN THIS OFFICE ON THE EIGHTH DAY OF SEPTEMBER, A.D. 2020, AT 6:30 O`CLOCK P.M.

/s/ Jeffrey W. Bullock
Jeffrey W. Bullock,
Secretary of State

STATE OF DELAWARE

CERTIFICATE OF INCORPORATION

OF

HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.

(a Delaware nonstock, nonprofit corporation)

THE UNDERSIGNED, for the purpose of forming a nonstock, nonprofit corporation pursuant to Section 101 of the General Corporation Law of the State of Delaware ("***DGCL***"), hereby certifies:

FIRST: The name of the corporation (hereinafter referred to as the "***Corporation")*** is **Horseracing Integrity and Safety Authority, Inc.**

SECOND: The address of the registered office of the Corporation is 251 Little Falls Drive, Wilmington, New Castle County, State of Delaware, 19808. The name of the registered agent of the Corporation at that address is Corporation Service Company.

THIRD: A. The Corporation is organized and shall be operated as a nonprofit business league described in Section 501(c)(6) of the Internal Revenue Code of 1986, as amended, or the corresponding provisions of any future United States federal tax law (the "***Code***") to accomplish the following objectives: (i) to establish safety and performance standards for horseracing to improve the safety and welfare of equine and human participants in Thoroughbred horseracing, and in horseracing with respect to such other equine breeds for which an election has been made to participate in the programs established by the Corporation, implemented through a comprehensive accreditation and compliance program, (ii) to develop and implement a horseracing anti-doping and

medication control program and a racetrack safety program for covered horses, covered persons, and covered horseraces and (iii) to do any other act or thing incidental to or connected with the foregoing purposes or in advancement thereof to the extent consistent with its status as a nonprofit corporation organized under the DGCL and its qualification under Code Section 501(c)(6) and as otherwise provided by law.

B. In furtherance of its corporate purposes, the Corporation shall have all the general powers enumerated in Sections 121 and 122 of the DGCL as now in effect or as may hereafter be amended, including the power to solicit, receive, and administer dues, assessments, and contributions for such purposes, and may engage in any lawful activity for which corporations may be organized under the DGCL that are not inconsistent with its qualification under Code Section 501(c)(6) and as otherwise provided by law.

FOURTH: The Corporation is not organized for profit and shall not have authority to issue capital stock.

FIFTH: The Corporation shall have one or more classes of members ("***Members***"). The designation of each class of Members, the qualifications and rights of Members of each class, and the conditions of membership for each class of Members shall be set forth in the bylaws of the Corporation (the "***Bylaws***"). The Bylaws shall provide whether a class of Members has voting rights or no voting rights and each class of Members with voting rights shall be entitled to elect or appoint such number of members of the Corporation's Board of Directors (each, a "***Director***" and collectively, the "***Board of Directors***") to the extent and in the manner provided in the Bylaws. Except as otherwise provided in this Certificate of Incorporation or

in the Bylaws or as otherwise required by law, Members of any class that do not have voting rights shall not be entitled to vote on any matter, including the election or appointment of Directors. A Director may be removed for cause by the member, or members of the class of membership, as the case may be, that elected or appointed the particular Director, and may also be removed for cause by the other Directors to the extent, and in the manner, provided in the Bylaws, with a replacement appointed in the manner provided in the Bylaws.

SIXTH: The name and mailing address of the sole incorporator is as follows:

Boris Belkin	c/o Akin Gump Strauss Hauer & Feld LLP One Bryant Park New York, NY 10036

SEVENTH: Except for those powers specifically reserved to the Members in this Certificate of Incorporation or in the Bylaws, and except as otherwise provided by law, this Certificate of Incorporation or the Bylaws, including the rights as set forth in the Bylaws to an initial nominating committee (the members of which committee shall be appointed by the initial temporary Directors, who are appointed by the incorporator), to nominate those individuals eligible to serve as the first full (non-temporary) Board of Directors, the business and affairs of the Corporation shall be managed and all of the powers of the Corporation shall be exercised by the Board of Directors of the Corporation. The qualifications, election, number, tenure, powers, and duties of the members of the Board of Directors shall be as provided in the Bylaws.

EIGHTH: The duration of the existence of the Corporation is perpetual.

NINTH:

A. No part of the net earnings of the Corporation shall inure to the benefit of, or be distributable to, any Director or officer of the Corporation ("***Officer***") or any other private person, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered to or for the Corporation and to make payments and distributions in furtherance of the purposes set forth in Article THIRD hereof.

B. Notwithstanding any other provision of this Certificate of Incorporation, the Corporation shall not directly or indirectly carry on any activity that would prevent it from obtaining exemption from Federal income taxation as a corporation described in Code Section 501(c)(6) or cause it to lose such tax-exempt status.

TENTH: In the event of dissolution or final liquidation of the Corporation, all of the remaining assets and property of the Corporation shall be applied and distributed in accordance with the Plan of Dissolution adopted by the Board of Directors, provided, however, that such Plan is not inconsistent with any provision of the DGCL as it applies to nonprofit corporations or any Code provision applicable to a corporation described in Code Section 501(c)(6).

ELEVENTH: To the fullest extent permitted by the DGCL, as now in effect or as hereafter may be amended, no person who is or was a Director, Officer or Member of the Corporation shall be personally liable to the Corporation or to any Member for monetary damages for any breach of fiduciary duty by such

Director, Officer or Member. Notwithstanding the foregoing sentence, a person who is or was a Director, Officer or Member of the Corporation shall be liable to the Corporation to the extent provided by applicable law (i) for breach of the duty of loyalty to the Corporation, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (iii) for any transaction from which the Director, Officer or Member derived an improper personal benefit. Moreover, such relief from liability shall not apply in any instance where such relief is inconsistent with any provision of the Code applicable to corporations described in Section 501(c)(6) of the Code. No amendment to or repeal of this Article ELEVENTH shall apply to or have any effect on the liability or alleged liability of any Director, Officer, or Member of the Corporation for or with respect to any acts or omissions of such Director, Officer, or Member occurring prior to such amendment.

TWELFTH: Except to the extent limited in the Bylaws, the Corporation shall indemnify, advance expenses and hold harmless, to the :fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person ("***Indemnified Party***") who was or is a party or is threatened to be made a party to, or is otherwise involved in any threatened, pending or completed action, suit or proceeding, ("***Proceeding***") whether civil, criminal, administrative or investigative in nature, by reason of the fact that such Indemnified Party is or was the legal representative, is or was a Director, Officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a Director, Officer, employee or agent of another corporation, partnership, joint venture, employee benefit plan, trust or other enterprise, against all liability and loss suffered

and expenses (including attorneys' fees) reasonably incurred by such person in connection with such Proceeding, and the Corporation may adopt bylaws or enter into agreements with any such person for the purpose of providing for such indemnification. Except to the extent otherwise provided in the Bylaws and except for claims for indemnification (following the final disposition of such Proceeding) or advancement of expenses, the Corporation shall be required to indemnify a Indemnified Party in connection with a Proceeding (or part thereof) commenced by such Indemnified Party only if the commencement of such Proceeding (or part thereof) by the Indemnified Party was authorized in the specific case by the Board of Directors of the Corporation. Except to the extent otherwise provided in the Bylaws, the payment of expenses incurred by a Indemnified Party in advance of the final disposition of the Proceeding shall be made only upon receipt of an undertaking by the Indemnified Party to repay all amounts advanced if it is ultimately determined that the Indemnified Party is not entitled to be indemnified under this Article or otherwise. Any amendment, repeal or modification of this Article shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification. Moreover, the Corporation shall not indemnify, reimburse, or insure any person in any instance where such indemnification, reimbursement, or insurance is inconsistent with any provision of the Code applicable to corporations described in Code Section 501(c)(6).

THIRTEENTH: The Corporation reserves the right to amend, alter, change, or repeal any provision contained in this Certificate of Incorporation or in the Bylaws in the manner now or hereafter set forth in the Bylaws, and except as set forth in Articles

ELEVENTH and TWELFTH, all rights conferred upon Members, Directors or any other persons by and pursuant to this Certificate of Incorporation are granted subject to this reservation.

I, THE UNDERSIGNED, being the sole incorporator, do make and file this Certificate of Incorporation, hereby declaring and certifying that the facts herein stated are true, and accordingly hereunto have set my hand and seal this 8th day of September, 2020.

/*s*/ Boris Belkin
Boris Belkin, Incorporator