Zimbra Collaboration Suite mark.fenner@txrc.state.tx.us

RE: Proposal to Amend Rule 313.50 Thursday, January 19, 2012 4:20 PM

From: Eric

To: mark.fenner@txrc.state.tx.us

Cc: ricky.walker@txrc.state.tx.us; ctrout@txrc.state.tx.us

Mr. Fenner,

Thank you for considering my concerns and, as offered, here is the alternative language that I would suggest.

Section 313.50 Horse Identifier

(a) The horse identifier shall identify each horse prior to the race while it is in the pre-race holding area or paddock. The horse identifier shall immediately report to the stewards and the paddock judge a horse that is not properly identified or that has any irregularities from the official identification record.

(b) The horse identifier shall determine the true sex of each horse prior to the race while it is in the pre-race holding area or paddock. The horse identifier shall report to the stewards any discrepancies and take all actions necessary to correct racing program information and identification documents.

(c) (b) The horse identifier shall inspect, identify and prepare identification records on all the horses that race at a race meeting.

(d) (c) The horse identifier shall inspect documents of ownership, eligibility, registration, or breeding necessary to ensure the proper identification of each horse scheduled to compete at a race meeting

(e) (d) The horse identifier shall supervise the tattooing or branding for identification of any horse located on association grounds.

I believe addition of (b) stays within the intent of the original language, while taking the identifier out of jeopardy. This language also keeps the burden of determining the sex of a horse on the trainer prior to his or her filing a claim for a horse. I also took the opportunity to offer a minor clean up on (a) if you feel it is worthy of the change.

I hope this is helpful and I look forward to seeing you at the meeting next week.

Sincerely,

Eric M. Johnston

Texas Racing Commission
Title 16, Part VIII,
Chapter 313. Officials and Rules of Horse Racing
Subchapter A. Officials
Division 3. Duties of Other Officials

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January 23, 2012

VIA ELECTRONIC MAIL

Mark Fenner
General Counsel
Texas Racing Commission
P.O. Box 12080
Austin, TX 78711-2080

Re: Proposed Amendment to Commission Rule 321.21 (36 Tex. Reg. 8480)

Dear Mr. Fenner:

As the host of the Kentucky Derby, the most respected and storied horse racing event in the nation, Churchill Downs Incorporated enjoys a proud tradition. Consistent with its history, Churchill Downs takes seriously its commitment to complying with all applicable federal and state laws and regulations across the country. It is in this spirit that Churchill Downs recently asked our firm to look into the legal issues presented by the proposed rule and to prepare this comment on its behalf.

Commission staff recently informed Churchill Downs of a proposal to implement "new statutory prohibitions against the acceptance of online wagers from Texas residents" contained in HB 2271 last year. This is curious, because HB 2271 made no new substantive changes to this area of law. HB 2271 merely clarified what has long been Texas law, dating back to the original 1986 Texas Racing Act—as both its text and legislative history confirm, and as the Commission itself has acknowledged.

The Commission has not seen fit to take enforcement action in this area prior to HB 2271. And that is precisely the point. The Commission's prior inaction in this area is telling—and unsurprising—considering the constitutional difficulties surrounding such an effort. Discrimination against interstate commerce, whether in purpose or effect, is a violation of the dormant Commerce Clause of the U.S. Constitution. Indeed, such discrimination was one of the central evils that our founders sought to eliminate, as the U.S. Supreme Court has noted on numerous occasions. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005) (invalidating numerous state laws for effectively excluding out-of-state manufacturers of alcohol). The lesson of the dormant Commerce Clause is simple: No one questions that the State of Texas could prohibit horse race wagering altogether. But discrimination in the regulation of horse race wagering is forbidden.

Accordingly, and for the reasons detailed below, we recommend that the Commission decline to adopt the proposed rule. At a minimum, the Commission should defer action until these issues can be studied further—a process that should also include the Legislature. Considering that HB 2271 was never intended to change policy in this constitutionally sensitive area, the Legislature deserves the opportunity to weigh in before the Commission considers adopting the proposed rule.

* * *

If the Texas Racing Commission wanted the authority under Texas law to stop out-of-state businesses from offering horse race wagering on the Internet, it did not have to wait for HB 2271. According to a January 13, 2011 report (issued by the Commission months before HB 2271 was introduced, let alone enacted into law), "Internet wagering is [already] illegal in Texas." Long before HB 2271, the Texas Racing Act prohibited "unlawful wagering," by providing that "[a] person shall not wager on the result of a . . . horse race in this state except as permitted by this Act." Under the Act, "[w]agering may be conducted *only* by an association within its enclosure"—in other words, only at licensed tracks within the State of Texas. HB 2271 added language specifically covering the Internet. But the language simply "clarified" what was already the law—as noted repeatedly throughout the bill's legislative history, and as confirmed by the Commission's own earlier report.

So as a matter of Texas law, the Commission could have adopted the proposed rule years ago. It did not do so—presumably because it is well established and widely understood that Texas cannot violate the Constitution by discriminating against out-of-state businesses.

As the U.S. Supreme Court has repeatedly made clear, "States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Granholm*, 544 U.S. at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)). Yet that is precisely what is being proposed here: the complete exclusion of all out-of-state businesses from offering horse race wagering to Texas residents—unless the business is willing to set up a track somewhere in the state.

Moreover, it is no defense that a state did not *intend* to discriminate (although as we will see below, such a defense could not be made in this case in any event). "A state law is discriminatory *in effect* when, *in practice*, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 10-11 (1st Cir. 2010) (emphasis added) (striking down facially-neutral state law because its "effect" was to "alter conditions of competition to favor in-state interests over out-of-state competitors").

* * *

HB 2271 provides further confirmation of the constitutional problems with the proposed rule. The legislative history of HB 2271 reflects an intent to exclude out-of-state businesses in order to help in-state businesses—one of the primary evils that motivated the ratification of our Constitution in the first place. That history provides an additional, *independent* reason why the proposed rule is constitutionally dubious. "[T]he Supreme Court has said a finding that state legislation constitutes economic protectionism may be made on the basis of *either* discriminatory purpose or discriminatory effect." *Id.* at 9 n. 7 (emphasis added, quotations omitted).

There is very little in the legislative history of HB 2271 that concerns the Internet provision (as noted, the provision did nothing more than "clarify" longstanding Texas law and thus drew little attention). But what does appear does not bode well for the proposed rule. The history reflects a desire to ban out-of-state businesses, in order to help in-state businesses—precisely what the Constitution forbids. For example, according to the House Research Organization bill analysis, bill supporters wanted to punish "out-of-state companies" for "taking bets from Texas residents." Both the House and Senate bill sponsors explained why: to support "today's declining racing industry" in Texas. After all, "[o]ne of the things that's hurting the track and reducing the handle at Texas tracks is internet gaming." The legislative history also contains various other statements condemning the "taking" of "bets from Texas residents" by "non Texas licensed entities" "outside of Texas" doing business "in other states in the United States."

These statements reflect discriminatory intent and fear of out-of-state competition, and thus further jeopardize the proposed rule. None of this should surprise the Commission. After all, these statements echo the Commission's own words. Its January 13, 2011 report notes that "[t]he pari-mutuel industry in Texas is struggling," and blames "significantly increased competition from tracks in the surrounding states." As the report further notes, "[t]he Texas racing industry has declined tremendously relative to neighboring states. . . . Texas tracks . . . lose money due to illegal wagering by virtue of the fact that patrons can wager online instead of coming out to the tracks."

The history also contains various admissions that an actual ban on Internet wagering would be unenforceable. According to the House Research Organization bill analysis, supporters conceded that "enforcement could be difficult." The president of a Texas racing track similarly testified that, even under the bill, Texans still "can just bet on websites."

Bill opponents agreed that it would be "an unenforceable policy that tries to prohibit Internet wagering." They instead recommended that "the state should move in a *different direction* and *authorize* advance deposit wagering"—a policy that would benefit in-state as well as out-of-state businesses.

* * *

This last statement by bill opponents reflects a sad irony worth reflecting upon here. HB 2271 may reflect an attempt to help in-state business by hurting out-of-state business—but Texas businesses know better. They see that the bill is doomed to backfire. And they agree that Texas business would indeed be better served by going in a "different direction" and expressly *authorizing* Internet wagering. As the *Houston Chronicle* noted just last fall, various Texas racetrack owners declined to support HB 2271, and instead tried "to include Texas tracks in the ADW revenue stream, not to eliminate ADW accounts."

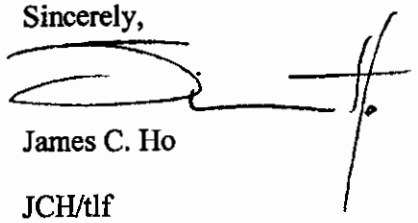
None of this should be news to the Commission. Its own January 13, 2011 report recommended "legislation that would allow ADWs in the state and set up fair revenue sharing between the horsemen, . . . Texas tracks and ADW operators." As the report concluded, "legalization [would] put the racing industry in Texas in the 21st century." It would also produce as much as "$94 million annually" in revenue—including "$2.5 million in additional purses and $4.6 million in additional revenue to [Texas] tracks." By contrast, under current policy, "[t]he racing industry, including Texas horsemen, greyhound owners and Texas breeders, is deprived of nearly $15 million."

So if anything, the Commission should follow through on these words and support measures that would help in-state and out-of-state businesses alike, by authorizing advance deposit wagering on the Internet. In all events, the Commission should reject or defer action on the proposed rule, pending further study and consultation with the Legislature.

The leaders of our state have expressed pride in our strong business climate, based on a philosophy that abhors government picking winners and losers—a philosophy that enjoys constitutional stature when it comes to out-of-state businesses. We ask the Commission to invoke that same philosophy here.

On behalf of Churchill Downs, thank you for the opportunity to comment on the proposed rule.

Sincerely,



James C. Ho

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