TEXAS RACING COMMISSION
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January 19, 2022

FTC
Office of Secretary
600 Pennsylvania Ave. NW
Ste. CC-5610 (Annex B)
Washington, DC 20580

Re: HISA Racetrack Safety (FTC-2021-0076)

Ladies and Gentlemen:

OBJECTIVE OF FEDERAL LEGISLATION

The Texas Racing Commission agrees protection of the integrity of the sport of horse racing as well as the health and safety of its participants are the paramount objectives for all industry stakeholders. However, protecting participants and the integrity of the sport cannot be attained by violating Constitutional tenets or targeting specific States' breeds who are pressured to acquiesce through hastily passed federal legislation. Given that the intent of the law is to protect horse racing, the rules, that currently address some, not all states and some, not all breeds, fall short of this goal.

Initially these proposed rules are intended to only regulate certain Thoroughbred horse races but not all. The Act itself delegates the Authority's discretion to expand its regulatory scope encompassing other breeds without any intelligible principle. After the effective date, the proposed rules will also regulate other States' breeds such as Quarter Horses while some States can opt for other breeds to continue under the States' regulatory scheme with funding to the federal government. These rules are costly and fail to achieve any uniform application.[1]

If the federal government wants to strengthen the protective posture of regulation in the horse racing industry, it should do so through public safety grants or cooperative agreements. Such partnership models encourage nationwide standards and collaboration while providing a funding source that will not imperil current state operations by realigning funds from currently effective State regulatory programs. Public safety grants and cooperative agreements would strengthen State regulatory programs without dismantling the States' longstanding ability to regulate its licensees.

[1] In Gillespie County, Texas, Thoroughbred horse racing does not have a substantial relation to interstate commerce and is not the subject of interstate off-track or advance deposit wagers. Therefore, Gillespie County, Texas, Thoroughbred horse racing falls outside federal jurisdiction and the proposed definition of a "Covered Horserace" as defined in the Act. The resulting proposed rules are arbitrary and capricious, promote disparate treatment of racing participants and only weaken, not strengthen, the integrity of the sport of Kings.

APA ARGUMENT

The proposed rules are promulgated by the auspices of an unconstitutional law and, therefore, outside the limitations of the APA. The Act violates the private nondelegation doctrine in Article 1, Section 1 of the US Constitution by granting regulatory authority to private entities. HISA grants the Authority broad regulatory power, including warrantless searches, yet the Authority is unaccountable to any political actor. No federal official can remove members of the Authority's Board of Directors. After creating this vast regulatory scheme and delegating rulemaking and enforcement to private corporations, Congress also waived any mechanism for funding. Instead, HISA forces the States to fund the federal scheme by imposing a choice between States funding the Authority with State money or, if a State refuses, the State is banned from collecting similar fees itself, and the Authority collects its funds directly from that States' racing participants. HISA unconstitutionally commandeers the legislative and executive branches of State government by forcing States to either fund the Authority or abandon its ability to impose or collect taxes or fees to fund similar State activities.

The rules published by the FTC and proposed by the private corporation fail to advise the public that the rules were first proposed on November 11, 2021, on the HISA website with a press release stating those rules were not final and would be revised before submission to the FTC. Unsaid in the background statement was the fact that these rules were initially released on the HISA website, then changed intermittently removing older versions without any public notification. The list of proposed rules by date are no longer available to establish the revisions from original proposed rules. On November 11, 2021, the proposed regulations were 66 pages.

The website's rules grew without notice from 66 pages to 154 pages, then overnight to 158 pages. The changes appeared to be adding on to the racetrack safety rules, adding rules on accreditation of racetracks which increased business costs with burdensome regulations, and adding rules on disciplinary hearings. Also undisclosed by the private entity was the requirement that those revising proposed rules were to execute non-disclosure agreements. These are outside the purview of open records requirements. The private entity's ad hoc rulemaking process, refusing to publicly account for its full rulemaking process, and insufficient FTC oversight clearly run afoul of the federal Administrative Procedure Act.

CONSTITUTIONAL ISSUES

Requiring States to help enforce HISA's regulatory program violates the Tenth Amendment and the Constitution's foundation that the federal government cannot commandeer the States as instruments to achieve federal ends and, when exercising its enumerated powers, must act directly on citizens. The Act violates the Due Process Clause of the Fifth Amendment requiring economically self-interested members from the Thoroughbred industry to be involved in the Authority's decision-making and sanctioning processes. Even if the Authority were a governmental body, the members of the Authority's Board of Directors would be officers of the United States, but they are not appointed by the President, a court of law, a department head, or nominated by the President and confirmed by the Senate, as required in the Constitution's Appointments Clause. Finally, if the Authority were a governmental entity, Congress created an entity unaccountable to the President, in whom the Constitution vests all executive power, and whose Board members cannot be removed by either the President, or any federal employee, in violation of Article II and the Constitution's separation of powers.

Forgotten in the promulgation of these rules are the voices of the regulated. In the event the FTC fails to heed those voices and rules are approved, the Texas Racing Commission has other concerns as follows:

1. Funding of the proposed federal regulatory scheme. Congress cannot force State legislatures to appropriate funds for a private entity.
2. The private entity's ability to contract with State Racing Commissions.
3. The private entity's ability to contract with another self-regulatory organization to enforce the rules and sanction private citizens, laboratories, and associations with a grant of police power.
4. The private entity's ability to research the use of furosemide in racing seeking to ban the future use in racing including, but not limited to, cost.
5. Mechanisms ensuring compliance of proposed racetrack safety rules other than removal of racetrack accreditation, burdening associations by interfering with their simulcast revenue, and placing undue burdens on interstate commerce.

Overall, these rules fail to justify federal intervention in state regulation as a matter of interstate commerce. There is no national interest to protect when regulating only Thoroughbreds or only the 38 States that conduct racing. There is no controversy between States as to how racing should be conducted for which federal intervention is required. Specific rule objections are as follows:

1. The definition of "covered horserace" does not include all Thoroughbred racing just those races the subject of substantial interstate commerce, interstate off-track or advance deposit wagers. Dividing the regulation of racing between Federal and State rules does not protect the integrity of the sport.

2. The definition of "covered person" does not include breeders.

3. The rules on provisional suspensions skirt constitutional due process requirements. There are no provisions for cure of an unintended default.

4. The rules on testing laboratories are unduly burdensome requiring the laboratories only test samples from racetracks. Samples are submitted to laboratories anonymously. Therefore, laboratories should be able to test for trainers who want to ensure the condition of their racehorse before participating in racing as a best practice.

5. The rules on testing laboratories blind testing are costly and sanctions are punitive. Many laboratories perform internal blind testing and can make those available for any accreditation. This requirement is like many others simply unduly burdensome, costly and without intelligible principle.

6. Rule Series 2100 Racetrack Safety Accreditation Program existing standards for accreditation purport to rely heavily on the NTRA Code of Standards. The cost/benefit analysis is on the NTRA website which states, "According to the latest figures from the Equine

Injury Database, the 21 tracks accredited by the NTRA Safety and Integrity Alliance reported 1.32 racing fatalities per 1,000 starts versus 1.48 for the 62 non-accredited tracks that raced in 2020 and reported to the EID."[2] In 2020, Texas racetracks reported 1.05 racehorse fatalities per 1000 starts.

7. Rule 2110 accreditation is designed to put State racetracks out of business. The accreditation process allows the Authority sole ability to account for State regional differences and the character of differing States' racetracks by providing various levels of accreditation and adequate time for racetrack compliance. This is clearly within the purview of State regulatory authority. There is no national interest served by the federal government intervening in the States' jurisdiction. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

8. Rule 2121 states accreditation requires injury assessment and risk management protocols be in place to "investigate", to identify contributing factors, to educate participants and to identify risk prevention and management. There is no evidence that racehorse attrition will be reduced and, therefore, no national interest in only Thoroughbred attrition. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

9. Rule 2130 for a Safety Director is redundant to state legislation as most States have a Safety Director or Equine Medical Director. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal jurisdiction.

10. Rules 2141-2142 Veterinary inspections are currently adopted rules of the States or part of the States' regulatory schemes. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal jurisdiction.

11. Rule 2143 Racehorse monitoring is currently an adopted rule of the States. The Texas Animal Health Commission issues a health certificate for racehorses traveling from state to state and entering a Texas racetrack. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal jurisdiction. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

12. Rule 2150 Racetrack surface design purports to improve racetrack welfare by reducing racehorse injury and enhancing "social perception of racing." This rule fails to recognize that most racehorse injury is due to factors outside the racetrack itself and fails to assess valid factors in a cost/benefit analysis. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

13. Rule 2160 for emergencies are protocols currently adopted in the States' regulatory schemes. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal jurisdiction.

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[2] https://www.ntra.com/safety-integrity-alliance/

14. Rule 2170 necropsies is unduly burdensome and fails to recognize the costs to racetracks associated with refrigerated transport of large animals for the procedure or refrigerated storage costs and space available on laboratories. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal jurisdiction. This information like most reported information to the Authority will not be available to States. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

15. Rule 2180 is the subject of States' reciprocity agreements and the respective States' racing commissions rulemaking authority. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

16. Rule 2190 on jockey drug testing is either a currently adopted rule of the States or part of the States' regulatory schemes. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal jurisdiction.

17. Rules 2220-2230 attending veterinarian rules are currently adopted in the States' regulatory schemes. State legislatures have enabled their Racing Commissions and/or State Veterinary Medical Boards with this rulemaking authority without necessity of federal jurisdiction.

18. Rule 2240 on Vet lists are currently adopted in the States' regulatory schemes. State legislatures have enabled their Racing Commissions and/or State Veterinary Medical Boards with this rulemaking authority without necessity of federal jurisdiction. Vet lists are currently shared among States without necessity of federal intervention. The rule is cost prohibitive, unduly burdensome and without intelligible principle.

19. Rule 2250 on veterinarian and trainer medication reporting is currently within the States' rulemaking authority. State legislatures have enabled their Racing Commissions and/or State Veterinary Medical Boards with this rulemaking authority without necessity of federal intervention.

20. Rule 2260 on claiming races proposes that title to a claimed horse be vested at the time the horse leaves the starting gate. The current rule in Texas is that title transfers when the horse steps on the racetrack. The Texas rule is the preferred rule, as it is more protective of the betting public and better promotes the safety of the racehorses and riders. If title transfers when horses leave the gate, it creates an incentive to the riders to get a horse of questionable soundness out of the gate. Jockeys know that they can be fired by trainers if the rider brings the horse to a vet's attention. In a jurisdiction where title transfers after the start of a race there is an incentive for riders to keep an unsound horse out of the track vet's line of vision, and then pull it up after the start, and say the horse felt funny. When this happens, those who wager on the racehorse will lose money. Voiding claims after the fact because the racehorse was unsound would protect prospective owners and trainers but does not protect the public. Although it is unstated, the claimant appears to be responsible for any veterinary costs associated with the voided claim.

21. Rule 2271 on prohibited practices currently within each States' rulemaking authority. State legislatures have enabled their Racing Commissions and/or State Veterinary Medical Boards with this rulemaking authority without necessity of federal intervention.

22. Rule 2272 on shock wave therapy reduces the time off from racing and sanction for prohibited use. This rule fails to protect the racehorse, riders, or betting public from the "social perceptions of racing." This rule is currently within the States' rulemaking authority. State legislatures have enabled their Racing Commissions and/or State Veterinary Medical Boards with this rulemaking authority without necessity of federal intervention.

23. Rules 2273-2275 on devices are currently within the States' rulemaking authority. This rule is vague: Does it refer to only what jockeys can use in a race? As it is written, the rule prohibits pony riders from using spurs. While spurs are inappropriate for use during races, they are appropriate for use while riding in other circumstances. Pony people and outriders often ride with spurs. Those riders have better control of their horses because of these legitimate aids. Prohibiting spurs in all circumstances would create new safety issues.

24. State legislatures have enabled their Racing Commissions and/or State Veterinary Medical Boards with this rulemaking authority without necessity of federal intervention. Most States recognize by reciprocity the sanctions imposed by other States as a detrimental practice.

25. Rule 2276 on horseshoes purports to enhance racetrack welfare by having a greater racehorse inventory to fill races, larger race fields, and consequently greater pari-mutuel betting. However, there is no empirical research data on differing turfs to justify a federal rule. Horseshoe technology is a rapidly changing in the sport of racing and is within the States' rulemaking authority. State legislatures have enabled its Racing Commissions with this rulemaking authority without necessity of federal intervention.

26. Rule 2280 on the riding crop is unreasonable because it requires racehorses to be disqualified based on the way a rider uses the crop. Owners are punished by a loss of purse for a circumstance over which owners have no control. Fines and suspensions will be sufficient to control crop use. Also, if a horse is supposed to be disqualifies when a rider misuses the crop, would that be done before the goes official? Or after the fact, and after a hearing? Disqualifying racehorses because a jockey misuses the crop is a poor idea.

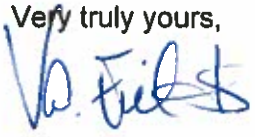
27. Rule 2290 on jockey physical examinations is currently within the States rulemaking authority. State legislatures have enabled their Racing Commissions with this rulemaking authority without necessity of federal intervention.

For more than a century, States have regulated racing while also respecting the powers granted to States by the Constitution particularly within each States' respective borders. The Texas Racing Act enables the Texas Racing Commission to "provide for the strict regulation of horse racing and greyhound racing and the control of pari-mutuel wagering in connection with that racing." The Texas statute covers all racehorses within its borders. HISA will place the States, industries, laboratories, and racetrack associations in financial and social ruin by dissecting State Commissions' rulemaking

authority, breed participation, and accreditation with limited governmental oversight by the FTC of these private self-regulatory non-profit corporations.

For all these reasons, the FTC should not approve these rules. The proposed rules are not the result of a constitutionally-sound statute. Further, the FTC should not approve the rules under the established broader considerations because the rules are not uniform in application; the rules fail to protect the health and safety of "all" covered horses; and the rules fail to protect the integrity of racing participants and the wagering public on "covered horse races". To perfect sound legislation with resulting rules under the established broader considerations, the FTC should not approve these rules and should instead return them to the starting gate to develop uniform rules that protect the health and safety of all racehorses and all racing participants as an executive branch of government exercising its enumerated oversight.

Very truly yours,



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