TEXAS RACING COMMISSION
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March 4, 2022

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

Re: HISA Assessment Methodology FTC 2022-0014-0001 (87 FR 9349)

Ladies and Gentlemen:

The Horse Racing Integrity and Safety Authority's (hereinafter Authority) proposed rules published in the Federal Register on February 17, 2022, for assessment allocation among the states of state-required fees to administer a federal program, without any total cost of the program proposed, should be rejected in their entirety. Neither the States nor the Federal Trade Commission have the Authority's purported insight on the total operating budget nor amounts borrowed for this federal program. Without an ability to assess the total cost to the States, the FTC should disapprove any method of how such undisclosed amounts would be allocated among racing states. The Authority is not required to provide total operating costs or cost of amounts borrowed to the States until April 1. The States are required to elect to pay Authority "fees" on or before May 2, 2022, in writing. Clearly allocating each States' proportionate cost through these proposed rules are putting the cart before the horse.

THERE IS A BETTER WAY

Texas has asked the Authority to rethink its approach to regulation of the sport by partnering with state racing commissions to create uniform national standards.[1] Partnership models are more effective than one-way communications where the federal government passes a law with no input, mandates action by the states, and engages in pro forma rulemaking. This is not the meaningful dialogue we need to achieve the common goal we all should have: **protecting the animals and people involved in the sport of horseracing**. This set of cost allocation rules appears to treat state regulatory agencies like bill collectors for the Authority. Even worse, we don't understand who decides what funds are included in these cost models and what those funds are paying for -- other than adding another unconstitutional management layer to the horse racing industry. With each rule published, the FTC steps further away from the community it purports to enable to achieve uniform safety standards. The FTC should partner with states and their congressional delegations then return to Congress with the goal of replacing any self-interested private actors formed in an unconstitutional "Authority" with a federal cooperative agreement program. This path creating an effective partnership model proven successful in agricultural, public safety, and national guard state programs has only three implementation steps:

1. FTC Request to Congress. FTC requests statutory authority and appropriations from Congress to administer a Cooperative Agreement Program. A cooperative agreement is defined in CFR § 200.24 as "a legal instrument of financial assistance between a federal awarding agency (in this case the FTC) and a non-federal entity (in this case

[1] Texas Proposes Joint Efforts With HISA - BloodHorse (www.bloodhorse.com/horse-racing/articles/256994/texas-proposes-joint-efforts-with-hisa)

the state racing commissions) to carry out a public purpose authorized by a law of the United States."[2] The central statutory authority is the Federal Grant and Cooperative Agreement Act (FGCAA) set out in Chapter 63 of Title 31 of the U.S. Code.

2. State Racing Commissions Project Costs. State Racing Commissions, as the perspective grantee, develops their own specific funding needs based on their enabling statutes and current ability to achieve uniform standards. The FTC, as the grantor, would use these cost estimates to request appropriations to fund the grant program. Next, the FTC would open an annual application period for state racing commission to apply for funds, which is a great opportunity to exam the actual gaps between the state activities and the federal goals for a better understanding of actual needs. The grant program can provide State Racing Commissions the ability to hire federally reimbursed state employees, engage in training programs, construct facilities, and purchase equipment that is subject to regularly scheduled federal audits to ensure compliance with the grant conditions.

Examples: In many programs, such as the National Guard cooperative agreement program, the state grant applicant agrees to match federal grant funds to create a partnership to enable state national guard organizations to prepare for federal deployments. The Department of Defense acts as the grants/cooperative agreement authority, since the state organization will ultimately work on their behalf to support federal efforts at home and overseas. One of the most helpful aspects of this model that addresses this FTC cost allocation rule -- is shared cost between the federal government and the state goverment. For the National Guard, the statutory language that could also be used by the FTC is found at 32 U.S.C. § 509(d), "Matching Funds Required." It states as follows: *(1) The amount of assistance provided by the Secretary of Defense to a State program of the Program for a fiscal year under this section may not exceed 75 percent of the costs of operating the State program during that fiscal year. (2) The limitation in paragraph (1) may not be construed as a limitation on the amount of assistance that may be provided to a State program of the Program for a fiscal year from sources other than the Department of Defense.*"

True partnership requires both parties commit resources and time to create effective results over time. This same model is employed by the Department of Defense to grant funds to the National Guard, the United States Department of Agriculture to grant funds to farmers, and the Department of Homeland Security to grant funds to fire and police organizations and is the answer for the horse racing industry. For decades, all these grant programs have been an effective way for individual states with unique governance models to achieve uniform federal standards in specific industries.[3]

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[2] The central statutory authority is the Federal Grant and Cooperative Agreement Act (FGCAA) set out in Chapter 63 of Title 31 of the U.S. Code.

[3] For more information on the Department of Defense Cooperative Agreements Program visit: https://comptroller.defense.gov/Portals/45/documents/fmr/archive/12arch/arch1205_12_05.pdf; for more information on USDA Cooperative Agreements: https://www.fsa.usda.gov/programs-and-services/cooperative-agreements/index; and for information on public safety grants visit: https://www.fema.gov/grants/preparedness/homeland-security.

3. FTC Becomes a Grant Making Federal Agency. FTC joins fellow federal agencies in becoming a grant making federal agency.[4] Since the FTC does not appear to be a current grantor it may take time to establish the program, collect applications from state racing commissions and distribute funds. There should be no doubt, however, that seeking appropriations to administer a cooperative agreement program would be a faster process than awaiting scheduling of the next hearing or responsive filings in litigation and would empower state racing commissions to join in the effort to develop realistic cost models required to attain the safety and integrity standards this industry has struggled for decades to develop. Cooperative agreements are legal instruments, unlike the HISA proposed "contract with racing commissions model", where states can opt out at the peril of their industry racing association partners. This program allows the FTC to work with all of us to craft the terms of these agreements around our shared goals. Funding would be contingent upon adherence to nationwide standards as well as providing a reliable funding mechanism for associated goals, such as equine research and educational internships. **Everyone loses in the current regulatory scheme, especially those who cannot speak for themselves: the horses.** After years of battling over the proper legal authority, policy and cost resulting in the current statutory scheme, which has only served up greater dissent and disagreement. We do not understand why this idea is not viewed as a better way to protect **ALL** horses, **ALL** participants and the authority of **ALL** state racing commissions. Today, Texans continue to work diligently without federal support to protect the sport and wonder why the FTC is determined not to hear our voice in this process.

PROBLEMATIC COST ALLOCATION

Although it is anticipated by both the Authority and States that any enforcement requirements will be conducted by States, racetrack associations and their staff on behalf of the Authority, the Act requires the Authority provide to each State racing commission an estimated amount required to: "(i) 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) liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year."[5]

A State's proportionate share is to be based on the annual budget of the Authority, "the projected amount of covered racing starts for the year in each State" and "take into account other sources of Authority revenue".[6] According to 15 U.S.C. § 3052(f)(2), if a State racing commission elects not to remit yet to be determined fees, then the Authority is required to "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."[7] The calculation is to be allocated "among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate"[8] and collected "according to such rules as the Authority may promulgate."[9] The state racing commission must give the Authority at least one year's notice before it withdraws that election.[10] To date, the

[4] See Grants.gov website: https://www.grants.gov/web/grants/grantors.html.
[5] 15 U.S.C. § 3052(f)(1)(C)(i). It is anticipated that the total cost will be provided by the Authority to the States on April 1, 2022. Shortly thereafter, these proposed cost allocation rules are effective immediately.
[6] 15 U.S.C. § 3052(f)(1)(C)(ii).
[7] 15 U.S.C. § 3052(f)(3)(A).
[8] 15 U.S.C. § 3052(f)(3)(B).
[9] 15 U.S.C. § 3052(f)(3)(C).
[10] 15 U.S.C. § 3052(f)(2)(C).

Authority has not provided any loan amounts to be repaid by States nor any annual budget necessary for the Authority to operate.

There is a clear advantage to the four (4) states that currently dominate horse racing: New York, Florida, Kentucky, and California. New York's actual nationwide purse share is 15.95%. If the purse cap is implemented, it will cut New York's cost share of the HISA budget by almost 25% with all other states forced to absorb the reallocated costs. This reallocation alone would add approximately $1,169 per HISA budget of $1M to Texas' fees alone. This is roughly an 8% increase over the amount that would be assessed to Texas without a purse cap. The cap alone defeats the purpose of the "equitable allocation" mission and certainly gives the appearance of monopolization by larger racetracks to enhance their wagering revenue at the expense of smaller racetracks. Smaller racetracks are required by statute to hold a certain number of race meets while larger tracks hold fewer race dates with generous purses, greater wagering handle and lower operating costs. In the long-term the cost allocation proposed will not be sustained for racetracks such as Saratoga, Demar and Keeneland where smaller racetracks and racing participants are forced out of business while footing those racetracks' share of the HISA total costs.

HISA AUTHORITY EXCEEDS ITS' ENABLING AUTHORITY

The Authority has exceeded its enabling authority and Congressional intent, stating that the proposed assessment rule was guided by the Act's explicit directive that the Authority "allocate equitably" the calculated assessments among covered persons.[11] Yet the Act states that the basis of the funding calculation is a State's proportionate share of "the projected amount of covered racing starts for the year in each State."[12] The Act does not define "covered racing start". The Authority exceeded its enabling authority and expanded the definition of a "covered racing start" beyond what Congress intended by including race purses.[13] In addition to attaching state purse awards to pay for the federal program, the Authority also includes horse racing starts that are outside the Act's definition of a "covered horserace" within its proposed definition of "covered racing start". The content provided by the Authority includes horse races in Gillespie County, Texas, which will not have any "covered horse race".

[11] 15 U.S.C. § 3051(6) a "covered person" 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. 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 (B) ending on the date on which the Authority receives written notice that the horse has been retired.

[12] 15 U.S.C. § 3052(f)(1)(C)(ii).

[13] Texas defines "purse" as a cash portion of the prize for a race. 16 TEX. ADMIN. CODE § 301.1(58). Regardless of breed, the Authority asserts: "To avoid an inequitable or skewed allocation, a state's total will be adjusted so that ***no State's assessment exceeds 10 percent of the purses in that State***. This excess amount is allocated proportionately to all States that do not exceed the maximum, based on each State's respective percentage of the Annual Covered Racing Starts." Statutory Basis, HISA Assessment Methodology Rule, File No. P222100, FN16. No credits are proposed for the States' employees carrying out the federal program on behalf of the Authority. The Authority's response to comments, "By way of information, it is anticipated that States that enter into voluntary agreements with the Authority will receive some type of a credit." Self-Regulatory Organization's Responses to Comments, HISA Assessment Methodology Rule, File No. P222100.

Specific unconstitutional and illegal aspects of the proposed rules are as follows:

1. Definitions exceed regulatory authority for funding from breeds not currently regulated:

(c) *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.

(d) *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.

2. Violates anti-commandeering doctrine:

8520. Annual Calculation of Amounts Required

(a) If a State racing commission elects to remit fees pursuant to 15 U.S.C. 3052(f)(2), the State racing commission shall notify the Authority in writing on or before May 2, 2022 of its decision to elect to remit fees.

(b) Not later than April 1, 2022, and not later than November 1 of each year thereafter, the Authority shall determine and provide to each State Racing Commission the estimated amount required from each State pursuant to the calculation set forth in Rule 8520(c) below.

(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

(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.

(d) Pursuant to 15 U.S.C. 3052(f)(2)(B), a State racing commission that elects to remit fees shall remit fees on a monthly basis and each payment shall equal one-twelfth of the estimated annual amount required from the State for the following year.

3. Requires private racetrack associations to collect operating funds on behalf of a private entity delegated federal rulemaking and enforcement authority by Congress in violation of the private nondelegation doctrine.

8520. Annual Calculation of Amounts Required

(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.

ACT VIOLATES ANTI-COMMANDEERING DOCTRINE

HISA unconstitutionally commandeers the legislative and executive branches of state government and puts Congress in control of state branches of government in violation of the Tenth Amendment. The Texas Racing Commission is foreclosed from protecting sovereign State interests in regulating occupations and professional standards within the State's borders including, but not limited to, Texas's rulemaking authority contained in the

Texas Racing Act[14] and its right to promulgate the rules of horseracing.[15] These proposed rules will be effective no later than July 1, 2022, for only one breed of racehorses, Thoroughbreds, that only engage in certain horse races. These rules in no way propose uniformity in standards for medication control or racetrack safety for all horse breeds.

By forcing states to fund the Authority or abandon any ability to impose or collect taxes or fees to fund similar state activities, HISA unconstitutionally commandeers the legislative and executive branches of state government. Forcing a state legislature to either appropriate dollars for a private corporation or be banned from passing legislation imposing certain taxes or fees—or interfering with the State enabling authority granted a state racing commission by a state legislature—where instead Congress is put in control of state branches of government is in violation of the Tenth Amendment. That the States are forced to fund this private regulatory corporation empowered by Congress, instead of Congress itself, is made explicit: "Nothing in this Act shall be construed to require . . . the appropriation of any amount to the Authority; or . . . the Federal Government to guarantee the debts of the Authority."[16] If Congress wants to regulate, "it must appropriate the funds needed to administer the program," and it must enforce it. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018).

By forcing state law-enforcement agencies to cooperate and provide information to the Authority, HISA unconstitutionally commandeers the executive branches of the states away from their prescribed duty to protect the health and safety of its racing participants. Conscripting the states to help enforce HISA's regulatory program violates the Tenth Amendment as well as the Constitution's structural principle that the federal government must act directly on the people when exercising its enumerated powers and may not commandeer the states as instruments to achieve federal ends. Congress has no constitutional authority to command the law-enforcement agencies of the several states to help the Authority administer a federal regulatory program. Congress may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). The "States are not mere political subdivisions of the United States," and our Constitution requires Congress to "exercise its legislative authority directly over individuals rather than over States." *New York v. United States*, 505 U.S. 144, 165, 188 (1992).

For more than a century, States have regulated horse racing while also respecting the powers granted 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 and is uniform in its application. 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 minimal oversight of private self-interested, self-regulatory, non-profit corporations.

For all these reasons, the FTC should not approve these rules and should instead return to the starting gate to re-think it the way it is attempting to achieve uniform standards across the Nation to protect the health and safety of all racehorses and all racing participants. If the FTC would consider the Texas proposed model of a cooperative

[14] TEX. OCC. CODE CHS. 2021-2035.
[15] 16 TEX. ADMIN. CODE CHS. 301-323.
[16] 15 U.S.C. § 3052(f)(5).

agreement grant program, I would be honored to assist this community as a subject-matter expert who has work in and administered cooperative agreements at the state level for over thirty years. In addition, we could reach out to our agricultural and public safety colleagues to assist us in creating the very best, cutting edge, partnership model between a federal agency and its industry stakeholders that the Nation has ever seen.

I invite anyone who would like to engage in a positive dialogue on alternatives to the current regulatory scheme to come to Texas so we can move toward our shared goal of protecting the safety and integrity of the sport of horse racing together, rather than sitting back and watching the slow train wreck that is HISA.

Sincerely,

Amy F. Cook

Amy F. Cook
Executive Director
Texas Racing Commission